

Luckose Zachariah @ Zak Nedumchira Luke vs Joseph Joseph on 18 February, 2022

Author: D.Y. Chandrachud

Bench: Surya Kant, Dhananjaya Y Chandrachud

Crl.A.256/2022

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IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No 256 of 2022
(Arising out of SLP (Crl) No 9556 of 2021)

Luckose Zachariah @ Zak
Nedumchira Luke and Others

Versus

Joseph Joseph and Others

JUDGMENT

Dr Dhananjaya Y Chandrachud, J 1 Leave granted.

2 This appeal arises from a judgment of a learned Single Judge of the High Court of Kerala dated 3 March 2021.

3 On 3 February 2016, FIR 205 of 2016 was registered at police station Alappuzha North against the appellants for the alleged commission of offences punishable under Sections 294(b), 323, and 324 read with Section 34 of the Indian Penal Code 1806. The first appellant was named as the second accused, the second appellant as the third accused and the third appellant as the first accused. On 26 September 2016, the Sub-Inspector of police at Alappuzha North police station submitted a report under Section 173(2) of the Code of Criminal Procedure 1973 implicating the appellants in the commission of the alleged offences. The case came to be numbered as CC No 2177 of 2016 before the

JFCM Court - I, Alappuzha. 4 The first appellant moved the Superintendent of Police and the IGP complaining of the registration of a false case and sought a further investigation in the matter. On 21 February 2017, the Dy SP (Administration) Alappuzha submitted a report recording that there were serious flaws in the earlier investigation. On 6 December 2017, the Dy SP Crime Branch submitted a supplementary report before the court of the JFCM Court - I, Alappuzha recommending that the proceedings against the appellants be dropped on the ground that no offence had been established during the course of the further investigation.

5 The first respondent filed a protest petition. By an order dated 19 May 2018, the Magistrate dismissed the protest petition for want of prosecution. On 30 May 2018, the Magistrate accepted the final report observing that the protest petition lodged by the complainant had been dismissed. 6 The first respondent at whose behest the FIR was registered challenged the order of the Magistrate before the Sessions Court, Alappuzha. Exercising the revisional jurisdiction, the Sessions Judge set aside the order of the Magistrate on 26 October 2019 and directed the Magistrate to take the case on file and proceed further in accordance with law. While doing so, the Sessions Judge relied on a judgment of a Single Judge of the High Court of Kerala in *Joseph v. Antony Joseph*¹. Aggrieved by the order of the Sessions Judge, the appellants moved the High Court under Section 482 of the Code of Criminal Procedure. The High Court by its impugned judgment dated 3 March 2021 dismissed the petition on the following grounds:

(i) The positive and negative reports submitted under the Sub-sections (2) and (8) of Section 173 respectively must be read conjointly to determine if there is prima facie ground for believing that the accused has committed the offence. The reports do not have a separate existence. This position is settled by the decision of the Supreme Court in *Vinay Tyagi v. Irshad Ali*²;

¹ 2018 (3) KHC 23 2 (2013) 5 SCC 762

(ii) There is no scope for filing a protest petition against a report under Section 173(2) or Section 173(8) of the CrPC. The protest petition and its dismissal for non-prosecution does not have any legal impact; and

(iii) The scope of a protest petition would arise only when both the reports that is, the final report under Section 173(2) CrPC and the supplementary report under Section 173(8) CrPC, are “negative reports”.

7 While entertaining the Special Leave Petition on 13 December 2021, the following order was passed by this Court, recording the submissions of the appellants:

“1 Mr R Basant, Senior Counsel appearing on behalf of the petitioners, has, while placing reliance on the decision of this Court in *Vinay Tyagi v Irshad Alia alias Deepak* (2013) 5 SCC 762, (paragraphs 41 and 42), submitted that since a supplementary report under Section 173(8) of the Code of Criminal Procedure 1973 was presented before the Magistrate after further investigation, the Magistrate would

be required to take into account both the report under Section 173(2) as well as the supplementary report and then determine as to whether there is any ground for proceeding. However, it has been submitted that on the basis of the judgment of the High Court which has been cited in the order of the Sessions Judge only the report under Section 173(2) would be considered while the supplementary report would be taken into account at the stage of the trial.

