

A BOHATIE DEVI (DEAD) THROUGH LR

v.

THE STATE OF UTTAR PRADESH & ORS

(Criminal Appeal No. 1294 of 2023)

B APRIL 28, 2023

[M. R. SHAH AND C. T. RAVIKUMAR, JJ.]

- Code of Criminal Procedure, 1973 – ss.158, 173(3) – Reinvestigation by another agency – Order passed by Secretary (Home), State of U.P., Lucknow for reinvestigation by CBCID – Legality of – Held: s.173(3) r/w s.158 does not permit the Secretary (Home) to order for further investigation/reinvestigation by another agency, other than the officer in charge of the concerned Police Station and/or his superior officer – For reinvestigation, the prior permission/approval of the Magistrate is required – In the present case, the Secretary (Home) passed an order for reinvestigation by CBCID and thereafter, the CBCID sent the intimation to the Magistrate – Thus, no prior approval/permission was accorded by the Magistrate – Order passed by the Secretary (Home) ordering reinvestigation by another agency and that too, on the basis of the application/complaint submitted by mother of the accused is unknown to law – Impugned judgment passed by the High Court is quashed and set aside – Order passed by the Secretary (Home) and consequently, further investigation/reinvestigation by the CBCID is also quashed and set aside – Penal code – ss.302, 120B.*

F **Disposing of the appeals, the Court**

- G HELD:** 1.1 Respondent Nos. 8 and 11 as such have been chargesheeted for the offence under Sections 302 and 120B of the IPC of which the cognizance has been taken by the Magistrate on 21.12.2016. That thereafter, respondent No. 8 as such moved the quashing petition before the High Court for quashing the entire criminal proceedings including the chargesheet/supplementary chargesheet. The High Court dismissed the quashing petition. Therefore, the accused must have taken all the defences which might have been available to him while considering quashing petition including the ground on which now H further investigation/reinvestigation is ordered by another

agency, namely, CBCID. Thereafter, respondent No. 8 approached this Court and the Special Leave Petition came to be dismissed by this Court and the interim protection in favour of respondent No. 8 came to be vacated. That thereafter, non-bailable warrant was issued against respondent No. 8 and only thereafter, mother of respondent No. 8 – accused moved an application before the Secretary (Home) for further investigation and he transferred the investigation to CBCID, *inter-alia*, on the ground that the so-called eye witnesses of the murder were not the eye witnesses. The request of the mother of accused has been accepted by the Secretary (Home) and the investigation was transferred to another agency, namely, CBCID despite the fact that after the first chargesheet, the investigation was handed over to the District Crime Branch to further investigate the case and they filed the supplementary chargesheet in which respondent Nos. 8 and 11 were even chargesheeted. Therefore, as such it is not a case of further investigation, but is a case of reinvestigation by another agency. The order passed by the Secretary (Home) transferring the investigation/ordering further investigation by another agency and that too, on the basis of the application/complaint submitted by mother of the accused is unknown to law.

1.2 There cannot be any dispute that even after the chargesheet is filed, it is the right of the investigating officer to further investigate in respect of offence even after a report under sub-section (2) of Section 173 of Cr.PC forwarded to a Magistrate and as observed and held by this Court the prior approval of the Magistrate is not required. However, as per the settled position of law, so far as the reinvestigation is concerned, the prior permission/approval of the Magistrate is required. In the present case, the Secretary (Home) has passed an order for further investigation by CBCID and thereafter, the CBCID has sent the intimation to the Magistrate. No prior approval/permission as observed by the High Court has been accorded by the Magistrate. The High Court in the impugned judgment and order has observed that the further investigation is ordered with the concurrence of the Magistrate, which is factually incorrect. In any case, as it is a case of reinvestigation, the same is not permissible and that too by another agency without the prior permission of the Magistrate

