

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR.HRISHIKESH ROY
&
THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

FRIDAY, THE 02ND DAY OF AUGUST 2019/11TH SRAVANA, 1941

W.A.No.628 OF 2018

AGAINST THE JUDGMENT DATED 7.3.2018 IN W.P(C).NO.6630/2018
OF HIGH COURT OF KERALA

APPELLANTS/RESPONDENTS 1 TO 3:

- 1 STATE OF KERALA
REPRESENTED BY THE ADDL. CHIEF SECRETARY
TO THE GOVERNMENT OF KERALA, DEPARTMENT OF HOME AND
VIGILANCE, THIRUVANANTHAPURAM - PIN 695001
 - 2 THE STATE POLICE CHIEF, KERALA POLICE,
POLICE HEAD QUARTERS, THIRUVANANTHAPURAM - 695001
 - 3 THE STATION HOUSE OFFICER
MATTANNUR POLICE STATION, MATTANNUR - 670702
- BY SRI. VIJAY HANSARIA, SENIOR COUNSEL
BY ADVS.SRI.P.NARAYANAN, SENIOR GOVT. PLEADER
SRI.SUMAN CHAKRAVARTHY, SENIOR GOVT.PLEADER
SRI.V.MANU SR. GOVT. PLEADER

RESPONDENTS/PETITIONERS AND THE 4TH RESPONDENT:

- 1 C.P.MOHAMMED
AGED 52 YRS, S/O.ASSAINAR,
RESIDING AT SCHOOL PARAMBATH HOUSE,
EDAYANNOOR P.O., KANNUR, DIST.-670595
 - 2 S.P.RAZIYA
AGED 48 YRS, W/O.C.P.MOHAMMED, HOUSEWIFE,
RESIDING AT SCHOOL PARAMBATH HOUSE,EDAYANNOOR P.O.,
KANNUR, DIST.670595
 - 3 THE DIRECTOR
CENTRAL BUREAU OF INVESTIGATION, NEW DELHI-110011.
- BY ADVS.SRI.T.ASAF ALI
SRI. SASTHAMANGALAM S. AJITHKUMAR, SPL.P.P. FOR C.B.I.
SMT.LALIZA.T.Y.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 23.07.2019,
THE COURT ON 02.08.2019 DELIVERED THE FOLLOWING:

"C.R."

J U D G M E N T

A.K.Jayasankaran Nambiar, J.

The State of Kerala is the appellant before us aggrieved by the judgment dated 07.03.2018 of the learned Single Judge in W.P.(C) No.6630 of 2018. By the said judgment, the learned Judge transferred the investigation in FIR No. 202/2018 of the Mattannur Police Station from the Special Investigation Team headed by the Inspector General of Police, Kannur District, to the Central Bureau of Investigation [CBI].

The facts in brief:

2. The writ petition was preferred by the parents of one *Shuhaib*, a 27 year old youth who was found hacked to death at Edayannoor, near Mattannur in Kannur District at about 10.50 pm on 12.02.2018. Based on the statement of one *Riyas*, who was also stated to have been injured during the aforesaid attack on *Shuhaib*, the Police registered the FIR No.202/2018 under *Sections 341, 324, 307, 302* read with *Section 34* of the *Indian Penal Code* [IPC] and under *Sections 3* and *5* of the *Explosive Substances Act, 1908*. The writ petitioners alleged that

the attack on *Shuhaib* was the fallout of a clash between local CPI(M) party workers and Congress Party workers over an incident where the CPI(M) workers allegedly vandalized the Local Congress Party office, and the Congress Party workers, led by *Shuhaib*, condemned the said act and organized a protest meet in retaliation. It was the apprehension of the petitioners that, since the alleged suspects owed allegiance to the ruling political dispensation in the State, there would be no fair investigation into the crime. The non-recovery of the weapons used for committing the crime, from the accused that were apprehended immediately after the event, was cited as an instance of shoddy investigation by the State investigating agencies. The petitioners were also perturbed by the non-invocation of the provisions of the *Unlawful Activities (Prevention) Act* (hereinafter referred to as the "UAPA") while registering the FIR. The above omissions on the part of the investigating agency led the petitioners to lose their confidence in the said agency and it was therefore that they approached this Court with a prayer for transferring the investigation to the CBI.

