

HIGH COURT OF JAMMU & KASHMIR
AT SRINAGAR

561-A No.184/2013
Cr. MP No.337/2013

Date of decision:27-06-2016

Rubi Jan

Vs.

State of J&K and others

Coram:

Hon'ble Mr. Justice Mohammad Yaqoob Mir, Judge

Appearing counsel:

For the Petitioner(s):	Mr. M. M. Iqbal.
For the Respondent(s):	Mr. R. A. Khan, AAG-for R1 & R2.
	Mr. Wajid Haseeb-for R3 to R5

i)	Whether to be reported in Digest/Journal:	YES
ii)	Whether to be reported in Media/Press:	OPTIONAL

1. Registration of the case FIR No.24/2011, Police Station, Harwan, on completion of investigation culminated in filing charge sheet (challan) before the Court of Chief Judicial Magistrate, Srinagar. The offence under Section 306 RPC being exclusively triable by the Court of Session's, as such, case has been committed to the Court of Session's Judge, Srinagar, same has been transferred to the Court of 1st Additional Sessions Judge, Srinagar, where case had been fixed for hearing vis-à-vis framing or otherwise of the charge.

2. The complainant not satisfied with the investigation and conclusion of the investigation has filed the instant petition praying for the following reliefs:

- a) To direct further investigation in the case as envisaged u/s 173 (Clause 8) Cr. P. C in order to bring the real culprits to book for murdering the deceased Rahil Amin Malik s/o Mohammad Amin R/o Laragam, Shopian in terms of Section 302 RPC in case file No.77 titled “State v/s Muneer Ahmad Bhat and ors”, pending before the Court of learned 1st Addl. Sessions Judge, Srinagar in FIR No.24 of 2011 u/s 306 RPC Police Station Harwan.*
- b) This Hon’ble Court may direct the reinvestigation of the matter at the hands of some independent investigating agency like J&K Crime Branch, in order to meet the ends of justice.*
- c) The proceedings in the case File No.77 titled “State v/s Muneer Ahmad Bhat and ors”, pending before the Court of learned 1st Addl. Sessions Judge, Srinagar, in FIR No.24 of 2011 u/s 306 RPC Police Station Harwan may kindly be put in abeyance till further investigation is completed and report submitted before the trial court.”*

3. The settled position of law is that to order further investigation is permissible and within the domain of both Magistrate as well as trial court under Section 173 (8) Cr. P. C whereas re-investigation is totally forbidden. Neither the committal Magistrate nor the trial court has such power, however, High Court has such power under Section 561-A Cr. P. C but for exercise of such power restraint is to be

exercised. It is only in exceptional cases such power can be exercised with circumspection i.e. in the cases where it appears that the investigation, *ex-facie*, is unfair, tainted, malafide and smacks of foul play. Same must be of a degree which may prick the judicial conscience of the Court. In my opinion, I am fortified by the judgment rendered in the case of “*Vinay Tyagi v. Irshad Ali alias Deepak and Ors*” (2013 AIR SCW 220). Paras 30, 33, 34 and 35 are advantageous to be quoted:

“30. Having analysed the provisions of the Code and the various judgments as afore-indicated, we would state the following conclusions in regard to the powers of a magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Code :

1. The Magistrate has no power to direct ‘reinvestigation’ or ‘fresh investigation’ (*de novo*) in the case initiated on the basis of a police report.
2. A Magistrate has the power to direct ‘further investigation’ after filing of a police report in terms of Section 173(6) of the Code.
3. The view expressed in (2) above is in conformity with the principle of law stated in *Bhagwant Singh’s case (supra)* by a three Judge Bench and thus in conformity with the doctrine of precedence.
4. Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173(8).
5. The Code is a procedural document, thus, it must receive a construction which would

advance the cause of justice and legislative object sought to be achieved. It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended to curtail the power of the Court to the extent that even where the facts of the case and the ends of justice demand, the Court can still not direct the investigating agency to conduct further investigation which it could do on its own.

