IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR

&

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

TUESDAY, THE 25TH DAY OF AUGUST 2020 / 3RD BHADRA, 1942

WA.No.2216 OF 2019

AGAINST THE JUDGMENT DATED 30.9.2019 IN WP(C) 10265/2019(G)
OF HIGH COURT OF KERALA

APPELLANTS/RESPONDENTS 1 TO 3 IN WPC:

1 STATE OF KERALA
REPRESENTED BY ADDITIONAL CHIEF SECRETARY TO
GOVERNMENT, DEPARTMENT OF HOME AND VIGILANCE,
GOVERNMENT OF KERALA, THIRUVANANTHAPURAM-692031.

2 THE STATE POLICE CHIEF,
POLICE HEAD QUARTERS, THIRUVANANTHAPURAM-695001.

3 THE STATION HOUSE OFFICER,
BEKAL POLICE STATION, KASARGODE DISTRICT-671318.

BY ADVS.SRI.MANINDER SINGH(SR),
SRI.SUMAN CHAKRAVARTY, SR.GOVT.PLEADER AND
SRI.P.NARAYANAN,SR. GOVT. PLEADER
SRI.V.MANU, SENIOR GOVT. PLEADER
DIRECTOR GENERAL OF PROSECUTION

RESPONDENTS/PETITIONERS AND RESPONDENT 4& 5 IN WPC:

1 KRISHNAN, AGED 54 YEARS
S/O.KORAN, HOUSE NO.3888,
POST KANJIRADUKKAM-675 531.

2 MRS.BALAMANI, AGED 41 YEARS
W/O.KRISHNAN, HOUSE WIFE, HOUSE NO.3888,
POST KANJIRADUKKAM-675531, VIA ANANDASHRAMAM,
KASARGODE DISTRICT, KERALA.

3 SATHYANARAYANAN,AGED 54 YEARS
S/O.KANNAN, KULANGARA VEEDU,
POST KANJIRADUKKAM-675531.

4 MRS.LATHA P.,AGED 39 YEARS
W/O.SATHYANARAYANAN, HOUSE WIFE,
KULANGARA VEEDU, POST KANJIRADUKKAM-675531, VIA.
ANANDASHRAMAM.

5 THE SPE/CBI, THIRUVANANTHAPURAM,
REPRESENTED BY STANDING COUNSEL, CENTRAL BUREAU
OF INVESTIGATION, HIGH COURT OF KERALA,
ERNAKULAM,KOCHI-682031.

6 THE DIRECTOR,
CENTRAL BUREARU OF INVESTIGATION,
NEW DELHI-110011.

R1-4 BY ADV. SRI.T.ASAFALI
R1-4 BY ADV. SMT.LALIZA.T.Y.
SRI.SASTHAMANGALAM S.AJITHKUMAR
SPL.PP FOR R5 AND R6

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 16-11-2019, THE COURT ON 25-08-2020 DELIVERED THE FOLLOWING:

"C.R."

JUDGMENT

Ravikumar, J.

The State of Kerala and two of its officers viz., the State Police Chief and the Station House Officer, Bekal Police Station have come up in appeal on being aggrieved by the judgment dated 30.9.2019 in W.P.(C)No.10265 of 2019. As per the impugned judgment, the learned Single Judge set aside the report filed under Section 173(2) of the Code of Criminal Procedure, 1973 (for brevity 'Cr.P.C.' only) in Crime No.75/CB/KNR&KSD/2019 of Crime Branch, Kasaragod (Crime No.81 of 2019 of Bekal Police Station), before the committal Court viz., the Judicial First Class Magistrate Court-II, Hosdurg and transferred its investigation to the Central Bureau of Investigation (CBI). In this context, it is worthwhile to refer to the reliefs sought for, in the writ petition filed by respondents 1 to 4 herein. They read thus:-

> "(i) Issuing a Writ of Mandamus or any other writ or order directing the 4th respondent to investigate the case viz., FIR No.81/2019 of Bekal Police Station, Kasargod district, Kerala (Corresponding to re-registered FIR No.75/2019 of CB) and file charge sheet before the appropriate court having jurisdiction.

(ii) Granting such other interim reliefs which this Hon'ble Court may deem fit and proper to secure the ends of justice."

It is also worthwhile to note that pending the writ petition investigation was completed in the aforesaid crime and thereupon the Investigating Officer of the Special Investigation Team (SIT) filed the final report. It is the said report which was set aside as per the impugned judgment. The writ petitioners have produced the copy of the final report as Ext.P24 along with the reply affidavit. The appellants, inter alia, contended that the learned Single Judge has erred in setting aside Ext.P24 final report as there was no specific challenge against it.

2. A succinct narration of facts is inevitable for an appropriate disposal of this appeal. The writ petitioners/respondents 1 to 4 in this appeal are the parents of the two victims, namely, one Kripesh aged 21 years and one Sarath Lal @ Joshy, aged 24 years who were done to death on 17.2.2019 at about 7.45 p.m. at Kannadippara on the Kallyottu-Thannithodu road in Periya Village of Kasaragod District. Respondents 1 and 2 are the parents of deceased Kripesh and respondents 3 and 4 are the parents of deceased Sarath Lal @ Joshy. The First Information Statement was lodged by one Sreekumar (CW1) and on its basis FIR No.81/2019 was registered at Bekal Police Station

under Section 302 of the Indian Penal Code (IPC) on the same day, in connection with the incident. On 18.2.2019, the District Police Chief, Kasaragod constituted a Special Investigation Team (SIT) for investigation of the said crime with Sri.Pradeepkumar.M., Deputy Superintendent of Police, C-Branch (District Crime Branch) as the Investigating Officer and the team consisted of two Deputy Superintendents of Police, three Inspectors and Cyber Cell Experts. On 21.2.2019 the case was transferred to Crime Branch and it was re-registered as Crime No.75/CB/KNR&KSD/2019 of Crime Branch, Kasargod. Sri.Pradeep.P.M., Dy.S.P., Crime Branch, Malappuram was appointed the Investigating Officer under the direct supervision of Sri.V.M.Mohammed Rafique, SP, CB, Ernakulam. Later, Sri.Sabu Mathew.K.M., SP, Crime Branch, Kottayam was made the Supervisory Officer in place of V.M.Mohammed Rafique and the SIT was reconstituted with 21 members. Sri.Pradeep.P.M. continues to be the Investigating Officer and this fact is evident from Exts.P24 and P25. The offences alleged in the case are punishable under Sections 143, 147, 148, 341, 326, 201, 212, 120B, 118 and 302 r/w Section 149, IPC.