The proceedings before the writ court:

3. The writ petition was presented before this Court on 27.02.2018 and on the same day the matter was posted to 06.03.2018 for the response of the State Government. As the matter could not be taken up on the said date, the matter stood adjourned to the next day i.e. 07.03.2018 when the State Attorney submitted a note giving details of the investigation carried on till then by

Investigating team, and the arrests made in the course of such investigation.

3.1. The said note, which is produced along with the appeal memorandum, indicates that while the attack on the deceased *Shuhaib* was at 10.50 pm on 12.02.2018, the First Information Statement of *Riyas* was recorded at 03.15 Hrs on 13.02.2018 and the FIR was registered at Mattannur Police Station at 04.54 Hrs on 13.02.2018. On the same day an inquest was conducted and the body of the victim was subjected to Post mortem examination. The scene of occurrence was also examined with the assistance of a dog squad, finger print experts, forensic experts and a scene mahazar and seizure mahazar were prepared. A tower dump analysis was also conducted on the same day and CCTV footage was collected from within a radius of 5 Km of the scene of occurrence. Details of the vehicle used by the accused and the call detail records of all probable accused were also collected. Thereafter the District Police Chief, the Inspector General of Police, Kannur Range and the Director General of Police, North Zone visited the hospital where *Riyas* was admitted, and pursuant to a discussion among the officers, a ten member special squad was constituted to assist the investigation of the case. On 14.02.2018, based on a representation received from the President of the KPCC, the Chief Minister passed an order directing the State Police Chief to take immediate action. Two of the prime accused were arrested on 18.02.2018 and they were interrogated and DNA samples and Nail clippings taken from them. They were also subjected to a Test

Identification Parade. Through separate orders on 19.02.2018 the constitution of the Special investigation team was expanded to make it a fifteen-member squad including two women police officers. Thereafter, police custody of the two arrested accused was obtained for five days with effect from 24.02.2018 and during the said period four more accused persons were arrested. By 01.03.2018, three more accused persons were arrested and some of the vehicles used in connection with the crime were seized, as was an unused bomb from a hideout at Palayode, based on the confession of one of the accused. Two more persons were arrested on 05.03.2018 and based on the confession statement of one of them (A6), two swords and an axe like weapon were recovered from Vellapparambu near Palayode. The learned State Attorney also raised a preliminary objection with regard to maintainability of the writ petition before the Single Judge.

3.2. The learned Single Judge considered the issue of maintainability of the writ petition and found the same to maintainable. He thereafter went into the merits of the averments in the writ petition, in the light of the note submitted by the State Attorney, and found that the investigating authority could not recover the weapons notwithstanding the arrest of two of the prime accused in the case, and the grant of custody of the said witnesses to the Police for five days. This was seen as a deliberate laches and inefficiency on the part of the investigating agency. The learned Judge also found it suspicious that the recovery of weapons was ultimately effected only based on the statement obtained from one Byju.K. (A6) who was a de facto complainant in another case registered against the

deceased *Shuhaib*. It was observed that there had to be others behind the “political murder” and the persons arrested were only pawns in the hands of those others. It was further observed that the case came within the category of terrorism as defined under *Section 15* of the *UAPA*, and hence the matter had to be investigated by incorporating the offences under the said enactment also. Finding the investigation to be an unfair one that did not inspire confidence in the writ petitioners as also the Court, the learned Judge directed a transfer of the investigation to the CBI.

