

VIPUL SHITAL PRASAD AGARWAL

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v.

STATE OF GUJARAT & ANR.

(Special Leave Petition (Crl.) No. 3672 of 2012 etc.)

NOVEMBER 6, 2012

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**[ALTAMAS KABIR, CJI, SURINDER SINGH NIJJAR
AND J. CHELAMESWAR, JJ.]**

CODE OF CRIMINAL PROCEDURE, 1973:

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ss. 439, 167(2), 173(2) and (8) - FIR -Charge-sheet submitted - Direction by Court for further investigation by CBI - CBI registering another FIR - Application for bail on default ground - Held: Since the prayer for default bail was made in connection with the initial F.I.R. in which charge-sheet had been filed within the stipulated period of 90 days, the plea with regard to the default bail was not available to the petitioner - The mere undertaking of a further investigation either by the Investigating Officer on his own or upon the directions of the superior police officer or pursuant to a direction by the Magistrate concerned to whom the report is forwarded does not mean that the report submitted u/s 173(2) is abandoned or rejected - Notwithstanding the practice of the CBI to register a "fresh FIR", the investigation undertaken by the CBI is in the nature of further investigation u/s 173 (8) pursuant to the direction of the court - Further, the delay including the trial has not been caused by the prosecuting authorities, but by a co-accused and advantage thereof cannot be taken by the petitioner.

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The petitioner, a Superintendent of Police, was arrested by the C.I.D. Crime on 3.5.2010 consequent upon an FIR registered as ICR No. 115 of 2006, in respect of an alleged fake encounter in which one 'TP' was killed. Charge-sheet in the case was filed on 30.7.2010 against

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A 12 Police Officers including the petitioner. In the writ
 petition filed by the mother of the deceased, the Supreme
 Court by its order dated 8.4.2011 directed the State Police
 authorities to hand over all the records to the CBI, and
 the latter was directed to investigate all aspects of the
 B case relating to the killing of the deceased and to file a
 report in the court concerned. The CBI, on 29.4.2011,
 registered a separate FIR No. RC 3(5)/2011 and applied
 before the Court of Session for release of certain
 C documents including the charge-sheet, and
 supplementary charge-sheet in FIR No. 115/2006, and to
 handover the same to it for fresh investigation. The prayer
 was allowed. The petitioner, after unsuccessfully
 approaching the Judicial Magistrate and the Court of
 Session for bail on the grounds of investigation not being
 D completed and delay in trial and the petitioner being in
 custody for a long time, challenged the order of the
 Sessions Judge before the High Court in a petition under
 Arts. 226 and 227 of the Constitution read with s.482
 CrPC, which was dismissed.

E Dismissing the petition, the Court

HELD: Per Altamas Kabir, CJI (for himself and for
 Surinder Singh Nijjar, J)

F 1.1 One of the most significant features of this case
 is that the prayer for default bail was made on behalf of
 the petitioner in F.I.R.No.115 of 2006, lodged by the local
 police, though the submissions in respect thereof have
 been made in connection with the subsequent F.I.R.
 lodged by the C.B.I. It is obvious that the petitioner was
 G fully aware of the situation while making the application
 for grant of bail, knowing that he was under arrest in
 connection with the first F.I.R. and not under the second
 F.I.R. lodged by the C.B.I. Since the prayer for default bail
 was made in connection with F.I.R.No.115 of 2006, in
 H which charge-sheet had been filed within the stipulated

period of 90 days, the plea with regard to the default bail was not available to the petitioner. It can also not be said that since a fresh investigation was directed to be conducted by the Court, the earlier charge-sheet must be deemed to have been quashed. [para 18] [996-F-H; 997-A]

1.2 Even on the question of delay in concluding the trial, such delay has not been caused by the prosecuting authorities, but by a co-accused and advantage thereof cannot be taken by the petitioner. [para 19] [997-B]

Per Chelameswar, J. (Concurring) :

1.1 Section 173 of the Code of Criminal Procedure, 1973 obligates the police investigating a case to make a report to the Magistrate to take cognizance of the offence which is subject matter of the investigation. Sub-s. (8) recognizes the authority of the Investigating Officer/ Agency to make any further investigation in respect of any offence notwithstanding the fact that the report contemplated under sub-s. (2) of s.173 had already been submitted. It is settled law that a Magistrate to whom report is submitted u/s 173(2) can direct the Investigating Officer to make a further investigation into the matter. [para 3] [997-G-H; 998-C; 999-A]