3. The case of the prosecution, in short, as revealed from Ext.P24 final report is that in furtherance of the criminal conspiracy

hatched between accused Nos.1 to 9 and 11, who are workers of the political party - CPI(M), the aforesaid Kripesh and Sarath Lal, who were Congress Party workers, were hacked to death, on 17.2.2019 at about 7.45 p.m. using swords and iron pipes. Going by Ext.P24, the accused ambushed and attacked the deceased with the intention to give a befitting reprisal for the attack and injury caused on CPI(M) Eachiladukkam Branch Secretary and Periya Area Committee Member - Peethambaran (A1) on 5.1.2019 at Kallyottu Town and also for the repeated attacks on CPI(M) workers by Congress workers in Kallyottu area. CW198, Dr.Gopalakrishna Pillai conducted autopsy on the bodies of the deceased from Pariyaram Medical College on 18.2.2019. The first accused was arrested on 19.2.2019. Accused No.2 had surrendered on 20.2.2019 and accused Nos.3 to 7 had surrendered on 21.2.2019. Upon their surrender, they were arrested on the said respective days. Accused No.8 was arrested on 16.5.2019. The dates of arrest of the others are as follows:-

Accused No.	Date of arrest
A9	12.3.2019
A10	16.3.2019
A11}	
A12}	29.4.2019
A13}	
A14}	14.5.2019

On completion of the investigation the investigating officer, SIT submitted Ext.P24 report under section 173(2) of Cr.P.C. before the committal Court viz., the Judicial First Class Magistrate Court-II, Hosdurg. Ext.P24 would reveal that accused Nos.1 to 8 were charged with offences punishable under Sections 143, 147, 148, 341, 326, 201, 120-B and 302 r/w Section 149, IPC, accused No.9 was charged with offences punishable under Sections 120B, 212 and 201, IPC and accused No.10 was charged with offences punishable under Sections 143, 147, 148, 341, 326 and 202 r/w Section 149 and 118, IPC. Accused No.11 was charged with offences under Sections 120B and 118, IPC and accused Nos.12 to 14 were charged with offences under Sections 201 and 212, IPC.

4. As a matter of fact, the writ petitioners/respondents 1 to 4 herein, filed the aforesaid writ petition when the investigation by SIT was underway after the re-registration of the crime. They contended that the deceased Kripesh and Sarath Lal @ Joshy were Youth Congress workers and the accused persons who got allegiance to the political party-CPI(M) committed their murder due to political vendetta. The apprehension of the writ petitioners which persuaded them to approach this Court by filing the aforesaid writ petition with the aforesaid prayers,

is that since the accused got allegiance to the main ruling political party in the State-CPI(M) there would be no free and fair investigation. The investigation unto then, is defective, faulty and malafidely done and to have an independent free and fair investigation envisaged under the Constitution of India investigation of the aforesaid crime is to be entrusted to CBI, it was contended therein. Furthermore, they contended that investigation in the crime is being done perfunctorily, in the manner dictated by CPI(M) leaders who are controlling the police machinery in the district. Behind the double murder, larger conspiracy had hatched and though it is liable to be investigated, no serious investigation is being conducted in that direction. In elaboration of the same they would contend that the Police did not investigate the role of Sri.Sastha Gangadharan, his brother Sri.Madhu and his nephew Sri.Hari as also the role of Messrs. Arun and Vikram. They would further contend that the abrupt transfer of Mr.Mohammed Rafique, the then Superintendent of Police, Crime Branch who was supervising the investigation, was a revengeful action for his attempt to widen the ambit of the investigation to include the district level leaders of the CPI(M), based on available evidence. The SIT, reconstituted thereafter, has been conducting investigation in a highly partisan manner, totally in violation of the established procedure, manner and method of

investigation prescribed by law. They also contended that Mr.K.V.Kunjiraman, a former MLA had rescued one of the accused in the aforesaid crime who was apprehended by Police in connection with the investigation. They reasonably believed that serious moves are afoot to destroy evidence in the case and to shield the other accused involved in the criminal conspiracy and that such an eventuality would be highly prejudicial and detrimental to the interest of the victims. Subsequently, the writ petitioners filed I.A.No.1 of 2019 in W.P.(C)No.10265 of 2019 with the prayer to receive additional documents viz., Exts.P14 to P23.

5. Pursuant to an order of the learned Single Judge on 2.4.2019 statement dated 10.4.2019 was filed by the Deputy Superintendent of Police, Crime Branch, Malappuram, the Investigating Officer of SIT, for and on behalf of respondents 1 to 3 therein viz., the appellants herein. It is stated therein that one Sreekumar who is a relative of deceased Sarath Lal gave FIS and based on which FIR in Crime No.81/2019 was registered for offences punishable under Section 302, IPC. Going by the same, CW1-Sreekumar stated that one month prior to the incident in question, in an accident a local leader of CPI(M) viz., Peethambaran got injured and in the crime registered in connection with that incident he along with deceased Kripesh and Sarath Lal @ Joshy were arraigned as accused and consequently,

arrested and remanded. According to Sreekumar, ever since their release on bail they were facing constant threat to life from Peethambaran (A1) and Pradeepan (A11) and that the incident in question in which Kripesh and Sarath Lal had lost their lives, is a retaliation to the aforesaid incident. Further relevant pleadings made in the statement dated 10.4.2019 filed for and on behalf of the appellants are as follows:-

> "3. On getting information about the incident, Sub Inspector of Police, Bekal Police Station along with his party rushed to the place of occurrence and helped the injured Kripesh for medical aid. Prior to the reaching of the Police at the spot, the relatives of Sarathlal had lifted him to Government Hospital, Kanjangad. The Police had found a motor cycle lying near road side near the residence of Gangadharan alias Sastha Gangadharan at Kannadippara, on Kannadippara-Thannithode Road. The scene was guarded considering the importance such a grave and heinous crime. ....."
>
> 4. Autopsy of the bodies were conducted at Pariyaram Medical College, Kannur. On 18.02.2019 morning, prepared scene Mahazar and Fifteen Material Objects including mobile phones, were collected from the scene of crime with the help of scientific officer who had visited the scene of crime.
>
> 5. ..... Hence, Police rigorously searched for them and Peethambaran was taken into custody from the place 'Pakkam', on 19.02.19 and during questioning he confessed the details of the crime. He was arrested at 18.00 hrs at C Branch Office Kasaragod. On the basis of his confession, one sword and four iron pipes which were the weapons used by

> the accused persons for the commission of this crime were recovered on 20.02.2019 from an abandoned well behind the house of Sastha Gangadharan, near to the place of occurrence u/s. 27 of Evidence Act.
>
> 6. On the same day 2nd accused Saji.C.George surrendered at Bekal Police Station, and he was arrested at Bekal Police Station at 17.45 hrs. Based on Saji's confession the vehicle, KL 14 J 5683 Xylo car was seized from the place Cheroot on Periya - Pallikara Road. Dried blood stains were found inside the seized vehicle. This was one of the vehicles which was used to reach and to escape from the place of occurrence by the accused persons. Scientific officer from Regional Forensic Science Lab Kannur visited the places of recovery and collected biological trace of evidence found on the weapons and blood stains inside the vehicle. Based upon the investigation and recovery, sections 143,147,148,149,341,326 were added and report was submitted before the Jurisdictional Court."