The proceedings in the appeal:

4. In the appeal before us, it is the case of the appellants that the learned Single Judge did not take note of the speedy, forensic and effective investigation carried out by the State Police and did not give them an opportunity to place on record material to substantiate that a fair and professional investigation was being carried out with necessary urgency. The findings of the learned Single Judge are stated to be based on mere surmises and conjectures, and without considering the settled principles in law governing transfer of investigation from one agency to another.

The preliminary objection as regards maintainability:

5. When the appeal came up for admission before this Court, the

respondents/writ petitioners raised a preliminary objection as regards the maintainability of the appeal. It was contended that the murder having taken place in Mattannur in Kannur District, which was part of the Malabar District of the erstwhile Madras Presidency, and therefore within the territorial jurisdiction of the Madras High Court, and as *Clause 15* of the *Letters Patent* for the High Court of Madras did not provide for an appeal from a judgment in exercise of Original Criminal Jurisdiction, the present appeal was not maintainable before a Division Bench of this Court. The said contention was, however, rejected by this Court, vide order dated 23.03.2018 in this Writ Appeal, on the finding that, with the commencement of the *Kerala High Court Act* w.e.f 09.03.1959, the jurisdiction and powers of this Court would be governed by the provisions of the *Kerala High Court Act* and the appeals filed before the Division Bench would be governed by *Section 5* of the said *Act*. The Division Bench also stayed the operation of the judgment of the learned Single Judge pending disposal of this appeal.

5.1. Although the writ petitioners preferred a Special Leave Petition (SLP (Crl.) No.3545/2018) before the Supreme Court against the said order, the same was subsequently dismissed as withdrawn on 20.07.2018, after reserving the liberty of the petitioners therein to approach the Supreme Court to raise the maintainability of the *Letters Patent* Appeal in case the decision of the High Court was adverse to the petitioners. It is thus that this appeal now comes up for hearing before us.

The submissions on merits:

6. Appearing on behalf of the appellants, Sri. Vijay Hansaria, the learned Senior Counsel, duly assisted by the Public Prosecutor Sri. Suman Chakravarthy, would contend, based on the plethora of judgments that were cited, and to which we shall advert during our analysis of the rival submissions, that the power to direct a transfer of investigation to the CBI is one that has to be exercised sparingly, cautiously and in exceptional circumstances. Those circumstances, according to him, did not exist in the instant case when the learned Single Judge chose to issue the impugned directions. It is further pointed out that, while allegations are made with regard to an alleged conspiracy having not been investigated by the State Police, none of those persons who are alleged to have formed part of the conspiracy were made parties in the writ petition. The fact that no opportunity was granted to the appellants to file a counter affidavit in the matter, refuting the allegations in the writ petition, as also the fact that the case diary maintained by the Police was not perused by the learned Judge, are cited as factors that vitiated the exercise of jurisdiction by the learned Single Judge. It is also pointed out that, during the pendency of this appeal, the investigation by the State Police continued on the strength of the stay order passed by this Court, and the investigating team has since filed its final report before the Sessions Court. Despite being aware of this, however, at no stage of the investigation, or thereafter at the time of laying the final reports before the Sessions Court on

14.05.2018 and 21.01.2019 respectively, did the writ petitioners approach the Criminal Court or this Court for any direction for further investigation.

6.1. Countering the finding in the impugned judgment that the provisions of the *UAPA* ought to have been invoked as against the accused persons, it is the contention of the learned Senior Counsel that even the First Information Statement proceeded on the assumption that the attack on the victim was a personal one albeit politically motivated. For invocation of the provisions of the *UAPA*, it had to be established that the actions of the accused were intended to strike terror in society. The mere fact that the act induced fear or terror in persons in the vicinity or locality cannot, it is argued, be a ground to treat the act as a terrorist act, more so when an intention to commit such an act was not established at the time of investigation.