2 Issue notice, returnable on 18 February 2022.

3 Counter affidavit, if any, be filed within a period of four weeks from the date of service.

4 Pending further orders, there shall be a stay of further proceedings in CC 2177/2016 pending before the Judicial First Class Magistrate Court-I, Alappuzha.”

8 In pursuance of the order issuing notice, the respondents have appeared in these proceedings. Accordingly, we have heard Mr R Basant, learned senior counsel appearing on behalf of the appellants with Mr Raghenth Basant and Dr S Gopakumaran Nair, learned senior counsel for the first respondent with Mr T G Narayanan Nair.

9 The initial report under Section 173(2) CrPC which was submitted before the competent court after investigation found that prima facie the appellants were involved in the commission of the offences alleged. The subsequent report under Section 173(8) however has come to the conclusion that the proceedings were liable to be dropped since prima facie no case involving the commission of the offences has been established. 10 In the judgment of this Court in Vinay Tyagi (supra) it has been held that a further investigation conducted under the orders of the court or by the police on its own accord would lead to the filing of a supplementary report. The supplementary report, the Court noted, would have to be dealt with “as part of the primary report” in view of the provisions of sub-Sections 3 to 6 of Section 173.

11 Section 173(8) specifically provides as follows:

“(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub- section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub- sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2).”

12 In terms of sub-Section 8 of Section 173, in the event of a further investigation, the report has to be forwarded to the Magistrate upon which, the provisions of sub-Sections (2) to (6) shall (as far as may be) apply in relation to such report or reports as they apply in relation to a report forwarded in

sub-section (2). In this backdrop, while interpreting the above provisions, in Vinay Tyagi (supra) this Court held thus:

“42. Both these reports have to be read conjointly and it is the cumulative effect of the reports and the documents annexed thereto to which the court would be expected to apply its mind to determine whether there exist grounds to presume that the accused has committed the offence. If the answer is in the negative, on the basis of these reports, the court shall discharge an accused in compliance with the provisions of Section 227 of the Code.”

13 The decision in Vinay Tyagi (supra) was noticed together with other decisions of this Court in the judgment of a three-Judge Bench in Vinubhai Haribhai Malaviya v. State of Gujarat³. This Court held:

“42. There is no good reason given by the Court in these decisions as to why a Magistrate's powers to order further investigation would suddenly cease upon process being issued, and an accused appearing before the Magistrate, while concomitantly, the power of the police to further investigate the offence continues right till the stage the trial commences. Such a view would not accord with the earlier judgments of this Court, in particular, Sakiri [Sakiri Vasu v. State of U.P., (2008) 2 SCC 409 : (2008) 1 SCC (Cri) 440], Samaj Parivartan Samudaya [Samaj Parivartan Samudaya v. State of Karnataka, (2012) 7 SCC 407 : (2012) 3 SCC (Cri) 365], Vinay Tyagi [Vinay Tyagi v. Irshad Ali, (2013) 5 SCC 762 : (2013) 4 SCC (Cri) 557], and Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86]; Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] having clearly held that a criminal trial does not begin after cognizance is taken, but only after charges are framed. What is not given any importance at all in the recent judgments of this Court is Article 21 of the Constitution and the fact that the Article demands no less than a fair and just investigation. To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate's nod under Section 173(8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases midway through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a prima facie guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h) and Section 173(8) CrPC, as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case before the trial actually commences. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case.