6. In paragraph 7 of the aforesaid statement it is stated that a sword used by one Anilkumar (A4) for commission of the crime, was seized on 22.2.2019 from a cashewnut plantation where it was stashed. Based on the confession by accused No.5 Gijin that he and Subeesh (A8) burned the clothes of all the members except his clothes, at a place near Velutholi, the place was identified and the remnants of burnt clothes were recovered. It is also stated therein that a blood stained shirt, which was identified by the said Gijin as that of one Suresh (A3), was also recovered. Based on the confession of the 7th accused viz., Aswin the sword which he kept in a rubber plantation near to an

abandoned building at Plakathotty was also recovered. It is further stated in the said paragraph that the accused along with the weapons were produced before the Court and on getting accused Nos.1 and 2 in Police custody their blood, nail clippings and hairs were collected. It is also stated that all the aforementioned items were sent for FSL examination. Paragraph 8 of the said statement dealt with transfer and re-registration of the crime to Crime Branch under the direct supervision of one Sri.V.M.Mohammed Rafique besides the subsequent re-constitution of SIT consisting of 21 members including three Circle Inspectors and a Cyber Expert. In paragraph 9 of the said statement it is stated that the vehicles used by the accused before and after the crime including Swift Dezire, Eon Car, 2 Jeeps, Innova Car, Tavera in addition to a Xylo Car and four motorcycles belonging to A1, A3 and A10 and another bike used by the deceased, were seized and that those seized vehicles were got examined by finger print experts, photographer and scientific officer for obtaining evidence. It is also stated that fingerprints were received from the vehicles. Bloodstains from Swift Dezire Car owned by the 5th accused as well as the Xylo Car owned by the 2nd accused were collected after preparing mahazars. Further it is stated therein that blood, hair and nail clippings of accused Nos. 3 to 7 were collected and they along with the material objects

seized were produced before the Court. It is stated in paragraph 10 therein that Call Data Records (CDRs) of accused and suspected persons were collected and Material Objects including weapons seized were sent to RFSL, Kannur for scientific examination. It is also stated therein that Sections 120B, 212, 118 and 201, IPC were then added and the inclusion report in that regard was sent to the Court on 2.3.2019 and that weapons seized were shown to the forensic surgeon, Dr.Gopalakrishna Pillai (CW198) who conducted the autopsy on the bodies of the deceased, from the Court after obtaining permission of the Court. It is stated therein that altogether 150 witnesses were questioned and their statements were recorded. Paragraphs 11 to 14 therein contain the prosecution version regarding conspiracy and the manner of accomplishment of the decision by the accused persons. Paragraphs 15 to 25 contain the narration of collection of clue materials by SIT, and they read thus:-

> "15. On analyzing the CDR of (A1) Peethambaran 9946781822 (Vodafone cell no. took using his own ID Proof), he was present on 17.2.2019 at the place of occurrence (Tower Dump). After the occurrence, he moved to Panayal through places Ambalathara, Chithari etc. and reached at Panayal at 20:12:54 hours and then switched off his mobile. The Panayal tower is overlapping the place of Velutholi. On the occurrence day from 12:43:03 hours to 19:47:42 hours he was present under the place of occurrence (Tower Dump). On 17.2.19 he had contacted A2 Saji C George (Cell No.8086946951), A5

Gijin (Cell No.9656566667), A3 Suresh (Cell No.9747567593), A6 Sreerag (Cell No.7909298079), A9 Murali (Cell No.9947212335) and A8 Subeesh (Cell No.9846445486). At 19:36:29 hours A1 received a call of 8 second duration from Cell No.6238555387 (used by Sura Kalliyot) then 19:40:36 hours A1 received 21 second duration call from 9747629252 (used by Hariprasad). On 14.2.2019 from 15:42:52 hours to 17:33:29 hours A1 is under Kalliyot and Periya tower. Kalliyot and Periya towers are overlapping Eachiladukam Bus Stop.

16. Analyzing the CDR of A2 Saji C George (Cell No. 8086946951 who availed Vodafone connection and ported to Idea connection with his own ID Proof). He was present on 17-02-2019 in the place of occurence (Tower Dump). After the occurence, he moved to Panayal and reached there Panayal at 20:37:21 hours and then switched off his mobile under Panayal (Tower Dump). The Panayal tower is overlapping the place of Velutholi. On the occurence day from 12:15:06 hours to 19:54:16 hours he is present under Periya Tower and he had contacted A1 Peethambaran, A5 Gijin, A9 Murali and A4 Anilkumar in different times. At 18:32:32 hours he recieved a 23 second duration call from A4 Anilkumar (9539020576) and 19:47:52 hours he made 14 second duration call to A1 Peethambaran. On 14-2-2019 from 15:26:19 hours to 18:23:11 hours A2 is under Periya tower. Periya tower is overlapping Eachiladukam Bus stop.

17. Analyzing the CDR of A3 Suresh (Cell No. 9747567593 who had an Idea conection with his own ID Proof) on 17-02-2019 from 10:45:36 to 17:59:12 his mobile is present under the place of occurence tower and then 18:08:42 hours to 18:09:37 hours he is under Panayal tower. At 17:59:12 hours he originated a 47 second duration call to 9446445486 used by A8 Subeesh under Kalliyot Periya tower. Then 18:08:42 hours and 18:09:37 hours he originated 11 and 16 seconds calls duration call to subeesh. After these calls he switched off his mobile phone under Panayal Tower. His mobile phone (dual slotted) bearing IMEI Nos.9115845880538 &

9115845880539 was recovered on 27-02-19 from the dash board of Swift Dezire car owned by A5 Gijin found at Plakathotti in an abandoned manner. In his CDR he had never contacted Subeesh before the aforesaid call originated at 17:59:12 hours (on analyzing the CDR of A3 it can be only seen that the above 3 contacts between A3 and A8). On 14-02-2019 from 15:05:35 hours to 17:45:49 hours A3 is under Kalliyot tower. Kalliyot tower is overlapping Eachiladukam Bus stop.