6.2. *Per contra*, it is the submission of Sri. Asaf Ali, learned counsel for the respondents/writ petitioners that the writ petitioners had approached this Court at the earliest stage when it was apparent that the investigation was not being carried on fairly and diligently. The possibility of close relationships between the accused and those in the higher echelons of the CPI (M) party hierarchy, led the petitioners to suspect the efficiency of the investigating team of the State Government. It is stated that the delay occasioned in recovering the weapons that were used for the political murder, coupled with news items in local newspapers that showed pictures of the accused with local leaders of the CPI (M) party all

contributed to shattering the hope of the petitioners for a fair investigation of the crime. The omission to invoke Section 120A of the *IPC*, as also the provisions of the *UAPA*, while registering the FIR, is cited as indicative of the deliberate attempt by the investigating agency to derail the investigation.

6.3. Responding to the submission of Sri. Hansaria that no steps were taken by the writ petitioners to approach the Magistrate seeking further investigation or to prefer protest petitions before the Criminal Court or approach this Court, it is stated that the petitioners had lost faith in the State investigation agency and it was therefore deemed unnecessary to pursue such a course.

Our Consideration:

7. We have considered the rival submissions and carefully perused the material before us. We might, at the outset, observe that we are deeply disturbed by the unfortunate turn of events that led to the tragic and gruesome end of the hapless victim who was in the prime of his youth. Crimes that have their roots in political rivalry are on the increase in our State and we are appalled by the extremity of the measures adopted by the perpetrators of such crimes. The perpetrators of the crime need to be quickly apprehended, tried, convicted and sentenced, for then alone will our criminal justice system inspire confidence in our citizenry. In this appeal, however, we are called upon to examine the legality of the direction of the learned Single Judge, to entrust the investigation of the case

to the CBI. We have to determine whether there was anything amiss in the investigation carried on by the State police that warranted a transfer of the investigation, to another agency.

The legal position:

8. It is now well settled that *Article 21* of our Constitution takes within its fold not only the enforcement of rights of the accused but also the rights of a victim. The State has a duty to enforce the human rights of a citizen by providing for a fair and impartial investigation against any person accused of the commission of a cognizable offence. Accordingly, when an investigation is found to be unfair or biased, the situation has to be corrected either by approaching the criminal courts for issuance of appropriate directions to the investigating authority or by seeking a transfer of the investigation to another agency for, otherwise, the unfair investigation would make a mockery of the criminal justice system.

8.1. In *State of West Bengal & Ors v. Committee for Protection of Democratic Rights, West Bengal & Ors. – (2010) 3 SCC 571*, the issue that came up for consideration before a Constitution bench of the Supreme Court was whether a High Court can direct a CBI investigation without the consent of the State Government concerned especially when the scheme of our Constitution prohibits encroachment by the Union upon a matter which exclusively falls within the domain of a State Legislature like Public order, Police etc.? The Court

answered the question in the affirmative by holding that under *Article 226* of our Constitution, a High Court can direct the CBI to investigate a cognizable offence, alleged to have been committed within the territory of a State, without the consent of the State, and that such a direction would not impinge upon the federal structure of the Constitution or violate the doctrine of separation of powers. It was held that, as protectors of the civil liberties of citizens, the High Court has not only the power and jurisdiction but also an obligation to protect the fundamental rights guaranteed by *Part III* in General and *Article 21* of our Constitution in particular, zealously and vigilantly. By way of a caveat, however, it was observed that in the matter of issuing directions to the CBI to conduct an investigation in a case, while no inflexible guideline can be laid down, Courts had to nevertheless exercise the extraordinary power sparingly, cautiously and only in exceptional situations where it becomes necessary to provide credibility and instill confidence in the investigations or where the incident may have national or international ramifications or where such an order may be necessary for doing complete justice and enforcing fundamental rights.

8.2. The aforesaid legal position was re-iterated in *Disha v. State of Gujarat and Others – (2011) 13 SCC 337* and *State of Punjab v. Davinder Pal Singh Bhullar and Others – (2011) 14 SCC 770* where the view taken was that the Court can transfer the matter to the CBI or any other special agency only when it is satisfied that the accused is a very powerful and influential person or the State authorities like high police officials are involved in the offence and the

investigation has not been proceeded with in proper direction or the investigation has been conducted in a biased manner. It was cautioned, however, that if an investigation is sought against any person, then that person has to be impleaded as a party in the proceedings before the Court and he has to be given a reasonable opportunity of being heard. The CBI cannot be directed to have a roving enquiry as to whether a person was involved in the alleged unlawful activities.

