Prosecution Can Be Allowed To Produce Evidence In Addition To Materials Submitted With Final Report If They're Necessary For Fair Trial: Kerala HC

2022 LiveLaw (Ker) 619

IN THE HIGH COURT OF KERALA AT ERNAKULAM
A. BADHARUDEEN; J.
Crl.M.C.No.7986 of 2022; 25 November, 2022
HUSSAIN *versus* **STATE OF KERALA**

Petitioner / Accused No. 1: by Advs. V. John Sebastian Ralph, Vishnu Chandran, Ralph Reti John, Appu Babu, Shifna Muhammed Shukkur, Giridhar Krishna Kumar, Vishnumaya M.B., Geethu T.A.

Respondents / Complainant / Sister of Deceased: by Senior Public Prosecutor S.U. Nazar

O R D E R

This petition has been filed under Section 482 of the Code of Criminal Procedure (hereinafter referred to as `Cr.P.C' for short) to quash Annexure-1, viz. common order in C.M.P.Nos.1322/2022 and 1323/2022 in S.C.No.265/2018 on the file of the Special Court for Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (hereinafter referred to as `SC/ST (POA) Act' for convenience), Mannarkad, Palakkad. Petitioner herein is the 1st accused in the above case.

2. Heard the learned counsel for the petitioner Sri John Sebastian Ralph as well as the learned Senior Public Prosecutor, Sri S.U.Nazar.

3. Bereft of unnecessary embellishments, the facts of the case are as under:

4. In S.C.No.265/2018, the prosecution alleges commission of offences under Sections 143, 147, 148, 323, 324, 326, 294(b), 342, 352, 364, 367, 368, 302 r/w 149 of the Indian Penal Code (hereinafter referred to as `IPC' for short) and Section 3(1)(d)(1), 3(2)(v) of the SC/ST Act, by the accused. During the final stage of trial, the learned Special Public Prosecutor filed CMP.No.1322/2022 with prayer to call for certified copy of the report of inquiry under Section 176(1-A) of the Code of Criminal Procedure (hereinafter referred to as `Cr.P.C' for short), filed by the Judicial First Class Magistrate, Mannarkkad. Similarly, CMP.No.1323/2022 also was filed to issue summons to the custodian of the inquiry report filed by Geromic George, the Sub Divisional Magistrate, Ottappalam and the Judicial First Class Magistrate, Mannarkkad to depose about the reports filed by them.

5. Accused No.1 and other accused filed objections resisting the petitions. Accused No.1 is the petitioner herein. The main contentions raised in the objection filed by the petitioner/1st accused as stated in paragraphs 3 to 5 are as under:

"3. The prosecution is playing a hide and seek game in this matter. The prosecution is now pretending ignorance of the contents of the documents mentioned in the petition. They are pretending that they have become aware of this only during the examination of CW78. This is absolutely incorrect. The Sub Divisional Magistrate and the Judicial Magistrate of the First Class are employed under the State of Kerala. Sub Divisional Magistrate is said to have submitted his report to the District Magistrate/District Collector. The Judicial Magistrate of the First Class – Mannarkkad is said to have submitted his report to the District Collector. Hence the State of Kerala cannot plead ignorance about the same. The said documents are forwarded to the concerned authorities not for retaining the same in sealed covers, but for initiating necessary actions in pursuance of the reports. Hence, if the prosecution is relying on the report, they ought to have produced the same at the time of filing the charge.

4. *The prosecution is not entitled to file a petition without disclosing the contents of the reports and without furnishing copies of the reports. Only when the copies of the reports are furnished,*

the accused will be in a position to say whether the same can be admitted in evidence or not. Hence, before taking a decision in the petition, it is absolutely necessary that the petitioner/State of Kerala is directed to furnish copies of the said reports.

5. *If the reports are to the effect that the death is not a custodial death, it is respectfully submitted that the reports filed by the above mentioned officers, are not admissible in evidence as the same are only conclusions arrived at by the said officers on the basis of the facts and evidence which are not subjected to cross examination by the accused. Hence, the said reports cannot be admitted in evidence even if the authors of the reports are examined. A conclusion arrived at by an authority without the participation of the affected parties and without giving an opportunity for cross examination by the affected parties, cannot be accepted in evidence."*

6. The learned Special Judge considered the rival contentions and finally allowed both the petitions.

7. While impeaching the veracity of the common order, the learned counsel for the petitioner pointed out that the inquiry reports have no evidentiary value. Relying on the decision reported in [2014 (12) SCC 419], ***Madhu v. State of Karnataka***, it is argued that the inquest report is not a piece of substantive evidence and can be utilised only for contradicting the witnesses to the inquest, examined during trial. Neither the inquest report nor the postmortem report can be termed as basic or substantive evidence. In ***Madhu***'s case (*supra*), the Apex Court dealt with Section 174 and 176(3) of Cr.P.C and it was held that discrepancy occurring in the reports under Sections 174 and 176 could not be termed as fatal or suspicious circumstances which would warrant to give benefit of doubt to the accused.