3 (2019) 17 SCC 1 Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law. If, for example, fresh facts come to light which would lead to inculcating or exculpating certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding, as was held in *Hasanbhai Valibhai Qureshi* [*Hasanbhai Valibhai Qureshi v. State of Gujarat*, (2004) 5 SCC 347 : 2004 SCC (Cri) 1603] . Therefore, to the extent that the judgments in *Amrutbhai Shambhubhai Patel* [*Amrutbhai Shambhubhai Patel v. Sumanbhai Kantibhai Patel*, (2017) 4 SCC 177 : (2017) 2 SCC (Cri) 331], *Athul Rao* [*Athul Rao v. State of Karnataka*, (2018) 14 SCC 298 : (2019) 1 SCC (Cri) 594] and *Bikash Ranjan Rout* [*Bikash Ranjan Rout v. State (NCT of Delhi)*, (2019) 5 SCC 542 : (2019) 2 SCC (Cri) 613] have held to the contrary, they stand overruled. Needless to add, *Randhir Singh Rana v. State (Delhi Admn.)* [*Randhir Singh Rana v. State (Delhi Admn.)*, (1997) 1 SCC 361] and *Reeta Nag v. State of W.B.* [*Reeta Nag v. State of W.B.*, (2009) 9 SCC 129 : (2009) 3 SCC (Cri) 1051] also stand overruled.” 14 In the present case, the record before the Court indicates that upon the submission of the supplementary report, the JFCM Court - I, Alappuzha by an order dated 19 May 2018 dismissed the protest petition submitted by the first respondent for non-prosecution. On 30 May 2018, the JFCM proceeded to accept the supplementary report in terms of the following order:

“It is seen from the records that after further investigation, police has referred the charge against the accused. Notice was issued to Defacto Complainant and he filed C.M.P. 155/2018 against the refer charge. The same was dismissed on 19.05.2018 due to non prosecution. Hence, final report referring the charge as false is hereby accepted. Hence, the further proceedings are dropped.

Hence, the further proceedings in the case dropped.”

15 The Sessions Judge was justified in setting aside the order of the Magistrate for the simple reason that after the supplementary report submitted by the investigating officer, the Magistrate was duty bound in terms of the dictum in paragraph 42 of the decision in *Vinay Tyagi* (supra), as well as the subsequent three-Judge Bench decision in *Vinubhai Haribhai Malaviya* (supra) to consider both the original report and the supplementary report before determining the steps that have to be taken further in accordance with law. The Magistrate not having done so, it was necessary to restore the proceedings back to the Magistrate so that both the reports could be read conjointly by analyzing the cumulative effect of the reports and the documents annexed thereto, if any, while determining whether there existed grounds to presume that the appellants have committed the offence. The order of the Sessions Judge restoring the proceedings back to the Magistrate was correct to that extent. However, the Sessions Judge proceeded to rely upon the decision of a Single Judge of the Kerala High Court in *Joseph* (supra), where it was held that:

“7. [...] When a positive report under Section 173(2) of Cr.P.C. is followed by a negative report under Section 173(8) Cr.P.C. and cognizance has been taken upon the former report, the magistrate shall proceed with the case ignoring the latter report. But the supplementary report and the papers connected therewith shall form part of

the record of the case and can be used at the trial. What I should do is to dispose of the Crl.M.C. making this position clear.”

16 In view of the clear position of law which has been enunciated in the judgments of this Court, both in Vinay Tyagi (supra) and Vinubhai Haribhai Malaviya (supra), it is necessary for the Magistrate, to have due regard to both the reports, the initial report which was submitted under Section 173(2) as well as the supplementary report which was submitted after further investigation in terms of Section 173(8). It is thereafter that the Magistrate would have to take a considered view in accordance with law as to whether there is ground for presuming that the persons named as accused have committed an offence. While the High Court has relied upon the decision in Vinay Tyagi (supra), it becomes necessary for this Court to set the matter beyond any controversy having due regard to the fact that the Sessions Judge in the present case had while remitting the proceedings back to the Magistrate relied on the judgment of the Single Judge of the Kerala High Court in Joseph (supra) which is contrary to the position set out in Vinay Tyagi. Hence, the JFCM – I Alappuzha shall reexamine both the reports in terms of the decisions of this Court in Vinay Tyagi vs Irshad Ali alias Deepak and Vinubhai Haribhai Malaviya vs State of Gujarat as noted above and in terms of the observations contained in the present judgment. The Magistrate shall take a considered decision expeditiously within a period of one month from the date of the present order. 17 The appeal shall stand disposed of accordingly in the above terms. 18 Pending applications, if any, stand disposed of.

.....J. [Dr Dhananjaya Y Chandrachud]J.
[Surya Kant] New Delhi;

February 18, 2022 CKB