Kashmeri Devi v. Delhi Administration & Another 1988 SCR 700 = (1988 (Supp.) SCC 482 - referred to

1.2 The mere undertaking of a further investigation either by the Investigating Officer on his own or upon the directions of the superior police officer or pursuant to a direction by the Magistrate concerned to whom the report is forwarded does not mean that the report submitted u/s 173(2) is abandoned or rejected. It is only that either the investigating agency or the court concerned is not completely satisfied with the material

A collected by the investigating agency and is of the opinion that possibly some more material is required to be collected in order to sustain the allegations of the commission of the offence indicated in the report. [para 4] [999-B-D]

B 1.3 Therefore, it cannot be said that the directions given by this Court earlier in Writ Petition (Criminal) No.115 of 2007 would necessarily mean that the charge-sheet submitted by the police stood implicitly rejected. [para 5] [999-E]

C 1.4 Even the fact that the CBI purported to have registered a "fresh FIR", does not lead to conclusion in law that the earlier report or the material collected by the State Police (CID) on the basis of which they filed the charge-sheet ceased to exist. It only demonstrates the administrative practice of the CBI. Notwithstanding the practice of the CBI to register a "fresh FIR", the investigation undertaken by the CBI is in the nature of further investigation u/s 173 (8) of the CrPC pursuant to the direction of the Court. [para 5-6] [999-F; 1000-A-B]

Case Law Reference:

1988 SCR 700 referred to para 3

F CRIMINAL APPELLATE JURISDICTION : SLP (Crl.) No. 3672 of 2012 etc.

From the Judgment & Order dated 20.03.2012 of the High Court of Gujarat at Ahmedabad in Special Criminal Application No. 2698 of 2011.

G WITH

Crl. M.P. No. 11364 of 2012.

H Ajay Veer Singh Jain, Nitin Jain, Anista Jain, Uday Ram, Ashish Kumar Saini, Atul Agarwal, Mosh. Irshad Hanif for the Petitioner.

VIPUL SHITAL PRASAD AGARWAL v. STATE OF 991
GUJARAT

Tushar Mehta, Hemantika Wahi, S. Panda, Jesal, Nandini Gupta Maheen Pradhan, Subramonium Prasad, Vaibhav Srivastava for the Respondents.

The Judgments of the Court was delivered by

ALTAMAS KABIR, CJI. 1. This Special Leave Petition is directed against the judgment and order dated 20th March, 2012, passed by the Gujarat High Court dismissing the petition filed by the Petitioner, Dr. Vipul Shital Prasad Agarwal, under Articles 226 and 227 of the Constitution, read with Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.), being SCRMA No.2698 of 2011.

2. There are certain special features in this case which need to be recorded in order to decide this matter.

3. The Petitioner was at the relevant time posted as Superintendent of Police, Banaskantha, Gujarat. On 28th December, 2006, one Tulsiram Prajapati was killed in an encounter and a First Information Report (F.I.R.), being I.C.R.No.115 of 2006, was registered with the Ambaji Police Station, Banaskantha, Gujarat, against unidentified persons under Sections 307, 427 and 34 of the Indian Penal Code, 1860 (IPC), Section 25(1)(A) of the Arms Act, 1959, and Section 135 of the Bombay Police Act, 1951.

4. In 2007, Nirmala Bai, the mother of the deceased, filed Writ Petition (Crl.) No.115 of 2007, before this Court praying for an inquiry into the incident by the Central Bureau of Investigation (C.B.I.), and while the same was pending, the prosecution, upon completion of investigation, added Sections 302, 364, 307, 333, 334, 427, 365, 368, 193, 197, 201, 120-B, 471 read with Section 34 I.P.C., together with Section 25(1)(a) and 27 of the Arms Act, 1959, as also Section 135 of the Bombay Police Act, against 12 police officers, including the Petitioner. Consequent thereupon, the Petitioner was arrested

A by the C.I.D. crime, on 3rd May, 2010, and charge-sheet was, thereafter, filed against the accused persons, including the Petitioner, on 30th July, 2010.

B 5. One of the strange features of this case, therefore, is that in the case which was registered against the victim, 12 police officers, including the Petitioner, came to be arraigned as accused in what was alleged to be a fake encounter. However, the fact remains that F.I.R. No.115 of 2006 was lodged with the Ambaji Police Station on 28th December, 2006, resulting in the arrest of the Petitioner by the C.I.D. crime,
C on 3rd May, 2010, and the filing of charge-sheet on 30th July, 2010, within 90 days of his arrest.