6. It has been a procedure of proprietary that the police has to seek permission of the Court to continue 'further investigation' and file supplementary chargesheet. This approach has been approved by this Court in a number of judgments. This as such would support the view that we are taking in the present case.

33. At this stage, we may also state another well-settled canon of criminal jurisprudence that the superior courts have the jurisdiction under Section 482 of the Code or even Article 226 of the Constitution of India to direct 'further investigation', 'fresh' or 'de novo' and even 'reinvestigation'. 'Fresh', 'de novo', and 'reinvestigation' are synonymous expressions and their result in law would be the same. The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. Of course, it is also a settled principle that this power has to be exercised by the superior courts very sparingly and with great circumspection.

34. We have deliberated at some length on the issue that the powers of the High Court under Section 482 of the Code do not control or limit, directly or impliedly, the width of the power of Magistrate under Section 228 of the Code. Wherever a charge sheet has been submitted to the Court, even this Court ordinarily would not reopen the investigation, especially by entrusting the same to a specialized agency. It can safely be stated and concluded that in an appropriate case, when the court feels that the investigation by the police authorities is not in the proper direction and that in order to do complete justice and where the facts of the case demand, it is always open to the Court to hand over the investigation to a specialized agency. These principles have been reiterated with approval in the judgments of this Court in the case of *Disha v. State of Gujarat & Ors.* [(2011) 13 SCC 337], *Vineet Narain & Ors. v. Union of India & Anr.* [(1998) 1 SCC 226], *Union of India & Ors. v. Sushil Kumar Modi & Ors.* [1996 (6) SCC 500] and *Rubabbuddin Sheikh v. State of Gujarat & Ors.*

[(2010) 2 SCC 200], (AIR 2010 SC 3175, 2010 AIR SCW 722.

35. The power to order/direct 'reinvestigation' or 'de novo' investigation falls in the domain of higher courts, that too in exceptional cases. If one examines the provisions of the Code, there is no specific provision for cancellation of the reports, except that the investigating agency can file a closure report (where according to the investigating agency, no offence is made out). Even such a report is subject to acceptance by the learned Magistrate who, in his wisdom, may or may not accept such a report. For valid reasons, the Court may, by declining to accept such a report, direct 'further investigation', or even on the basis of the record of the case and the documents annexed thereto, summon the accused."

4. Now coming to the case in hand where question arises as to whether, on the basis of material collected by the investigating agency, further investigation or re-investigation is warranted or not.

5. In an unfortunate event of circumstances, a young 21 year old boy, namely, Rahil Amin Malik, lost his life. The investigating agency concluded that he has been compelled to commit suicide when according to the complainant he has been murdered.

6. **PRECISE FACTUAL BACKGROUND:**

I) Three families of Nusrat Jan (accused No.1), Showkat Ahmad Bhat, a shopkeeper of Village Imam Sahib, Imtiyaz Ahmad Malik, uncle of the deceased, were friendly to each other and used to visit each other's house. Sister of Showkat Ahmad Bhat is married to Imtiyaz Ahmad Malik. The deceased used to go to the

house of Showkat Ahmad Bhat at Thokarpura Shopian where he was introduced to Nusrat Jan (accused No.1).

On the persuasion of accused No.1, deceased visited her home at Harwan time and again. They developed good relations and in the process Nusrat Jan (accused No.1) also visited the house of the complainant where she found the father of the deceased paralyzed and in a distress condition. Claiming to have some political clout and also acquaintance with officials of the State, Nusrat Jan (accused No.1) made the complainant to believe that she can manage financial aid from State in favour of her ailing husband and in this way duped the complainant to pay her Rs.10,000(rupees ten thousand). When nothing happened, the complainant got disappointed and asked Nusrat Jan (accused No.1) to return Rs.10,000(rupees ten thousand) which she did not. Later on Rs.2500(rupees twenty-five hundred) were paid by the Nusrat Jan (accused No.1) by depositing the same in the bank account of petitioner's sister as the petitioner did not maintain any bank account.