8. The learned counsel for the petitioner has placed an exhaustive argument notes with heading `brief argument notes' raising the following contentions and argued in tune with the said contentions.

"*The enquiry report under Section 176(1A) has nothing to do with the present case since the fact in issue in the other case was not the one that is being tried before the trial court. The report has no legal value in the eye of law as held by Supreme Court.*

Relying on the decision reported in [AIR 2020 SC 4908], ***Arjun Panditrao v. Kailash Kushanrao****, it is argued that if the prosecution wanted to rely on the said report, the copy of the report ought to have been produced along with the final report so as to make out a proper defence.*

*In an application under Section 311, there should be a definite finding to the effect that it is for the just decision of the case. There is no such finding in the impugned order. The Apex Court in [(2013) 5 SCC 741],****Natasha Singh v. CBI*** *made this clear. The Kerala High Court in [2017 (4) KHC 91],* ***Vijyadas v. State of Kerala*** *has elaborately consaidered this aspect. In* ***Manoj G. v. State of Kerala****, this Court held that if the document was within the knowledge of the investigating officer, the prosecution cannot be permitted to produce it on a later stage to the surprise of the accused.*

In the enquiry before the magistrate, under Section 176(1A), the accused herein had no occasion to conduct cross examination as mandated in S.33 of the IEA. Evidence not tested in cross cannot be relied on.

Witness 1 to 3 examined by the magistrate were the police officers in whose custody the deceased died. Hence there is no meaning in finding in favour of those police officers.

None of the witnesses have stated that any of the accused has assaulted the deceased. Nevertheless the finding of the Magistrate is to the effect that it was the accused herein caused the death.

The report now sought for is a report allegedly made by a judicial officer under a statute which is having the colour of a judgment on the finding of cause of death in custody. In order to bring such

an evidence that matter should come under any of the sections of evidence act from S.40 to 43 of the Act.

The court below relying on a decision of the Madras High Court, found that this can be used in the present case. This is a complete misunderstanding of the law of evidence. The report assumes importance and may have some relevance if the police officers are tried for custodial death of the deceased in their custody. The prosecution case herein is an entirely different one and hence it cannot be relied at all.

The finding of the court below "that if the enquiry report is in favour of a custodial death, at the hands of the police officers, the accused herein can get the benefit of the same and gets themselves exonerated" is absolutely erroneous. This will operate as estopped by record. It will also work as ouster of jurisdiction. The concepts of Estoppel and ouster of jurisdiction are the principles behind confining the relevancy of judgments into Sections 40 to 44. If the view of the court below is accepted, a damage suit that ended in dismissal will preclude the criminal court from finding the accused guilty of on the same set of facts and vice versa.

The witnesses allegedly examined by the Magistrate were cited in the Sessions Case as prosecution witnesses. But the statements allegedly recorded by the Magistrate in the enquiry were not supplied to the defence and the time when those witnesses were examined by the prosecution. This has caused a serious handicap to the defence by losing their right under Section 145 of the Indian Evidence Act.

The court below has found that the Inquiry report, if favourable to the defence, they can use it. The corollary of the same is that, if the report is in favour of the prosecution, they can also use it. This is against the fundamental principles of Evidence Act contained in Sections 41 to 44.

Procedure is liberty and liberty is procedure. Article 21 of the Constitution guarantees this procedural safeguard. The sections contained in Cr.P.C, namely S.173(5), 207, 209, 226 etc. are the procedural safeguards through which the accused is informed about the materials which are going to be produced agianst him for which and for which alone the accused is expected to reply in a criminal trial.

The present report cannot be marked under S.35 of the Evidence Act, since S.35 speaks about entry in public records.

"35. Relevant of entry in public record made in performance of duty – An entry in any public or other official book, register or 2 [record or an electronic record], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performances of a duty specially enjoined by the law of the country in which such book, register or 2 [record or an electronic record], is kept, is itself a relevant fact.