D 6. While considering the writ petition filed by the mother of the deceased (Writ Petition (Crl.) No.115 of 2007), this Court, by its judgment and order 8th April, 2011, refused to accept the investigation conducted and completed by the State C.I.D. and directed as follows:

E "39. In view of the above discussion, the Police Authorities of the Gujarat State are directed to handover all the records of the present case to the CBI within two weeks from this date and the CBI shall investigate all aspects of the case relating to the killing of Tulsiram Prajapati and file a report to the concerned court/special court having jurisdiction within a period of six months from the date of taking over of the investigation from the state Police Authorities. We also direct the Police Authorities of the state of Gujarat, Rajasthan and Andhra Pradesh to cooperate with the CBI Authorities in conducting the investigation."
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G 7. We have intentionally quoted the aforesaid direction of this Court, since the main plank of the submissions made on behalf of the Petitioner in this Special Leave Petition depends on an interpretation thereof.

H 8. Pursuant to the directions given by this Court, the C.B.I.

registered a separate F.I.R. on 29th April, 2011, being R.C.- 3(S)/2011/Mumbai dated 29th April, 2011. On 31st May, 2011, the C.B.I. applied before the Court of Sessions Judge Palanpur, Banaskantha, Gujarat, in Sessions Case No.58 of 2010, inter alia, for the following directions:

"It is, therefore, humbly prayed that keeping in view the orders dated 08.04.2011 of the Hon'ble Supreme Court of India, the articles submitted by the Gujarat Police as per the list enclosed (as desired by this Hon'ble Court) along with the Charge Sheet No.50/2010 dated 30.07.2010 vide CC No.1439/10 dated 30.07.2010 and supplementary Charge Sheets in case FIR No.115/2006 dated 28.12.2006 of PS Ambaji, District Banaskantha may be released and handed over to the CBI for the purpose of fresh investigation.

It is further prayed that in the light of order of the Hon'ble Supreme Court of India, no further proceeding may be allowed in the case till the investigation of CBI is finalized. And for this the applicant shall ever pray."

9. The said application was allowed by the Sessions Judge on 9th June, 2011.

10. Since the investigation was not completed and the Petitioner had been in custody for a long time, an application for bail was moved on his behalf in the Court of learned Sessions Judge, Palanpur, on 16th August, 2011, who rejected the same on the ground that the application ought to have been moved before the Judicial Magistrate, First Class, Danta, and not before the Sessions Court.

11. Having regard to the order of the learned Sessions Judge, the Petitioner moved an application before the Judicial Magistrate, First Class, Danta, on 2nd September, 2011, for bail, which was rejected on 7th October, 2011. The Petitioner then moved the Gujarat High Court by way of Special Criminal

- A Application No.2698 of 2011, for quashing and setting aside the aforesaid judgment and order dated 7th October, 2011, passed by the Judicial Magistrate, First Class, rejecting his prayer for bail. Another application for regular bail, being Criminal Misc. Application No.04 of 2012, was also filed on
- B behalf of the Petitioner before the Sessions Judge, Palanpur, on 2nd January, 2012, on the limited ground of delay in the trial. The said bail application was dismissed by the 2nd Additional Sessions Judge on 27th February, 2012. The High Court also rejected the Petitioner's application challenging the order of the
- C Magistrate by its order dated 20th March, 2012. On 9th April, 2012, the Petitioner's Criminal Misc. Application No.4729 of 2012, challenging the order of the 2nd Additional Sessions Judge dated 27th February, 2012, was dismissed by the High Court. It is against the said order that the present Special
- D Leave Petition has been filed.

12. The major thrust of the submissions made by Mr. Sushil Kumar, learned Senior Advocate, appearing for the Petitioner, was that the Petitioner was entitled to the benefit of statutory bail in terms of Sub-Section (2) of Section 167 Cr.P.C. Learned

E counsel urged that since after registering a fresh F.I.R. and commencing of fresh investigation, as directed by this Court, the C.B.I. had failed to file charge-sheet pursuant to such F.I.R., within the stipulated period of 90 days, the Petitioner was entitled to bail on account of such default in view of the

F provisions of Sub-Section (2) of Section 167 Cr.P.C. Learned counsel also emphasized that the Petitioner was in custody since his arrest on 3rd May, 2010, and on the other hand, the trial was being delayed.