8.3. Thus, it is not in all cases where a complainant is dissatisfied with the progress of an investigation that a CBI investigation will be directed by the High Court. On the contrary, as observed by the Supreme Court in *Sakiri Vasu v. State of Uttar Pradesh & Ors. – (2008) 2 SCC 409*, barring the exceptional cases where a CBI investigation is warranted, the person complaining of an improper investigation will ordinarily be relegated to his alternate remedy of approaching the criminal courts under the *Code of Criminal Procedure (Cr.P.C.)*. Elaborating upon the powers of a Magistrate under the *Code*, it was held that *Section 156 (3)* of the *Cr.P.C.* provides for a check by the Magistrate on the police performing its duties under *Chapter XII Cr.P.C.* In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same. The said power of the Magistrate is independent of his power under *Section 173(8)* of the *Cr.P.C.* to re-open the

investigation even after the police have submitted their final report. The Court went on to hold that when any power is expressly granted by the *Code*, there is impliedly included in the grant, even without special mention, every power and every control that is essentially necessary for its execution.

8.4. We may also notice, at this stage, the decisions of the Supreme Court in *K.Saravanan Karuppasamy & Anr. v. State of Tamil Nadu & Ors. – (2014) 10 SCC 406* and *Sudipta Lenka v. State of Odisha & Ors. – (2014) 11 SCC 527* where the Court took note of the fact that criminal cases had been registered and charge sheets filed before the criminal courts concerned to hold that a direction for CBI investigation at that stage was not warranted. It was felt that further investigation of a criminal case, after the charge sheet has been filed in a competent court, could affect the jurisdiction of the said Court under *Section 173(8)* of the *Cr.P.C.*

Our findings:

9. When we analyse the facts in this case, in the backdrop of the legal position discussed above, we have to observe that there was hardly any material available before the writ court that could have led it to assume that the investigation was inherently unfair or biased in any manner. It needs to be noted that while it was the allegation of the writ petitioners that the conspiracy behind the incident, that had been suggested in the First Information Statement of *Riyaz*,

had not been investigated by the State Police, and there was a specific reference in the writ petition to one *Ratheesh*, who was the Secretary of the Edayannoor Local Committee of the CPI (M) party, and the latter's alleged connection with senior members of the said political party, none of those persons were made parties to the writ petition. This clearly offended the dictum in *Davinder Pal Singh Bhullar's case (supra)* where it was emphasized that, if an investigation is sought against any person, then that person has to be impleaded as a party in the proceedings before the Court, and he has to be given a reasonable opportunity of being heard.

9.1. We also note that the inference as regards unfairness of the investigation was based solely on the finding that the investigating authority had not recovered the weapons notwithstanding the arrest of two of the prime accused in the case, and the grant of custody of the said witnesses to the Police for five days. As is evident from a perusal of the note submitted before the writ court by the State Attorney, the State police had already arrested six persons, and recovered the weapons used for the crime, within three weeks of the incident and before the case came up for consideration before the writ court. If the writ court wanted to get further details as regards the investigation carried out, it could have asked for the production of the Case Diary in Court but, for reasons that are not very clear, it chose not to do so. It did not also grant any opportunity to the State Government to file a counter affidavit in response to the averments in the writ petition. In our opinion, the aforesaid omissions of the writ court, without

anything more, vitiates the direction issued by it to transfer the investigation of the case to the CBI. Such a hasty direction was not warranted on the facts and circumstances of the case and, at any rate, cannot be seen as an instance where the power was exercised "*sparingly, cautiously and only in exceptional situations where it becomes necessary to provide credibility and instill confidence in the investigations or where the incident may have national or international ramifications or where such an order may be necessary for doing complete justice and enforcing fundamental rights.*" (*State of West Bengal & Ors. v. Committee for Protection of Democratic Rights, West Bengal & Ors. (Supra)*).