The enquiry report is an opinion formed by a person after examining the witnesses (Though not cross examined and though not on oath). It will not come under S.35."

9. Resisting these contentions, the learned Public Prosecutor would urge that under Section 35 of the Evidence Act, inquiry reports are public documents and, therefore, the same are admissible in evidence.

10. He also submitted that the inquiry report under Section 176 is akin to a report filed under Section 174 of Cr.P.C and, therefore, the same is admissible in evidence.

11. First of all, I would like to address one point argued by the learned counsel for the petitioner. According to him, in a criminal trial, it is assumed that when the investigation is completed, the prosecution has, as such, concretised its case against an accused before commencement of the trial, then the prosecution ought not to be allowed to fill up any lacunae during a trial, the only exception to this general rule is, if the prosecution had `mistakenly' not filed a document, the said document can be allowed to be placed on record, as recognized by the Apex Court in the decision reported in [2002 KHC 403 : 2002

(5) SCC 82 : 2002 (2) KLT 149 : 2003 (1) KLJ NOC 4 : AIR 2002 Sc 1644 : 2002 CriLJ 2029], ***Central Bureau of Investigation v. R.S.Pai***,

12. Therefore, it is argued that the only exception to the general rule would come into play, when the prosecution mistakenly not filed a document, that can be allowed to be placed on record and the prosecution has no right to get all documents as part of evidence which were not filed along with final report. In this connection, the learned counsel relied on a latest 3 Bench decision of the Apex Court reported in [2020 (4) KHC 101 : 2020 (2) KLD 157 : 2020 (7) SCC 1 : AIR 2020 SC 4908 : 2020 (8) SCALE 735], ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors.***

13. In response to this contention, the learned Public Prosecutor would place a decision of the Apex Court reported in [2022 (1) KHC 812], ***Rajesh Yadav & anr. v. State of U.P*** to contend that a mere non-examination of the witness *per se* will not vitiate the case of the prosecution. It depends upon the quality and not the quantity of the witnesses and its importance. If the Court is satisfied with the explanation given by the prosecution along with the adequacy of the materials sufficient enough to proceed with the trial and convict the accused, there cannot be any prejudice. Similarly, if the Court is of the view that the evidence is not screened and could well be produced by the other side in support of its case, no adverse inference can be drawn. Onus is on the part of the party who alleges that a witness has not been produced deliberately to prove it. He also submitted that the aforesaid settled principle of law has been laid down in [(1976) 4 SCC 369 : 1976 KHC 956 : (1976) SCC (Cri) 646 : AIR 1976 SC 2304 : 1976 CriLJ 1757], ***Sarwan Singh v. State of Punjab*** as well. It is argued further that as per the ratio of the above decision, the trial court is the best court to decide on the necessary evidence to be adduced to decide the case in accordance with law.

14. While allaying the controversy on par with the rival arguments fervently mooted, it is worthwhile to have a glimpse on the impugned order, the legal provisions and the law governing the field. As per the order impugned, the learned Special Judge relied on a decision of the Madras High Court reported in [2014 SCC OnLine Mad 12579], ***R. Kasthuri v. State Represented by District Collector***. In the said decision, the Madras High Court referred a decision of the Apex Court reported in [(2012) 9 SCC 771], ***V.K. Sasikala v. State represented by Superintendent of Police*** also and it was held that the statements of the witnesses recorded during inquiry under sub section 1-A of Section 176 of Cr.P.C can be used either for corroboration or for contradiction of the makers of the statements during trial and accordingly the learned Special Judge ordered to call for the inquiry report.

15. In order to decide upon the sanctity of an inquiry report filed under Section 176(1) by the District or Sub Divisional Magistrate and also an inquiry report filed by the Judicial Magistrate or the Metropolitan Magistrate under Section 176(1-A) of Cr.P.C (introduced w.e.f 23.06.2006), it is necessary to extract the said provision. Section 176 of Cr.P.C reads as under:

"176. Inquiry by Magistrate into cause of death:-- (1) When any person dies while in the custody of the police or when the case is of the nature referred to in clause (i) or clause (ii) of sub- section (3) of section 174] the nearest Magistrateempowered to hold inquests shall, and in any other case mentioned in sub- section (1) of section 174, any Magistrate so empowered may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence.

[(1-A) Where, --

(a) any person dies or disappears, or

(b) rape is alleged to have been committed on any woman,while such person or woman is in the custody of the police or in any other custody authorised by the Magistrate or the Court, under this Code, in addition to the inquiry or investigation held by the police, an inquiry shall be held by the Judicial Magistrate or the Metropolitan Magistrate, as the case may be, within whose local jurisdiction the offence has been committed.]