- A even while exercising the powers under Section 173(8) of the Cr.PC. So far as the investigation is concerned under the scheme of the Cr.PC, the Police Officer of the concerned Police Station, who is the investigating officer, has to investigate/further investigate the case under the supervision of Superintendent of Police. So far as the Secretary (Home) is concerned, he does not come into picture at all. If such powers are given to the Secretary (Home) in that case any accused who is already chargesheeted may approach the Secretary (Home) and may get an order of further investigation or reinvestigation by another agency and obtain the fresh report nullifying the earlier chargesheet and get himself discharged. If the accused is aggrieved by the chargesheet in that case, the remedy available to him would be either to file the quashing petition under Section 482 of Cr.PC and/or to move an appropriate application for discharge before the Magistrate and it is for the High Court and/or the Magistrate as the case may be, to quash criminal proceedings or discharge the accused. The Secretary (Home) and/or any accused who is already chargesheeted cannot be permitted to circumvent such provision. In the present case, respondent No. 8 – accused earlier did file the quashing petition, but failed. [Paras 7.1, 7.2][652-D-H; 653-A-E]
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- 1.3 Section 173(3) read with Section 158 does not permit the Secretary (Home) to order for further investigation/reinvestigation by another agency, other than the officer in charge of the concerned Police Station and/or his superior officer. [Para 7.3][653-G]

State of Andhra Pradesh Vs. A.S. Peter (2008) 2 SCC 383 : [2007] 13 SCR 517; Ram Lal Narang Vs. State (Delhi Administration) (1979) 2 SCC 322 : [1979] 2 SCR 923 – referred to.

Case Law Reference

- | | referred to | Para 5.1 |
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| [2007] 13 SCR 517 | referred to | Para 5.2 |
| [1979] 2 SCR 923 | referred to | Para 5.2 |
| G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.1294 of 2023. With Criminal Appeal No. 1295 of 2023 From the Judgment and Order dated 17.11.2020 of the High Court H of Judicature at Allahabad in CRLMWP No.7093 of 2019. | | |

Ardhendumauli Kumar Prasad, A.A.G, Ms. Vibha Datta Makhija, A
S Nagamuthu, Rameshwar Singh Malik, Sr. Advs., Atul Kumar,
Abhimanyu Sharma, Ms. Deepali, Pulak Bagchi, Tarun Gupta, Jitesh
Malik, R Sudhakaran, Abhaya Nath Das, Satish Kumar, Harikesh Singh,
Sandeep Sinhmar, Satish Hooda, Satyendra Kumar, Anand Sanjay M.
Nuli, Prashant Chowdhari, K.P. Singh, Kanishk Chowdhari, Sarvesh Singh
Baghel, Ms. Deepika Kalia, Sidharth Sengar, Advs. for the appearing
parties.

The Judgment of the Court was delivered by

M. R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court of Allahabad in Criminal Misc. Writ Petition No. 7093/2019, by which, the High Court has dismissed the said writ petition preferred by the appellant herein – mother of the deceased – Satyveer alias Kallu, in which, the appellant challenged order dated 13.02.2019 passed by the Secretary (Home), State of UP, Lucknow, whereby he ordered for further investigation by CBCID of Case Crime No. 1069/2014, the original writ petitioner has preferred the present appeal.

2. The facts leading to the present appeal in a nutshell are as under:-

2.1 That son of the appellant – Satyaveer @ Kallu was murdered by un-known persons. An FIR was lodged by the informant Sanjeev son-in-law of the appellant against Smt. Anju and two un-known persons. The investigation was carried out by the Inspector of Police, Baraut, District Baghpat who submitted chargesheet on 01.03.2015 against two persons of which cognizance was taken by the learned Magistrate on 31.03.2015. That thereafter, on the complaint/application by the appellant, the investigation was handed over to the District Crime Branch. A supplementary chargesheet was filed on 02.12.2016 against one Ashwani Kumar – respondent No. 8 herein (son of respondent No. 9 herein) and Smt. Anju - respondent No. 11 herein. The learned Magistrate took cognizance of the same on 21.12.2016. That thereafter, respondent No. 8, namely, Ashwani Kumar filed the quashing petition before the High Court for quashing of the entire criminal proceedings of Case No. 7626/2016 originating out of Case Crime No. 1069/2014 as well as for quashing of the chargesheet dated 02.12.2016. The said application came to be