18. Analyzing the CDR of A4 Anilkumar @ Ambu (Cell No. 9539020576 Vodafone conncetion taken with his own ID Proof) on 17-02-2019 from 18:03:36 hours to 18:32:32 hours he was present under Kalliyot (Tower Dump). After the occurrence, he moved from Periya and reached at Velutholi at 20:31:00 hours and then switched off his mobile. The Panayal tower is overlapping the place of Velutholi. On the occurrence day he had contacted A2 & A9 and at 18:56:34 hours he received a 25 second duration call from A9 Murali and at 19:42:49 hours he originated 10 second duration call to A9. On 14-02-2019 from 16:09:48 hours A4 is present under Periya tower. Periya tower is overlapping Eachiladukam Bus stop.

19. On analyzing the CDR of A5 Gijin (Cell No. 9656566667) who took Idea connection with his own ID Proof) on 17-02-19 from at 18:30:43 hours he is present under Periya tower. After 18:30:43 hours he switched off his mobile phone. He contacted A1 Peethabaran, A2 Saji, A9 Murali & A4 Anilkumar on the occurrence day. On 14-02-2019 from 15:31:58 hours to 16:25:35 hours he is present under Periya tower. Periya tower is overlapping Eachiladukam Bus Stop.

20. On analyzing the CDR of A6 Sreerag had two cell Nos. Viz., 8086379305 and 7909298079. The cell No. 8086379305 was taken from Vodafone by using the ID Proof of Raveendranath and 7909298079 cell connection of Idea by using his own ID Proof. These two sim cards were inserted in one mobile phone having two slots bearing IMEI Nos. 86587403623915 & 86587403623914.

On the occurrence day he is present under Periya (Tower Dump) during the occurrence time. After the occurrence, he moved to Panayal. At 21:46:56 hours he switched off his mobile phone. He had contacted A1 Peethambaran, A5 Gijin, A7 Aswin, A9 Murali & A10 Renjith. On 17-02-19 from 19:00:40 hours to 19:36:30 hours he contacted A10 Renjith @ Appu (Cell No.7909291607) eleven times both originated/terminated calls. At 19:36:30 hours he recieved eleven second duration call from A10 Renjith (informing the arrival of Sarathlal and Kripesh towards the house of Sarathlal). This is the crucial call in this case recieved by Sreerag from Renjith. On 14-02-19 from 17:17:08 to 17:40:25 hours he is under Kalliyot Tower. Kalliyot tower is overlapping Eachiladukam Bus stop.

21. On analyzing the CDR of A7 Aswin (Cell No. 9562063553 who taken the connection of Idea by using his own ID Proof), on the occurrence day from 17:00:01 hours to 17:00:23 hours he is under Kalliyot, Periya Tower and switched off his mobile phone at 17:32:54 hours. On 14-02-19 from 15:38:05 to 18:06:55 hours he was under Kalliyot Tower. Kalliyot tower is overlapping Eachiladukam Bus Stop.

22. On analyzing the CDR of A8 Subeesh (Cell No. 9846445486 who took the connection of Vodafone by using his own ID Proof), on the occurrence day, at 17:17:17 hours he recieved 29 second duration call from 9946781822 used by A1 Peethambaran and 17:50:10 another 11 second duration call recieved from A1 Peethambaran. On the same day three incoming calls at 17:59:11, 18:08:42, 18:09:37 of 11 second, 47 second and 11 second duration respectively recieved from 9747567593 used by A3 Suresh. On 14-02-19 from 17:24:38 hours to 18:04:58 hours he was present under Periya tower. Periya tower is overlapping Eachiladukam Bus Stop.

23. On analyzing the CDR of A9 Murali (Cell No. 9947212335 who took the connection of Idea by using his own ID Proof), on the occurrence day he had contacted A3

> Suresh, A11 Pradeepan @ Kuttan, A6 Sreerag, A2 Saji George, A1 Pethambaran and A4 Anilkumar. He originated 26 second duration call to A1 Pethambaran at 18:56:31 hours. He recieved 11 second duration call from Peethambaran at 19:42:49 hours and 19:44:45 hours he originated 7 second call to Peethambaran. He is present under Periya Tower at the occurrence time. Then he moved to Thachangad (Thachangad is overlapping to Velutholi Tower). On 17-2-19 from 20:19:56 hours his mobile phone was switched off and switched on 04:22:27 hours on 19-02-19 and again switched off at 04:30:43 hours.
>
> 24. On analyzing the CDR of A10 Renjith @ Appu (Cell No.7909291607 who taken the connection of Idea by using his own ID Proof), on the occurrence day from 10:38:10 hours to 19:50:00 hours he is present under Periya Tower. After the incident, he recieved a call from Sreerag at 20:18:26 hours and he originated two calls to Sreerag at 20:22:32 and 20:29:01 hours then he moved to Panayal. He had contacted A6 Sreerag and A5 Gijin. At 19:36:30 hours he originated eleven second duration call to A6 Sreerag (informing the arrival of Sarathlal and Kripesh towards the house of Sarathlal). This is the crucial call in this case recieved by Sreerag from Renjith. On 17-02-19, he contacted A6 Sreerag (7909298079) 22 times.
>
> 25. On analyzing the CDR of A11 Pradeepan @ Kuttan (Cell No.7510702050 who taken this Idea connection by using his own ID Proof), on 17-02-19 he was not present in the place of occurrence. On 14-02-19 from 15:47:00 hours to 18:08:00 hours A11 is present under Periya tower. Periya tower is overlapping Eachiladukam Bus stop."
>
> (underline supplied)

7. In short, in the said statement dated 10.4.2019 filed for and on behalf of the appellants herein by the Investigating Officer, the details of investigation conducted and the details of clue materials

collected are explained. After narrating the details of investigation it is stated therein that they would go to show that the investigation has been progressing in the right track and it is being conducted truthfully, without bias or mala fides. It is also stated therein that the decision extracted as **C.P.Muhammed and Another** v. **State of Kerala & 3 Others** rendered in W.P.(C)No.6630/2018 was challenged by the State of Kerala in W.A.No.628/2018 and the said judgment was stayed. Accordingly, the appellants herein sought thereunder for the dismissal of the writ petition.

8. To the statement dated 10.4.2019 referred supra, the writ petitioners filed a reply affidavit and therewithal they produced Exts.P24 to P34. They filed a verified petition to receive the reply affidavit and also the documents. Besides replying to the contentions of the appellants herein the writ petitioners raised new pleadings thereunder based on the materials produced viz., Exts.P24 to P34. It is stated therein that after conducting the investigation the Police filed a charge sheet on 20.5.2019 arraigning A1 to A14 as accused and certified copies of the report filed in the said crime under Section 173(2), Cr.P.C. and the memo of evidence are produced as Exts.P24 and P25 respectively.