(2) The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any manner hereinafter prescribed according to the circumstances of the case.

(3) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already inferred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined.

(4) Where an inquiry is to be held under this section, the Magistrate shall, wherever practicable, inform the relatives of the deceased whose names and addresses are known, and shall allow them to remain present at the inquiry.

[(5) The Judicial Magistrate or the Metropolitan Magistrate or Executive Magistrate or police officer holding an inquiry or investigation, as the case may be, under sub-section (1A) shall, within twenty-four hours of the death of a person, forward the body with a view to its being examined to the nearest Civil Surgeon or other qualified medical person appointed in this behalf by the State Government, unless it is not possible to do so for reasons to be recorded in writing.]

Explanation.- In this section, expression "relative" means parents, children, brothers, sisters and spouse."

16. Going by the statutory wordings in Sec.176, the same deals with Inquiry by Magistrate into cause of death. It is to be noted that before the introduction of sub section 1-A of Section 176 w.e.f 23.06.2006, when the case is one of the nature referred to in clause (i) or clause (ii) of sub section 3 of Section 174 [(i) the case involves suicide by a woman within 7 years of her marriage; or (ii) the case relates to the death of a woman within 7 years of the marriage in any circumstances raising a reasonable suspicion that some other person committed an offence in relation to such woman] as per sub section (1) of Section 176 the nearest Magistrate empowered to hold inquests shall hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence; and in any other case mentioned in sub section (i) of Section 174 [relating to a case where a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident or has died under circumstances raising a reasonable suspicion that some other person has committed an offence or when any person dies while in the custody of the police (the underlined portion omitted by amendment w.e.f 23.06.2006)], as per sub section (1) of Section 176 the nearest Magistrate empowered to hold inquests may hold an inquiry into the cause of death either instead of, or in addition to, the investigation held by the police officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence.

17. After the introduction of sub-section 1-A, when any person dies or disappears or rape is alleged to have been committed on any woman, while such person or woman is in the custody of the police, or in any other custody authorised by the Magistrate or the court, under this Code, in addition to the inquiry or investigation held by the police an inquiry shall be held by the Judicial Magistrate or any Metropolitan Magistrate as the case may

be, within whose local jurisdiction the offence has been committed. No doubt this inquiry is in addition to the inquiry provided under Section 176(1).

18. Section 2(g) of Cr.P.C defines the word `inquiry'.`Inquiry' means, every inquiry, other than a trial, conducted under the Code by a Magistrate or Court. Thus it has to be held that the inquiry authorised to be done by the District or Sub Divisional Magistrate under Section 176(1) and an inquiry authorised to be done by a Judicial Magistrate/Metropolitan Magistrate under Section 176(1-A)of Cr.P.C are statutory inquiries and the same includes examination of the body of any person, who has been already inferred in order to discover the cause of his death and for this purpose the Magistrate may cause the body to be disinterred and examined, as provided under Section 176(3) of Cr.P.C. Similarly, in such an inquiry the Magistrate shall record the evidence whatever practicable, in terms of Section 176(2) of Cr.PC. Thus it has to be concluded that the inquiry contemplated under Section 176(1) and (1-A) of the Cr.P.C authorises a Magistrate to examine the dead body of any person in order to discover the cause of his death. This part includes the record of what had seen by the Magistrate with his own eye and the direct action done by the Magistrate. The second part is recording of evidence on oath as could be done in a normal enquiry to be conducted by the Magistrate. Such a way of recording evidence may lead to an opinion of the Magistrate regarding the cause of death. To be more explicit, a report under Section 176 (1) and (1-A) of Cr.P.C includes the contemporaneous and coetaneous acts done by the Magistrate on examining the dead body, on the first part and recording of evidence to form an opinion on the second part.

19. In the decision reported in [1993(1) KLT 876], ***Pookunju v. State of* Kerala**, placed by the learned Senior Public Prosecutor a Division Bench of this Court considered the admissibility of inquest report under Section 174 of Cr.PC in evidence and it was held as under:

"Inquest report would, in the ordinary course, consist of three types of recitals. First category consists of the statements made by persons interrogated by the investigating officer during inquest. Second category consists of the opinions of the persons in whose presence the inquest was held. Third is the record of what the investigating officer had seen with his own eyes. The first category has no evidenciary value. Second category cannot be used as evidence on account of more than one inhibition, main among them is the bar contained in S.162 of the Code. But the third category is not subject to any such legal disability. We have not come across any legal hurdle against accepting them as admissible evidence. If the inquest report is proved under law, the recitals falling under the thrid category mentioned above are relevant under S.35 of the Evidence Act and are admissible in evidence even if the officer fails to repeat them in his oral evidence."