- A dismissed by the High Court on 05.07.2017. Being aggrieved of order dated 05.07.2017, respondent No. 8 – Ashwani Kumar approached this Court by way of Special Leave Petition (Crl) No. 599/2017 which was dismissed by this Court on 24.08.2018. This Court also vacated the interim protection granted to respondent No. 8 vide order dated 15.09.2017.
- B The learned CJM, Baghpat issued non-bailable warrant against respondent No. 8 vide order dated 08.09.2018. That thereafter and after non-bailable warrant was issued against respondent No. 8 herein, mother of Ashwani Kumar – accused moved an application dated 23.01.2019 to the Secretary (Home), State of Uttar Pradesh for transferring the investigation to CBCID, *inter-alia*, on the ground that respondent No. 8
- C has been arraigned as accused on the basis of statements of two witnesses who in fact were in the Jail and therefore, their statements cannot be believed. That by order dated 13.02.2019, Secretary (Home) State of U.P., Lucknow, ordered further investigation by CBCID. The order passed by the Secretary (Home) transferring investigation to CBCID
- D was impugned before the High Court by way of present petition. By the impugned judgment and order the High Court has dismissed the writ petition by observing that further investigation was ordered after intimation to the learned Magistrate and therefore, there is no infirmity in the order passed by the Secretary (Home) directing further investigation. The impugned judgment and order passed by the High Court is the subject
- E matter of present appeal.

3. Ms. Vibha Datta Makhija, learned Senior Advocate has appeared on behalf of the appellant and Shri S. Nagamuthu and Shri Rameshwar Singh Malik, learned Senior Advocates have appeared on behalf of respondent Nos. 8 and 11. Shri Anand Sanjay M. Nuli, learned F counsel has appeared on behalf of the intervenor.

4. Ms. Makhija, learned Senior Advocate appearing on behalf of the appellant has vehemently submitted that the order passed by the Secretary (Home) transferring the investigation to CBCID is absolutely illegal and contrary to the provisions of the Code of Criminal Procedure G (Cr.PC).

4.1 It is submitted that in the present case after thorough investigation by the investigating agency of the State, respondent Nos. 8 and 11 were chargesheeted. It is submitted that once chargesheeted thereafter, at the instance of mother of one of the accused, the Secretary H (Home) could not have transferred the investigation.

4.2 It is vehemently submitted that such an order of transfer of investigation by the Secretary (Home) and that too at the instance of mother of one of the accused, is un-known to law and is not permissible at all. A

4.3 It is further submitted by Ms. Makhija, learned Senior Advocate that in fact, the grounds on which the investigation was sought to be transferred can be said to be the defences on behalf of the accused which are required to be considered at the time of trial. It is submitted that as such by passing the order of transfer of investigation to CBCID and the subsequent investigation by CBCID virtually acquits the accused who are chargesheeted in the supplementary chargesheet and would tantamount to nullify the chargesheet against respondent Nos. 8 and 11, which as such is not permissible. B

4.4 It is further submitted by Ms. Makhija, learned Senior Advocate appearing on behalf of the appellant that in fact it is not a case of further investigation but it is a case of reinvestigation and therefore, for reinvestigation the prior approval of the Magistrate is must. It is submitted that in the present case, the Secretary (Home) first took a decision and passed the order to transfer the investigation to CBCID and thereafter, the IO only intimated the learned Magistrate about transfer of investigation, which cannot be said to be following due procedure as required by law, more particularly, Section 173(8) of the Cr.PC. C

4.5 It is further submitted that even on facts also, the High Court has materially erred in observing that the order directing further investigation was passed with the concurrence of the concerned Magistrate. It is submitted that even learned counsel for respondent No. 8 was wrong in making the submission before the High Court that the order passed by the Secretary (Home) of further investigation was passed after taking leave of the Magistrate competent to do so. It is submitted that nothing is on record that any leave was sought and granted by the learned Magistrate. It is submitted that what is there on record is only the intimation to the learned Magistrate and nothing more than that. D

4.6 It is further submitted that the High Court has not properly appreciated and considered the fact that respondent Nos. 8 and 11 were chargesheeted pursuant to supplementary chargesheet dated 02.12.2016 of which the learned Magistrate took cognizance on 21.12.2016 and that thereafter, respondent No. 8 prayed for quashing of the entire criminal proceedings including the chargesheet and respondent No. 8 failed up to E