G 13. Mr. Sushil Kumar urged that since the earlier investigation by the State police had not been accepted by this Court and the C.B.I. was directed to conduct a fresh investigation, it would necessarily entail that the charge-sheet filed on the basis of the initial inquiry was also rejected by this

H Court, though not in explicit terms. Mr. Sushil Kumar submitted

that there could not be two charge-sheets arising out of the two FIRs in respect of a single incident and charge would have to be framed on the basis of one of the said two charge-sheets filed and, since the first investigation had not been accepted, the logical consequence would be that the first charge-sheet also stood quashed which would give the second charge-sheet due legitimacy. Accordingly, since the charge-sheet had not been filed in respect of the second F.I.R. within a period of 90 days, as stipulated under Section 167(2) Cr.P.C., the Petitioner was entitled to be released on default bail, as a matter of right.

14. Mr. Sushil Kumar made it clear that he was basing his submissions mainly on the ground available under Section 167(2) Cr.P.C. and the fact that the trial had been delayed for a long period during which the Petitioner has remained in custody.

15. Appearing for the C.B.I., Mr. Vivek Tankha, learned Senior Advocate, submitted that there was a basic fallacy in Mr. Sushil Kumar's submissions since the Petitioner was arrested in connection with the first F.I.R., being No.115 of 2006, in which charge-sheet had been filed within the stipulated period of 90 days and that he had not been arrested in connection with the second F.I.R. filed by the C.B.I. Accordingly, the benefit of default bail under Section 167(2) Cr.P.C. was not available to the Petitioner. Mr. Tankha also submitted that the investigation started by the C.B.I. was in continuation of the investigation initially commenced on the basis of F.I.R. No.115 of 2006 of Ambaji Police Station and that the lodging of a fresh F.I.R. by the C.B.I. was only for the purpose of enabling the C.B.I. to take over the investigation from the State police in terms of the directions given by this Court.

16. On the question of delay in the trial, Mr. Tankha pointed out that the same had been stayed at the instance of a co-accused and C.B.I., therefore, had no hand as far as delay of the trial is concerned. According to Mr. Tankha, in any event,

A charge-sheet had already been filed even on the basis of the second F.I.R., which would have to be treated as a supplementary charge-sheet to the original charge-sheet filed in F.I.R. No.115 of 2006. Mr. Tankha pointed out that it was also significant that the prayer for default bail in terms of Section 167(2) Cr.P.C. had been made on behalf of the Petitioner in connection with F.I.R. No.115 of 2006, of Ambaji Police Station dated 28th December, 2006, and not in connection with F.I.R. No.RC-3(S)/2011/Mumbai dated 9th April, 2011, filed by the C.B.I.

C 17. Mr. Tankha, therefore, contended that the Special Leave Petition filed by the Petitioner was entirely misconceived and was liable to be dismissed.

D 18. We have carefully considered the submissions made on behalf of the respective parties and we have little hesitation in rejecting Mr. Sushil Kumar's submissions. One of the most significant features of this case is that the prayer for default bail was made on behalf of the Petitioner in F.I.R.No.115 of 2006, lodged by the local police with the Ambaji Police Station, though the submissions in respect thereof have been made in connection with the subsequent F.I.R. lodged by the C.B.I. It is obvious that the Petitioner was fully aware of the situation while making the application for grant of bail, knowing that he was under arrest in connection with the first F.I.R. and not under the second F.I.R. lodged by the C.B.I. In the event the second investigation is treated to be a fresh investigation and the Petitioner had been arrested in connection therewith, the submissions made by Mr. Sushil Kumar would have been relevant. However, since the prayer for default bail was made in connection with F.I.R.No.115 of 2006, in which charge-sheet had been filed within the stipulated period of 90 days, the argument with regard to the default bail was not available to the Petitioner and such argument has, therefore, to be rejected. The other submission of Mr. Sushil Kumar that since a fresh investigation was directed to be conducted by this Court, the

earlier charge-sheet must be deemed to have been quashed, A
has to be rejected also on the same ground.

19. Even on the question of delay in concluding the trial, B
such delay has not been caused by the prosecuting authorities,
but by a co-accused and advantage thereof cannot be taken
by the Petitioner.