9. It is stated in the said reply affidavit that on perusal of Exts.P24 and P25 it was found that investigation made by the Police was totally defective, faulty, incomplete and was conducted in a lackadaisical manner and further they would vindicate their apprehensions regarding the impartiality of the investigation. It is also stated therein that the same would reveal that the investigation was conducted in such a manner to undermine and sabotage the whole process of collection of evidence necessary for a conviction in the case. Regarding the recovery of four GI Pipes and one Sword under Section 27 of the Evidence Act under Ext.P26 seizure mahazar dated 20.2.2019, based on the allegedly given disclosure statement of Sri.Peethambaran (A1), who was arrested on 19.2.2019, it is contended therein that Ext.P26 itself would reveal that the weapons so recovered include the weapons allegedly used by the other accused for commission of the crime and in respect of such weapons there is nothing on record to indicate that disclosure statements were also made by the accused concerned to lead to their discovery. Such contentions are raised in respect of the same to canvass the position that SIT, who are fully alive to the relevance and importance of recovery of weapons allegedly used for the commission of a heinous crime effected recovery in such a careless and lackadaisical manner

with the deliberate intention to save the accused. Yet another contention raised therein was that those recovered weapons and the subsequently recovered weapons based on disclosure statements of Anilkumar(A4) and Gijin(A5) were not shown to CW198 Dr.Gopalakrishna Pillai, the forensic surgeon who conducted autopsy on the bodies of the deceased, before recording his statement with deliberate intention to save the accused. The writ petitioners also raised a grievance therein that the attempt made by the present Investigating Officer who succeeded the Investigating Officer who effected recovery of the weapons, to get examined the weapons by CW198 from the Court by filing Ext.P10, marked as such in the writ petition, is another instance of faulty investigation. The contention is that though the prayer in Ext.P10 was to permit CW198 to inspect the weapons from the Court when the matter came up before the Court of the Judicial First Class Magistrate-II the learned APP submitted that it would be sufficient if the Material Objects, wrapped in plastic covers, be permitted to be shown to the forensic surgeon in Court instead of granting him permission to inspect them. The contention is that the statement obtained from CW198 subsequently, idest Ext.P29, would reveal the prejudice which could be caused to the prosecution ultimately due to such inept action. Evidently, the nub of the

contentions in that regard is that such defective and faulty investigation conducted, taking note of the fact that it is a case of double murder, would reveal the inevitability to transfer the investigation to have a fair trial as for a fair trial a fair investigation is required. In the reply affidavit the writ petitioners further stated that no serious effort was made to find out the source from where the accused obtained the weapons recovered. That apart it is contended therein that the 8th accused Subeesh, who is a coolie worker at Periya, went abroad immediately after the incident and no investigation was conducted as to who arranged the visa for him to go abroad and who accommodated him in the foreign country for a period of three months. It is the further contention that A8 being a coolie was not capable enough to acquire visa on his own. It is also contended by the writ petitioners that no serious investigation was made to find out the role played by one Sastha Gangadharan, his brother Sri.Madhu and his nephew Sri.Hari as also that of Messrs. Arun and Vikram who joined the other accused prior to and after the commission of the crime. Furthermore, it is contended therein that with respect to the meeting, convened in the evening of 17.2.2019 viz., the very date of occurrence, where the first accused was joined by Messrs. Madhu, Vikram and some others no serious investigation was conducted. According to the writ petitioners

Ext.P32(a), which is the certified copy of the 161 statement of CW150 Mr.Krishnan, S/o.Appu, would indicate that those persons stand on the same footings as that of accused Nos.1, 2 and 5. It is also their contention that based on the evidence of CW97 Kunjuraman.A, S/o.Koman no serious investigation was conducted. Based on Ext.P33 viz., the certified copy of 161 statement of CW97 it is contended that it would reveal that on the date of occurrence at about 7 p.m. he had seen A5, A2 and the aforesaid Madhu driving vehicles through Periya-Kallyottu Road. They would further contend that the details of investigation conducted unto then would also reveal the attempt on the part of the prosecution to make the motive for the murder as personal enmity of Peethambaran (A1) in place of the real motive of political rivalry of CPI(M) leaders towards the deceased.

10. To answer such contentions, as referred supra, made in the reply affidavit of the writ petitioners, on behalf of the appellants herein an additional statement dated 18.9.2019 was filed before the writ court. In the said statement filed by the Investigating Officer Sri.Pradeep.P.M., Deputy Superintendent of Police, Crime Branch, Malappuram the allegation of refusal by the SIT to take statements of important witnesses who came forward with clinging evidence, was denied. Furthermore, it is stated that non-incorporation of Section

120B, IPC by the local police was not deliberate and at any rate, the said section was incorporated by the SIT on gathering facts unfurling the true picture of the incident. It is also stated that besides the statements of witnesses who came forward to give evidence the statements of others were also recorded and the SIT cannot be found fault with if some of the witnesses had allegiance to CPI(M) party. The allegation of failure to show the weapons recovered to the police surgeon viz., CW198, Dr.Gopalakrishna Pillai as also the failure to find out the source of the weapons used, were answered in paragraph 7 of the said additional statement. It is stated therein that the first accused Peethambaran was arrested on 19.2.2019 at 18.00 hrs. and based on his disclosure statement, under Ext.P26 seizure mahazar, the weapons thrown into an unused well immediately after the commission of the offences, were recovered on 20.2.2019 at 11.a.m. According to the Investigating Officer, all legal procedures were followed while effecting recovery of the said weapons viz., four G.I. Pipes and one sword. Another sword was recovered under Ext.P27 pursuant to the statement of Anilkumar @ Ambu (A4) and thereafter yet another sword was recovered pursuant to the disclosure statement of A7 under Ext.P28. It is stated therein that only 7 weapons were used by the accused and all the seven weapons were recovered and thereupon they were produced

in court for the purpose of sending them for examination in Forensic Science Laboratory. Evidently, such contentions were raised to controvert the allegation of faulty investigation by the SIT and also to establish that flawless investigation was conducted. According to the appellants, the allegation of non-investigation in the matter of alleged conspiracy for arranging visa for Sri.Subeesh (A8) is unfounded as the said matter was investigated and found baseless. As regards the allegation of lack of proper investigation into the role of Madhu, the brother of one Sastha Gangadharan, Hari, Arun and Vikram who joined with other accused prior to, during and after the commission of the crime it is stated therein that the said allegation is ill-founded and on investigation it is found that they got no complicity in the case, as alleged. So also, with respect to the allegation that top leaders of the political party CPI(M) also had role in the crime it is stated therein that the SIT investigation revealed it as baseless.