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- A this Court and only thereafter, when the non-bailable warrant was issued, on his behalf an application was moved for transfer of investigation. It is submitted that once the chargesheet was filed and even the quashing petition came to be dismissed up to this Court, thereafter, it was not open for the accused or on his behalf to move an application for further investigation/reinvestigation.
- B 4.7 Making the above submissions, it is prayed to allow the present appeal and quash and set aside the order passed by the Secretary (Home) transferring the investigation to CBCID.
 - 5. While opposing the present appeal Shri Ardhendumauli Kumar Prasad, learned AAG appearing on behalf of the State has vehemently submitted that having being satisfied that a case is made out for further investigation and to do the complete justice to the parties including the accused, no error has been committed by the Secretary (Home) in ordering further investigation by CBCID. It is submitted that the order passed by the Secretary (Home) being the head of the department was on administrative side and thereafter, the concerned IO intimated to the learned Magistrate about transfer of investigation/further investigation which is the requirement under the law.
- C 5.1 While opposing the present appeal, Shri S. Nagamuthu and Shri Rameshwar Singh Malik, learned Senior Advocates appearing on behalf of respondent Nos. 8 and 11 have vehemently submitted that fair investigation is the right of the accused as well as the victim. It is submitted that Section 173(8) of Cr.PC permits/authorises the investigating officer (IO) to further investigate the case for which the permission of learned Magistrate is not required. It is submitted that under Section 173(8) of Cr.PC, it is the right of IO for further investigation. Reliance is placed on the decision of this Court in the case of **State of Andhra Pradesh Vs. A.S. Peter (2008) 2 SCC 383 (para 9)**.
- D 5.2 It is submitted that as observed and held in the case of **Ram Lal Narang Vs. State (Delhi Administration) (1979) 2 SCC 322**, in the interest of both the prosecution and the defence, the Police should have the power to make further investigation and submit a supplemental report.
- E 5.3 It is further submitted by learned senior counsel appearing on behalf of the accused that in the present case even, further investigation was carried out by the District Crime Branch (other than the IO of the

concerned Police Station) which was on the application/complaint by the appellant and respondent Nos. 8 and 11 came to be chargesheeted pursuant to the supplementary chargesheet. It is submitted that thereafter, when further investigation has been ordered by CBCID on the application of mother of the accused thereafter it is not open for the appellant to make a grievance that further investigation cannot be ordered by another agency – CBCID.

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5.4 It is further submitted by learned senior counsel appearing on behalf of the accused that even as per Section 173(3) read with Section 158 of Cr.PC, the investigation by another agency is permissible.

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5.5 It is further submitted by Shri Nagamuthu, learned Senior Advocate appearing on behalf of respondent No. 8 that after the investigation by CBCID as ordered, a further report shall be submitted before the learned Magistrate and thereafter, there shall be three reports before the learned Magistrate, one on the basis of chargesheet, second on the basis of supplementary chargesheet and third on the basis of further investigation by CBCID and thereafter, it is ultimately for the learned Magistrate to consider the reports. It is submitted that therefore, let the third report also be considered by the learned Magistrate and therefore, the impugned order may not be interfered with by this Court.

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6. Heard learned counsel appearing on behalf of the respective parties at length. We have also heard Shri Anand S. Nuli, learned counsel appearing on behalf of the intervenor.

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7. At the outset, it is required to be noted that respondent Nos. 8 and 11 as such have been chargesheeted for the offence under Sections 302 and 120B of the IPC of which the cognizance has been taken by the learned Magistrate on 21.12.2016. That thereafter, respondent No. 8 as such moved the quashing petition before the High Court for quashing the entire criminal proceedings including the chargesheet/supplementary chargesheet. The High Court dismissed the quashing petition. Therefore, the accused must have taken all the defences which might have been available to him while considering quashing petition including the ground on which now further investigation/reinvestigation is ordered by another agency, namely, CBCID. It is required to be noted that thereafter, respondent No. 8 approached this Court and the Special Leave Petition came to be dismissed by this Court and the interim protection in favour of respondent No. 8 came to be vacated. That thereafter, non-bailable