In the above decision, this Court held that the record of what the Investigating Officer had seen with his own eyes and the inquest report is proved under law, the same are relevant under Section 35 of the Evidence Act and are admissible in evidence.

20. Now the prosecution wants to tender two inquiry reports, viz. (i) an inquiry report under Section 176(1) by the Sub Divisional Magistrate and (ii) an inquiry report under Section 176(1-A) by the Judicial Magistrate, as evidence in the Sessions trial. According to the learned Senior Public Prosecutor, the specific case put up by the prosecution before the trial court is that Madhu was brutally manhandled by the accused and he died in consequence thereof. But the defence case that has been taken by the accused throughout the case is that Madhu died due to police torture while he was in police custody. Therefore, the above two reports dealt with the cause of death are essential to throw light into the fact that there was no police torture as alleged by the defence.

Therefore, the said evidence is absolutely necessary to decide the case in a fair manner and therefore, the Special Judge rightly allowed the petitions.

21. Per contra, as already extracted herein above, the learnedcounsel for the petitioner would submit that inquiry reports under Section 176 of Cr.P.C are mere opinion evidence and the same are not substantive evidence. He also submitted that the said documents would not come under the purview of Section 35 of the Evidence Act. In fact, Section 35 of the Evidence Act deals with an entry in any public or other official book, register or 2 [record or an electronic record], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performances of a duty specially enjoined by the law of the country in which such book, register or 2 [record or an electronic record], is kept, is itself a relevant fact. Here, statutory inquiry reports under Section 176(1) and 176(1-A) are sought to be summoned by the prosecution.

22. In this connection, it is relevant to refer Section 5 of the Evidence Act. Section 5 of the Evidence Act provides that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others. Thus the statutory wording in Section 5 is so clear that evidence may be given in any proceeding regarding the existence or non-existence of every fact in issue and of such other facts. It is true that normally if the prosecution wants to rely on such a report, the copy of the same ought to be produced along with the final report so as to make out a proper defence as pointed out by the learned counsel for the petitioner, referring to the decision in ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors.***'s case (*supra*). Similarly, in an application filed under Section 311 of Cr.P.C, there should be a definite finding to the effect that it is for the just decision of the case, as argued by the learned counsel for the petitioner relying on ***Natasha Singh v. CBI***'s case (*supra*) and ***Vijyadas v. State of Kerala***'s case (*supra*). It is true that in the inquiry report prepared by the Judicial First Class Magistrate, 3 among the witnesses are police officers.

23. In this matter, though the prosecution not produced the above reports along with the final report, if the reports have something so as to decide the fact in issue finally, merely because of non-production of the same, the hands of the prosecution could not be chained. Indubitably, it is at these junctures, the power of the Court under Section 311 of Cr.P.C to summon material witness assumes significance. As per Section 311, the power of the Court is discretionary at one part and mandatory on the other part. That is to say, at the first part, any court may at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined. On the second part, the Court is given a wide and mandatory power and the same is to the effect that the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case. Be it so, the court has power to summon and examine any person if his evidence appears to be essential to the just decision of the case.

24. In [(2004) 4 SCC 158 : 2004 SCC (Cri) 999 : 2004 CrLJ 2050 (2065) (SC)], ***Zahira Habibulla H.Sheikh v. State of Gujarat***; it was held that where the evidence of any person appears to be essential to the just decision of the case, it is obligatory on the Court to summon and examine or re-call and re-examine him.

25. The very usage of the words such as `any Court', `at any stage', or `or any enquiry, trial or other proceedings', `any person' and `any such person' clearly spells out that this section is expressed in the widest possible terms and does not limit the discretion of the Court in any way. The second part of the section does not allow for any discretion but it binds and compels the Court to take steps if the fresh evidence to be obtained is essential to the just decision of the case [AIR 1991 SC 1346 : 1991 Supp (1) SCC 271 : 1991 CrLJ 1521, 1524], ***Mohanlal Shamji Soni v. Union of India***; [(2004) 4 SCC 158 : 2004 SCC (Cri) 999 : 2004 CrLJ 2050 (2065) (SC), ***Zahir Habibulla H. Sheikh v. State of Gujarat***; [2006 CrLJ 711 (713) : 2006 (1) ALJ 181 (All)], ***Chhotey Badri Prasad v. State of U.P***].