- II) In connection with recovery of the balance amount, deceased went to the home of Nusrat Jan (accused No.1).

- III) On 3rd March, 2011, a telephonic call was received by the police to the effect that from the top floor of the house of Nusrat Jan situated at Friends Colony, Harwan, some untoward incident has happened, people have gathered on spot. On such basis the police party went on spot and found dead body of Rahil Amin Malik.
- IV) Proceedings in terms of Section 174 Cr. P. C were initiated. After completion of other legal formalities and after postmortem, dead body was handed over to the heirs. Proceedings were carried forward and it was found that the deceased and Nusrat Jan (accused No.1) had some family relation which had developed into very deep relation. The deceased was subjected to the circumstances which compelled him to end his life. During investigation, after the postmortem report was obtained, it was found that the death of the deceased had occurred **due to strangulation**. On such basis docket was sent for registration of the case and accordingly case was registered as FIR No.24/2011 for commission of offence punishable under Section 306 RPC.
- V) From the statements of witnesses, FSL report, call details collected from BSNL and Airtel companies and

in view of medical certificate it was established that Mst. Sarwa, Muneer Ahmad Bhat S/o Bashir Ahmad Bhat as well as Nusrat Jan, under a planned conspiracy managed to get the deceased to the house of accused No.1 where he was compelled to end his life. Both Nusrat Jan, Mst. Sarwa and Muneer Ahmad were taken into custody."

7. Contention of the learned counsel for the petitioner is that from the investigation it is clear that the dead body was recovered from the house of Nusrat Jan (accused No.1). It is also revealed by the final report that the death has occurred due to strangulation. The medical certificate placed on record is clear to the effect that the cause of death is strangulation. When cause of death is due to strangulation, was it possible for a person to strangulate himself to death. In short, he would submit that the deceased has been strangulated to death.

8. It is also projected that the investigating agency in a very arbitrary manner concluded the investigation so as to show that a murder case is solved. They have not investigated the angle of cause of death due to strangulation when there was other evidence available i.e. marks of violence were found on the shoulders, neck and also on the

back of the deceased. Cause for such marks of violence has not been looked into

9. Finally, learned counsel submitted that since investigation has not been fair, re-investigation may be ordered, which power is available to be exercised under Section 561-A Cr. P. C. Supporting his contentions, placed reliance on the judgments in the case of **Vinay Tyagi v. Irshad Ali alias Deepak and Ors (2013 AIR SCW 220), State of Punjab v. Central Bureau of Investigation and others**, reported in (2011) 9 SCC 182 and the judgment in the case of **Chandra Babu @ Moses v. State through Inspector of Police & ors(Criminal Appeal No.866 of 2015 arising out of SLP (Crl.) No.5702 of 2012)**.

10. Learned AAG, appearing on behalf of respondents No.1 and 2, in opposition, highlighted that the matter is to be considered by the trial court for framing or otherwise of the charge. All such grounds as projected by the petitioner can be agitated before the trial court. There is no question of re-investigation in view of the material as has been collected.

11. Counsel for respondents No.3 to 5 would submit that no offence at all has been committed. The respondents No.3 and 4 have been un-necessarily implicated which they will

agitate at the time of determination of the question of framing or otherwise of the charge.

12. While going through the material as collected by the investigating agency, what will emerge is that the investigating agency was required to further investigate the matter so as to come out with positive conclusion about the death of the deceased in the background of death due to strangulation i.e. as to how deceased was strangulated and as to whether a person could strangulate himself to death, if yes, in what manner.