9.2. There was also no material before the writ court, on the basis of which it could have opined that the provisions of the *UAPA* had to be invoked by the investigating authorities. At any rate, the said opinion could not have been the basis for the direction to entrust the investigation to the CBI. Directions with regard to further investigation, or inclusion of additional charges, could have been issued by this Court even to the State investigating agency if, after perusing the Case Diary and other relevant material, it was found necessary to issue such directions in exercise of its inherent powers. The said option was not, however, explored by the writ court.

9.3. Before parting with this case, we might also deal with the submission on behalf of the writ petitioners that, the material now available before this Court would clearly reveal that the investigation by the State agency was biased and

unfair and hence, if we find that a CBI investigation is warranted, we need not interfere with the impugned judgment of the learned Single Judge. If we accept the said submission of Sri.Asaf Ali, the learned counsel for the writ petitioners, we will be forced to consider the contrary submission made by the learned counsel Sri.Vijay Hansaria, on behalf of the appellants. According to the State's counsel, around one lakh calls were analysed during the relevant period, including those of the office bearers of the Ruling Party at various levels. Besides, a total of 168 CDRs were also specifically investigated to determine whether any of the accused had made calls to political leaders, during the said period. The senior counsel submitted that while few local level political functionaries (A14, A12, A15, A13, A9 & A17) were found involved in the conspiracy, no higher level leaders of the Ruling Party were found to be involved in the crime. Around 210 witnesses were examined and many of them have been mentioned in the charge-sheet as prosecution witnesses. To project that a competent investigation was done by the State's police, Sri.Hansaria highlights that a 15 member SIT was constituted to investigate the case and the District Police Chief, Kannur had monitored the investigation, on a daily basis to unravel the truth. The State accordingly argues that a professional and unbiased investigation was carried out, leading to filing of charge-sheets in the case. These materials according to Sri.Hansaria if considered, would amply demonstrate the impropriety of transferring the investigation to the CBI.

9.4. While considering the rival contentions on this aspect, we must

remind ourselves that in the present Appeal, the legality of the impugned judgment has to be assessed on the basis of the materials that were available before the learned Judge when he issued the impugned direction on 07.03.2018 in the W.P.(C).No.6630 of 2018. At that early stage, most of the materials pertaining to the nature and contour of the investigation were not available to the Court and in our view, premature inferences were drawn to transfer the case to the CBI.

9.5. There are also other reasons why we cannot accept the contention of Sri.Asaf Ali. Firstly, this is an Appeal by the State Government impugning the direction of the learned Single Judge, on the ground that there was no material before him, at the time of disposal of the Writ Petition, that warranted a direction for CBI investigation. Secondly, during the pendency of this Appeal, when the operation of the impugned judgment stood stayed by this Court, the investigation of the case was continued by the State agency and they have since completed the exercise and laid two final reports dated 14.05.2018 and 21.01.2019 respectively before the Criminal Court. The writ petitioners did not, at any stage of the said investigation, approach the Magistrate concerned for any direction under *Section 156(3)*. Even after the final reports were laid before the Criminal Court, they did not approach either the said Court or this Court for any direction. The said inaction of the writ petitioners impinges upon the *bona fides* of their claim that there was no fair investigation of the case.

10. The upshot of the above discussion is that this Appeal must succeed. We allow the Appeal by setting aside the judgment of the learned Single Judge. We make it clear, however, that nothing in this judgment shall be construed as prejudicing the right of the writ petitioners to pursue the remedies available to them in law in relation to the investigation or trial of the case in question.

**Sd/-
HRISHIKESH ROY
CHIEF JUSTICE**

**Sd/-
A.K.JAYASANKARAN NAMBIAR
JUDGE**

prp