11. Subsequent to the filing of the said additional statement on the aforesaid lines a reply affidavit to the same was filed by the writ petitioners before the writ court, evidently, reiterating their contentions. In this appeal, I.A.No.1 of 2019 was filed by the Supervisory Officer of the Special Investigating Team with the prayer to accept a revised translation of Ext.P31 stating that during its translation a slight

omission had crept in paragraph 2 and owing to the same the presence of persons mentioned in the confession extract of Original Malayalam document, was not properly reflected in the translation. In fact, the crucial words 'who were present there at that time' after the words 'Madhu, younger brother of Sastha Gangadharan and Hari', were not there in the original translation. Annexure-A is the corrected rather, revised translation of Ext.P31. Though it cannot be lightly taken, upon hearing the parties we are inclined to allow it and to take Annexure-A on file. It is ordered accordingly. We have referred to the rival pleadings in detail to show that in the case on hand the writ court provided the parties opportunities to bring in appropriate pleadings to drive home their respective stand and also to show that certified copies of various relevant documents, which form part of the case diary, were available before the learned Single Judge. The said aspect assumes relevance in the context of the contentions raised by the appellants based on the decision of a Division Bench of this Court in **State of Kerala & Others** v. **C.P.Muhammed and Others** **(2019 (4) KHC 359).** We will deal with the same a little later.

12. We have heard the learned Senior Counsel Sri.Manindar Singh for the appellants, the learned counsel Sri.Asif Ali for respondents 1 to 4/the writ petitioners and Sri.Sasthamangalam S.Ajithkumar for

respondents 5 and 6.

13. In this appeal, besides reiterating the contentions raised before the learned Single Judge, the parties have raised additional contentions and thereafter, filed argument notes. As regards the argument notes submitted by the appellants, on its perusal we are of the considered view that one aspect of it requires to be deprecated. It is of common knowledge that during the course of arguments Courts may make observations and may also put questions to both sides, essentially, to elicit various aspects and also to have clarity on certain contentions etc. We are at a loss to understand as to how such observations or questions could be made part of the argument notes as if they reflect final conclusions of this Court. At any circumstances, how can the appellants build up contentions, as raised in sub-paragraphs (a), (b), (c) and (d) of paragraph 4 in the argument notes based on observations made or questions put, by the Court during the course of arguments. We have no hesitation to hold that Courts cannot be tied down by raising such contentions or dissuaded from considering all the relevant aspects, in accordance with law. We will now, consider the relevant rival contentions raised before us.

14. The primary objection raised on behalf of the writ petitioners/respondents 1 to 4 herein, against the very preference of

the appeal is that no adverse observation is made against any individual police official in the impugned judgment and hence, it is understandable as to why the appellants have preferred this appeal. We are of the view that this objection or contention deserves to be rejected without any detailed consideration for the simple reason that as per the judgment the learned Single Judge has set aside the report filed under Section 173(2), Cr.P.C. on completion of investigation in the crime in question besides ordering for transferring its investigation to CBI. Hence, this contention against the preference of appeal merits no further consideration.

15. To mount challenge against the judgment of the learned Single Judge setting aside Ext.P24 report and ordering transfer of investigation to CBI, the appellants have raised manifold contentions. Their core contention is that there was no error or deficiency in the investigation conducted by the SIT and therefore, the extraordinary jurisdiction of this Court ought not to have been invoked to set aside Ext.P24 final report and also to transfer the investigation to CBI. In the light of various decisions it is contended that such power could be exercised by the High Court only in rare and exceptional circumstances and that too, with great care and caution and the case on hand did not fall under such categories of cases. To bring home various contentions

the appellants have relied on the following decisions:-

Sakiri Vasu v. **State of Uttar Pradesh and Others ((2008) 2 SCC 409), Divine Retreat Centre** v. **State of Kerala ((2008) 3 SCC 542), State of W.B. & Ors.** v. **Committee for Protection of Democratic Rights West Bengal & Ors. (AIR 2010 SC 1476), Vinay Tyagi** v. **Irshad Ali @ Deepak & Ors. ((2013) 5 SCC 762), K.V.Rajendran** v. **Superintendent of Police, CB CID, South Zone, Chennai & Ors. ((2013) 12 SCC 480), K.Saravanan Karuppasami & Anr.** v. **State of Tamil Nadu & Ors. ((2014) 10 SCC 406), Sudipta Lenka** v. **State of Odisha & Ors. ((2014) 11 SCC 527), Sujatha Ravi Kiran** v. **State of Kerala ((2016) 7 SCC 597), Vinubhai Haribhai Malaviya** v. **State of Gujarat (2019 (5) KHC 352), 1994 KHC 557, State of Kerala & Others** v. **C.P.Muhammed and Others (2019 (4) KHC 359)** and orders in **Crl.A.No.1502 of 2018** (arising out of SLP(Cri.) No.5868/2018) and in **Crl.A.No.294 of 2019** (arising out of SLP(Cri.)No.9561/2017).

16. To counter the appellants' contentions and to get sustained the impugned judgment respondents 1 to 4 herein/writ petitioners relied on the decisions in **Ankush Maruti Shinde & Ors.** v. **State of Maharashtra (2019 KHC 6274), State of W.B. & Ors.** v. **Committee for Protection of Democratic Rights West Bengal &**

Ors. (AIR 2010 SC 1476), Mithelesh Kumar Singh v. **State of Rajasthan & Ors. ((2015) 9 SCC 795), Dharam Pal** v. **State of Haryana (AIR 2016 SC 618), R.S.Sodhi & Others.** v. **State of U.P. And Others (1994 KHC 557), Vinay Tyagi v. Irshad Ali @ Deepak & Ors. ((2013) 5 SCC 762), Kerala Trading Corporation** v. **State of Kerala (1989 (1) KLT 353), Bhagawan Swarup Lal Bishan Lal** v. **State of Maharashtra (AIR 1965 SC 682)** and **Central Bureau of Investigation** v. **State of Rajasthan (2001 (1) KLT 563)**.

17. We do not propose to burden this judgment with all the aforesaid decisions, relied on by the parties for the reason that all the said decisions do not reflect or reveal any cleavage in opinion in regard to the position that in exercise of the powers under Article 226 of the Constitution of India it will be well within the jurisdiction of this Court to order for CBI investigation or to transfer the investigation to CBI though the said power is exercisable only sparingly and that too, in rare and exceptional cases with caution and care and also the position that it is also within the jurisdiction of this Court to set aside the final report laid in a crime in very exceptional cases where it is inescapably inevitable, after recording the reasons therefor. It is also a settled position that filing of final report or commencement of the trial and examination of some witnesses cannot be an absolute bar or impediment for exercising

the constitutional power under Article 226 of the Constitution of India to ensure fair and just investigation. We will refer to relevant decisions on various points appropriately.