13. Important aspect is that in Column No.10 of death report No.1 (Marg Report No.1), it is recorded that on the neck beneath chin, on right side, there were 'hematoma' marks whereas 'hematoma' marks were also on the right and left shoulders. Whether such 'hematoma' marks could be possible if a person would strangulate himself to death. This aspect too has not been looked into by the investigating agency. The medical officer on postmortem conducted has opined that the alleged cause of death is strangulation. In the postmortem report opinion as to cause of death has been recorded as under:

"The deceased under autopsy has sustained as 'asphyxia' due to the blocking of the air passage by the root of the tongue pressing against pharynx and closing it on account of upward pull of ligature leading to cardio-

respiratory arrest and death. Moreover, the viscera was sent to FSL and report received vide No.FSL/249-Cxt/Sgr dated 15.3.2011 "No poison was detected in the exhibit No.ST-156/11 to T-159/11". Serological report vide No.FSL/29-Sero/Sgr dated 15/3/11" (1) No seminal stains were detected on the exhibit No.S-15/11, (2) Facial material was detected on the exhibit No.S.15/11. And Deptt. Of Pathology report No.MLC-16/11 dt. 26/4/2011, "Heath unremarkable histologically. Liver congested, Kidney congested and Lungs congested."

14. In the afore-stated circumstances, the investigating agency was required to seek opinion of the doctors as to whether self strangulation so as to cause death in the stated circumstances was possible. There has been lapse on the part of investigating agency in not clarifying the position of strangulation coupled with the fact of 'hematoma' on the neck near chin and on the right and left shoulders.

15. It is quite unfortunate that the investigation of a very serious and heinous crime has been conducted by an unskilled investigating officer who, in an arbitrary and irresponsible manner, has drawn the conclusion without looking into various aspects as referred to above. In addition to above, investigating officer has not looked into the statement of Showkat Ahmad Bhat and that of Mst. Rubi Jan, mother of the deceased, recorded on 01.06.2011. The statements of other witnesses too have not been looked into carefully. So in short there are defects in drawing the conclusion by the investigating officer.

16. In view of the material available on the record collected by the investigating agency, investigation can't be said to be tainted, *mala fide* and also it can't be said that it smacks of foul play. At the most, at this stage, it may be said to be a lapse, indolence or lack of skill of investigation. The said situation coupled with the material collected/placed on records do not warrant re-investigation but it is a case for further investigation which could be ordered even by the trial court. In this connection, it shall be quite advantageous to quote Para 52 of the judgment in the case of **Vinay Tyagi v. Irshad Ai alias Deepak and Ors (2013 AIR SCW 220)**:

"52. It appears, the trial court may have three options, firstly, it may accept the application of accused for discharge. Secondly, it may direct that the trial may proceed further in accordance with law and thirdly, if it is dissatisfied on any important aspect of investigation already conducted and in its considered opinion, it is just, proper and necessary in the interest of justice to direct 'further investigation', it may do so."

17. The first prayer in the petition is for further investigation and the second prayer is for reinvestigation. Reinvestigation, admittedly, is not within the domain of Committal Magistrate or that of the trial court. It is permissible to be done by this Court in exercise of powers under Section 561-A Cr. P. C or by invoking extraordinary jurisdiction but it is only in rarest cases such power is to be exercised. The present case is not the one which warrants reinvestigation but is a case for further investigation.

18. In the afore-stated facts and circumstances, petition succeeds. Investigating agency is hereby directed to conduct further investigation in the case in the light of observations made hereinabove and in the light of the material as has been collected by it and then to submit the supplementary report before the trial court. The trial court shall proceed further in the matter only after receipt of the supplementary report.
19. In case the Investigating Officer who had conducted the investigating shall not be available, then in that eventuality, SHO, Police Station concerned shall be asked to conduct further investigation and to submit the supplementary report with promptitude. SSP, Srinagar, shall monitor the further investigation and to ensure compliance at an earliest.
20. Trial court record along with copy of the order be sent to the trial court. Copy of the order be also sent to the SSP, Srinagar, for information and compliance.
21. Disposed of as above along with connect Cr. MP.

*(Mohammad Yaqoob Mir)
Judge*

Srinagar
27.06.2016
"Mohammad Altaf"