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- A warrant was issued against respondent No. 8 and only thereafter, mother of respondent No. 8 – accused moved an application before the Secretary (Home) for further investigation and he transferred the investigation to CBCID, *inter-alia*, on the ground that the so-called eye witnesses of the murder were not the eye witnesses. The request of the mother of the accused has been accepted by the Secretary (Home) and the investigation was transferred to another agency, namely, CBCID despite the fact that after the first chargesheet, the investigation was handed over to the District Crime Branch to further investigate the case and they filed the supplementary chargesheet in which respondent Nos. 8 and 11 were even chargesheeted. Therefore, as such it is not a case of further investigation, but is a case of reinvestigation by another agency. The order passed by the Secretary (Home) transferring the investigation/ ordering further investigation by another agency and that too, on the basis of the application/complaint submitted by mother of the accused is un-known to law.
- D 7.1 There cannot be any dispute that even after the chargesheet is filed, it is the right of the investigating officer to further investigate in respect of offence even after a report under sub-section (2) of Section 173 of Cr.PC forwarded to a Magistrate and as observed and held by this Court the prior approval of the Magistrate is not required. However, as per the settled position of law, so far as the reinvestigation is concerned, the prior permission/approval of the Magistrate is required. In the present case, the Secretary (Home) has passed an order for further investigation by CBCID and thereafter, the CBCID has sent the intimation to the learned Magistrate. No prior approval/permission as observed by the High Court has been accorded by the learned Magistrate. The High Court in the impugned judgment and order has observed that the further investigation is ordered with the concurrence of the Magistrate, which is factually incorrect. What is on record is only an intimation to the learned Magistrate which in any case cannot be said to be concurrence of the learned Magistrate.
- G 7.2 In any case, as it is a case of reinvestigation, the same is not permissible and that too by another agency without the prior permission of the learned Magistrate even while exercising the powers under Section 173(8) of the Cr.PC. Under what authority of law, the Secretary (Home) has transferred the investigation to another agency and/or ordered further investigation by another agency is not pointed out and that too at the H

instance of the accused on the grounds which as such can be said to be the defences of the accused which are required to be considered at the time of trial. The case on behalf of the accused that as the Secretary (Home) is the head of the department and the further investigation was ordered by another agency on administrative side and therefore, the Secretary (Home) is justified in ordering further investigation by CBCID cannot be accepted. So far as the investigation is concerned under the scheme of the Cr.PC, the Police Officer of the concerned Police Station, who is the investigating officer, has to investigate/further investigate the case under the supervision of Superintendent of Police. So far as the Secretary (Home) is concerned, he does not come into picture at all. If such powers are given to the Secretary (Home) in that case any accused who is already chargesheeted may approach the Secretary (Home) and may get an order of further investigation or reinvestigation by another agency and obtain the fresh report nullifying the earlier chargesheet and get himself discharged. If the accused is aggrieved by the chargesheet in that case, the remedy available to him would be either to file the quashing petition under Section 482 of Cr.PC and/or to move an appropriate application for discharge before the learned Magistrate and it is for the High Court and/or the learned Magistrate as the case may be, to quash criminal proceedings or discharge the accused. The Secretary (Home) and/or any accused who is already chargesheeted cannot be permitted to circumvent such provision. It is to be noted that in the present case, respondent No. 8 – accused earlier did file the quashing petition, but failed.

7.3 Now, so far as the submission on behalf of the accused relying upon Section 173(3) of Cr.PC is concerned, it provides how to submit/send a report to the Magistrate and who shall send the report to the Magistrate. It provides that where a superior officer of police has been appointed under Section 158, the report, shall be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation. Therefore, Section 173(3) read with Section 158 does not permit the Secretary (Home) to order for further investigation/reinvestigation by another agency, other than the officer in charge of the concerned Police Station and/or his superior officer.

8. In view of the above and for the reasons stated above, the present appeal succeeds. The impugned judgment and order passed by

- A the High Court is hereby quashed and set aside. Consequently, order dated 13.02.2019 passed by the Secretary (Home) impugned before the High Court, by which, the Secretary (Home), State of U.P., Lucknow ordered for reinvestigation by CBCID of Case Crime No. 1069/2014 under Sections 302 and 120B of IPC, Police Station Baraut, District, is
- B hereby quashed and set aside. Consequently, further investigation / reinvestigation by the CBCID is also hereby quashed and set aside. However, it is observed that all the defences which may be available to the accused are to be considered by the learned Trial Court at the time of trial. Present appeal is accordingly allowed.
- C As we have allowed Criminal Appeal arising out of SLP (Crl.) No. 4394/2021 filed by the mother of the deceased (now dead through LR), connected Criminal Appeal arising out of SLP (Crl.) No. 7708/2021 filed by original accused Nos. 6 and 7 against issuance of non-bailable warrants against them stands dismissed.
- D Divya Pandey Appeals disposed of.
(Assisted by : Abhishek Pratap Singh and Roopanshi Virang, LCRAs)