18. We will firstly, refer to the decision of the Hon'ble Apex Court in **Mithelesh Kumar Singh's** case (supra) in view of the rival contentions. The decision of the Hon'ble Apex Court in **Vinubhai Haribhai Malaviya's** case (supra) was relied on, by the appellants evidently, to canvass the position that it is incumbent on the person alleging unfair investigation to take recourse to the provisions under Section 156(3), Cr.P.C. before approaching the High Court seeking transfer of investigation as the Magistrate did possess power to order further investigation at all stages of the progress of a criminal case before the actual commencement of the trial. To appreciate the contentions of the appellants it is relevant to refer to certain aspects. In **Vinubhai Haribhai Malaviya's** case (supra) a criminal complaint was filed by the power of attorney holder of one Ramanbhai Bhagubhai Patel and Shankarbhai Bhagubhai Patel alleging that the appellant Vinubhai Haribhai Malaviya was blackmailing those two gentlemen with respect to an agricultural land. Ultimately, an FIR was registered and after investigation charge sheet was laid before the Court. Learned Magistrate took cognizance and issued summons and on receipt of the

same Vinubhai, the accused therein filed an application for further investigation under Section 173(8), Cr.P.C. and another for discharge. Those applications were dismissed. The application for further investigation was dismissed stating that the facts sought to be placed by the accused/appellant therein were in the nature of evidence of the defence that would be taken in the trial. The accused Vinubhai and another had also filed applications to register an FIR based on the facts stated in their applications. In the alternative they prayed for an order for investigation under Section 156(3), Cr.P.C. into the facts stated in their applications. Upon rejection of the said applications revision petitions were filed before the Sessions Court. The Sessions Court allowed the applications holding that a case was made out for further investigation. In the appeal the High Court of Gujarat held that Magistrate does not possess any power to order further investigation after a charge sheet is filed and cognizance is taken. Based on the aforesaid factual scenario obtained in the said appeal the Hon'ble Apex Court held the question of law involved in the case as 'whether, after a charge sheet is filed by the Police, the Magistrate has the power to order further investigation, and if so, up to what stage of a criminal proceeding' ? After referring to various provisions in Cr.P.C. including Sections 156(3), 173(8), 190 and various decisions including the

decisions in **Sakiri Vasu's** case (supra) and **Dilawar Singh** v. **State of Delhi (2007 (3) KHC 940)** and taking the aid of the doctrine of implied power (relied on in **Sakiri Vasu's** case) the Hon'ble Apex Court held that Magistrates got no power to direct 're-investigation' or 'fresh investigation (de novo)' in a case initiated on the basis of a Police report and at the same time possesses power to order 'further investigation' even after a charge sheet is filed and cognizance is taken and that the said power would be available to Magistrates at all stages of the progress of a criminal case before trial is actually commenced. However, on a scanning of the decision in **Vinubhai Haribhai Malaviya's** case (supra) we do not find any laid down law that a writ petition seeking transfer of investigation to CBI on the ground of unfair investigation or defective or incomplete investigation by the State Police and such other grounds, shall not be entertained at all unless the person aggrieved by such investigation took recourse to the provisions under Section 156(3), Cr.P.C., before approaching the High Court. Thus, the said decision though an authority on the question whether a Magistrate possesses power to order further investigation after a charge sheet is filed and cognizance is taken and whether the said power would be available to the Magistrate at all stages of the progress of a criminal case we are of the view that the appellants are not justified in relying

on the said decision to contend that since such powers are available to a Magistrate the respondents herein/the writ petitioners were not justified in approaching this Court seeking transfer of investigation to CBI before taking recourse to the provisions under Section 156(3), Cr.P.C. In other words, the appellants cannot canvass the position that this Court can entertain a writ petition carrying such prayers only if the party concerned had exhausted the said remedy. We say so, because in exercise of the power under Section 156(3), Cr.P.C. the Magistrate would be having no power to order transfer of investigation to CBI. In that context, it is relevant to refer to the decision of the Apex Court in **Sakiri Vasu's** case (supra) more particularly, paragraph 31 thereunder. It reads thus:-

> "No doubt, the Magistrate cannot order investigation by CBI vide CBI v. State of Rajastan but, this Court or the High Court has the power under Article 136 or Article 226 to order investigation by CBI. That, however, should be done only in some rare and exceptional case, otherwise CBI would be fedded with a large number of cases and would find it impossible to properly investigate all of them."
>
> (emphasis added)

19. Thus, the position that Magistrates could not order investigation by CBI as held by the Apex Court in **CBI** v. **State of Rajasthan ((2001) 3 SCC 333)** has been restated by the Apex Court in **Sakiri Vasu's** case (supra). It is common contention that though

the power to order transfer of investigation to CBI or investigation by CBI is available only to the Hon'ble Apex Court under Article 32 or 136 or to the High Courts under Article 226, of the Constitution of India such power could be exercised only in rare and exceptional cases that too, with great care and caution, going by the settled position. In **State of West Bengal's** case (supra) a Constitution Bench of the Hon'ble Apex Court held that High Court, in exercise of its jurisdiction under Article 226 of the Constitution, could issue direction for CBI investigation in respect of a cognizable offence alleged to have taken place within the territorial jurisdiction of the State concerned without the consent of that State. But, such power, being extraordinary in nature, must be exercised sparingly, cautiously and in exceptional circumstances. In the contextual situation, it is only worthwhile to refer to paragraphs 46 & 47 of the said decision. They read thus:-

> "46. Before parting with the case, we deem it necessary to emphasize that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise. In so far as the question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine

> or merely because a party has levelled some allegations against the local police. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations.
>
> 47. In Secretary, Minor Irrigation and Rural Engineering Services, U.P. and Ors. v. Sahngoo Ram Arya and Anr., this Court had said that an order directing an enquiry by the CBI should be passed only when the High Court, after considering the material on record, comes to a conclusion that such material does disclose a prima facie case calling for an investigation by the CBI or any other similar agency. We respectfully concur with these observations."
>
> (underline supplied)

20. The decision in **Sudipta Lenka's** case (supra) of the Hon'ble Apex Court would reveal that transfer of investigation to CBI or any other specialised agency, notwithstanding the filing of charge-sheet is not absolutely impermissible. Paragraphs 13 to 15 therein are relevant in this context and they read thus:-

> 13. On the question whether a criminal case in which a charge sheet has been filed by the local/state investigating agency can/should be referred to Central Bureau of Investigation for further investigation there is near unanimity of judicial opinion. In Gudalure M.J.

Cherian vs. Union of India[2] and Punjab & Haryana High Court Bar Association vs. State of Punjab[3], it has held that after the chargesheet is filed the power to direct further investigation by Central Bureau of Investigation should not be normally resorted to by the Constitutional Courts unless exceptional circumstances exist either to doubt the fairness of the investigation or there are compulsive reasons founded on high public interest to do so. Vineet Narain vs. Union of India[4], Union of India vs. Sushil Kumar Modi[5] and Rajiv Ranjan Singh 'Lalan' (8) vs. Union of India[6] are not decisions on the same line as the issue in the said cases was with regard to the exercise of jurisdiction by the Monitoring Court to order further investigation of a case after chargesheet had been filed by the Central Bureau of Investigation to which body the investigation already stood entrusted.