20. Since no argument had been advanced on behalf of C
the Petitioner on the merits of the case, we also refrain from
looking into the same and on the basis of our aforesaid
observations, we are not convinced that the Special Leave
Petition, along with the Criminal Miscellaneous Petition
No.11364 of 2012, warrants any interference by this Court. The
Special Leave Petition and the Criminal Miscellaneous Petition
are, therefore, dismissed.

J. CHELAMESWAR, J. 1. While I agree with the D
conclusion reached by Hon'ble the Chief Justice of India, I wish
to add a few lines.

2. The necessary facts and submissions of the learned E
counsel for the petitioner are clearly set out in the judgment of
my Lord the Chief Justice. I wish to deal with only one
submission made on behalf of the petitioner - that the earlier
judgment and order of this Court in Writ Petition (Criminal)
No.115 of 2007 dated 8th April 2011 directing the Central F
Bureau of Investigation (CB) to conduct an investigation
pertaining to all aspects of killing of Tulsiram Prajapati would
necessarily mean that the charge-sheet filed by the Gujarat
Police (CID) stood rejected. In my view, the submission is
misconceived for the following reasons.

3. Section 173 of the Code of Criminal Procedure, 1973 G
(for short "the CrPC") obligates the police investigating a case
to make a report to the Magistrate to take cognizance of the
offence which is subject matter of the investigation. Sub-section
(2) indicates the various pieces of information which are H

A required to be contained in the said report. Section 173(2)(i)(d)¹ stipulates that the said report should state whether any offence appears to have been committed and, if so, by whom. If the Investigating Officer opines in the said report that an offence appears to have been committed by the persons named

B therein, he is also obliged to forward to the Magistrate all documents on which the prosecution proposes to rely along with the statements recorded under Section 161 of the CrPC of all persons whom the prosecution proposes to examine as witnesses.² Sub-section (8)³ recognizes the authority of the

C Investigating Officer/Agency to make any further investigation in respect of any offence notwithstanding the fact that the report contemplated under sub-Section (2) of Section 173 had already been submitted. It may be worthwhile noticing that under sub-Section (3), even a superior police officer appointed under

D Section 158 of the CrPC could direct the Investigating Officer to make a further investigation pending any orders by the

1. Section 173(2)(i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, in the form prescribed by the State Government, stating—

E (d) whether any offence appears to have been committed and, if so, by whom.

2. Section 173(5). When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report—t

F (a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

3. Section 173(8). Notwithstanding 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 report regarding such evidence in the form prescribed and the provision of sub-section (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

G under sub-section (2).

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concerned Magistrate on the report submitted. It is settled law that a Magistrate to whom report is submitted under Section 173(2) can direct the Investigating Officer to make a further investigation into the matter.⁴

4. In my opinion, the mere undertaking of a further investigation either by the Investigating Officer on his own or upon the directions of the superior police officer or pursuant to a direction by the concerned Magistrate to whom the report is forwarded does not mean that the report submitted under Section 173(2) is abandoned or rejected. It is only that either the Investigating Agency or the concerned Court is not completely satisfied with the material collected by the investigating agency and is of the opinion that possibly some more material is required to be collected in order to sustain the allegations of the commission of the offence indicated in the report.

5. Therefore, the submission of Mr. Sushil Kumar, learned senior advocate appearing for the petitioner, that the directions given by this Court earlier in Writ Petition (Criminal) No.115 of 2007 would necessarily mean that the charge-sheet submitted by the police stood implicitly rejected is without any basis in law and misconceived. Even the fact that the CBI purported to have registered a "fresh FIR", in my opinion, does not lead to conclusion in law that the earlier report or the material collected by the Gujarat Police (CID) on the basis of which they filed the

4. Kashmeri Devi v. Delhi Administration & Another (1988 (Supp.) SCC 482 para 7.

"7. Since according to the respondents charge-sheet has already been submitted to the Magistrate we direct the trial court before whom the charge-sheet has been submitted to exercise his powers under Section 173(8) CrPC to direct the Central Bureau of Investigation for proper and through investigation of the case. On issue of such direction the Central Bureau of Investigation will investigate the case in an independent and objective manner and it will further submit additional charge-sheet, if any, in accordance with law. The appeal stands disposed of accordingly."

A charge-sheet ceased to exist. It only demonstrates the administrative practice of the CBI.

B 6. In my view, notwithstanding the practice of the CBI to register a "fresh FIR", the investigation undertaken by the CBI is in the nature of further investigation under Section 173 (8) of the CrPC pursuant to the direction of this Court.

R.P.

Petitions dismissed.