26. Inasmuch as the argument tendered by the learned counsel for the petitioner positing the fact that the learned Special Judge failed to make a definite finding to the effect that it is for the just decision of the case, Section 311 petition could be allowed, it could be read out from the impugned common order that the learned Special Judge observed in paragraph 19 that "*if in the report of the Judicial Magistrate there is a definite finding that it is a case of custodial death involving police torture, then it is a valuable piece of material that can be relied on by the defence to prove their innocence*." Again in para.20, the learned Special Judge observed that "*let the truth come out from all sources*" again *why all these materials should not be brought on record*. Thus on a combined reading of the order, the learned Special Judge found to be of the view that the reports are necessary for the just decision of the case and therefore this challenge cannot be countenanced.

27. Coming back to the inquiry reports, in the inquiry report submitted by the Judicial First Class Magistrate Court it has been stated that *I met Dr.Prabhudas who was the then Medical Superintendent and sought his assistance to conduct inquest, Dr. Prabhudas helped me to conduct inquest. Again, Dy.S.P, Agali and RDO, Ottappalam were present in the mortuary while I was conducting inquest. Inquest was conducted by the RDO, Ottappalam also. Again, after completing inquest, I proceeded to record the statements of Dr. Lima Francis CHC Agali who examined the deceased Madhu when he was brought to hospital by the aforesaid Police Personnel.* Similarly, regarding the inquiry report prepared by the Sub Divisional Magistrate also, it has been stated that *undersigned in the capacity of the Sub Divisional Magistrate, Ottappalam (having jurisdiction) conducted the inquiry under Section 176 of Cr.P.C and examined (between 10.37 A.M to 11.37 A.M) the dead body of the dead body of the deceased Madhu*.

28. As I have already pointed out, in this case the inquiry reports under Sections 176(1) and 176(1-A) of Cr.P.C include three types of recitals/materials/parts. The first one is the contemporaneous and coetaneous acts done by the Judicial Magistrate as well as the Sub Divisional Magistrate recorded in the reports as to cause of death of the person, which the Magistrate had seen with his own eyes. Regarding those recitals, the Magistrates could very well give direct evidence and the said part of evidence, if given before a court, the same is substantive piece of admissible evidence. At the same time, the second part includes the statements of the witnesses recorded during inquiry by the Magistrates on oath and the same are previous statements without opportunity to the affected persons to cross examine the maker of the statements. Therefore, the said statements can be used for contradicting and corroborating the makers of the statements during trial and the same have no other independent evidentiary value substantive in nature. Similarly, the third part is the opinion formed by the Magistrate based on the inquiry. The same is nothing but opinion of the Magistrates and not substantive evidence. Therefore, the sanctity as well as the probative value of the said opinion shall be decided by the Court when deciding the case finally.

29. It is true that the prosecution is duty bound to place all the evidence to be tendered along with the final report and copies thereof shall be furnished to the accused, as mandated under Section 208 Cr.P.C, in a Sessions trial. However, in an appropriate case where the evidence sought to be tendered by the prosecution is absolutely necessary to decide the case fairly, and the Court is of the opinion that the said evidence is essential for the just decision of the Court (S.311 of Cr.P.C discussed herein above), the said evidence also can be permitted to be tendered and there is no hard and fast rule that the prosecution is totally debarred from adducing evidence in excess of the materials, what have been filed along with the final report.

30. Therefore, the contentions raised by the learned counsel for the petitioner otherwise, inclusive of one pressed into service on the assertion that the reports now sought to be tendered in evidence are having the colour of judgment on the finding of cause of death and the same would come under Sections 40 to 43 of the Evidence Act, could not be appreciated since the same are not tenable.

31. In view of the above legal position, I am not inclined to consider the challenge raised by the learned counsel for the petitioner. Resultantly, I am inclined to hold that the order to summon and examine the above witnesses by the prosecution, is within the ambit of power of the Court under Section 311 of Cr.P.C and the said order suffers from no illegality, warranting interference by this Court.

32. Therefore, this petition fails and is accordingly dismissed.

It is specifically made clear that this Court not gone into the merits of the case in any manner and the observations herein are for the purpose of deciding the legality of the common order impugned and the Special Judge shall decide the case on evaluating the evidence in the said case independently untramelled by the observations in this order.