14. Rubabbuddin Sheikh vs. State of Gujarat[7], really, carries forward the law laid down in Gudalure M.J. Cherian and Punjab & Haryana High Court Bar Association (supra) which position finds reflection in para 60 of the report which is in the following terms :

"…….Therefore, it can safely be concluded that in an appropriate case when the court feels that the investigation by the police authorities is not in the proper direction and in order to do complete justice in the case and as the high police officials are involved in the said crime, it was always open to the court to hand over the investigation to the independent agency like CBI. It cannot be said that after the charge-sheet is submitted, the court is not empowered, in an appropriate case, to hand over the investigation to an independent agency like CBI."

15. The position has also been succinctly summed up in Disha (supra) to which one of us (the learned Chief Justice) was a party by holding that transfer of the investigation to the Central Bureau of Investigation or any other specialised agency, notwithstanding the filing of the chargesheet, would

> be justified only when the Court is satisfied that on account of the accused being powerful and influential the investigation has not proceeded in a proper direction or it has been biased. Further investigation of a criminal case after the chargesheet has been filed in a competent court may affect the jurisdiction of the said Court under Section 173 (8) of the Code of Criminal Procedure. Hence it is imperative that the said power, which, though, will always vest in a Constitutional Court, should be exercised only in situations befitting, judged on the touchstone of high public interest and the need to maintain the Rule of Law."

21. In regard to the question of scope of interference by High Courts in the matter of transfer of investigation to CBI subsequent to the decision of the Constitution Bench of the Apex Court in **State of West Bengal's** case (supra) the Apex Court held in **K.V.Rajendran's** case (supra) thus:-

> "13. The issue involved herein, is no more res integra. This Court has time and again dealt with the issue under what circumstances the investigation can be transferred from the State investigating agency to any other independent investigating agency like CBI. It has been held that the power of transferring such investigation must be in rare and exceptional cases where the court finds it necessary in order to do justice between the parties and to instil confidence in the public mind, or where investigation by the State police lacks credibility and it is necessary for having "a fair, honest and complete investigation", and particularly, when it is imperative to retain public confidence in the impartial working of the State agencies. Where the investigation has already been completed and charge sheet has been filed, ordinarily superior courts should not reopen the investigation and it should be left open to the court,

where the charge sheet has been filed, to proceed with the matter in accordance with law. Under no circumstances, should the court make any expression of its opinion on merit relating to any accusation against any individual. (Vide: Gudalure M.J. Cherian & Ors. v. Union of India & Ors., (1992) 1 SCC 397; R.S. Sodhi v. State of U.P. & Ors., AIR 1994 SC 38; Punjab and Haryana Bar Association, Chandigarh through its Secretary v. State of Punjab & Ors., AIR 1994 SC 1023; Vineet Narain & Ors., v. Union of India & Anr., AIR 1996 SC 3386; Union of India & Ors. v. Sushil Kumar Modi & Ors., AIR 1997 SC 314; Disha v. State of Gujarat & Ors., AIR 2011 SC 3168; Rajender Singh Pathania & Ors. v. State (NCT of Delhi) & Ors., (2011) 13 SCC 329; and State of Punjab v. Davinder Pal Singh Bhullar & Ors. etc., AIR 2012 SC 364).

14. In Rubabbuddin Sheikh v. State of Gujarat & Ors., (2010) 2 SCC 200, this Court dealt with a case where the accusation had been against high officials of the police department of the State of Gujarat in respect of killing of persons in a fake encounter and the Gujarat police after the conclusion of the investigation, submitted a charge sheet before the competent criminal court. The Court came to the conclusion that as the allegations of committing murder under the garb of an encounter are not against any third party but against the top police personnel of the State of Gujarat, the investigation concluded by the State investigating agency may not be satisfactorily held. Thus, in order to do justice and instil confidence in the minds of the victims as well of the public, the State police authority could not be allowed to continue with the investigation when allegations and offences were mostly against top officials. Thus, the Court held that even if a chargesheet has been filed by the State investigating agency there is no prohibition for transferring the investigation to any other independent investigating agency.

15. In State of West Bengal v. Committee for Protection of Democratic Rights, AIR 2010 SC 1476, a

> Constitution Bench of this Court has clarified that extraordinary power to transfer the investigation from State investigating agency to any other investigating agency must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigation or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights.
>
> (See also: Ashok Kumar Todi v. Kishwar Jahan & Ors., AIR 2011 SC 1254).
>
> 16. This Court in the case of Sakiri Vasu v. State of UP, AIR 2008 SC 907 held:
>
> "This Court or the High Court has power under Article 136 or Article 226 to order investigation by the CBI. That, however should be done only in some rare and exceptional case, otherwise, the CBI would be flooded with a large number of cases and would find it impossible to properly investigate all of them." (Emphasis added)
>
> 17. In view of the above, the law can be summarised to the effect that the Court could exercise its Constitutional powers for transferring an investigation from the State investigating agency to any other independent investigating agency like CBI only in rare and exceptional cases. Such as where high officials of State authorities are involved, or the accusation itself is against the top officials of the investigating agency thereby allowing them to influence the investigation, and further that it is so necessary to do justice and to instil confidence in the investigation or where the investigation is prima facie found to be tainted/biased."

22. Thus, the positions of law settled in respect of the questions involved can be summed up, in view of the decisions referred

supra, as hereunder:-

High Courts got power under Article 226 of the Constitution of India to order investigation by CBI, to transfer investigation from the State Investigating Agency to CBI. However, such power should be exercised only in rare and exceptional cases, that too, with care and caution. In so far as the question whether a criminal case in which a charge sheet has been filed by the local/State Investigating Agency could be transferred to CBI for further investigation the position is that under normal circumstances such interference would not be justified as it may affect the jurisdiction of the competent court, where charge-sheet is filed, under Section 173(8), Cr.P.C. In such circumstances, as held by the Apex Court, it is imperative that the said power, which, though, always vests with a constitutional court, should be exercised only in situations befitting, judged on the touchstone of high public interest and the need to maintain the Rule of Law as also to do justice between the parties and to instill confidence in the public mind or where investigation by the State Police lacks credibility or where the investigation is prima facie found to be tainted/biased.

23. The contentions raised and the decisions relied on behalf of the appellants would undoubtedly reveal that they too, did not doubt the positions of law, as aforesaid. The learned Senior Counsel

Sri.Maninder Singh relied on the decisions of the Apex Court in **Central Bureau of Investigation** v. **Shyambir Singh & Ors.** (**Crl.A.No.1502 of 2018** arising out of **SLP(Cri.)No.5868/2018**) and in **Director, Central Bureau of Investigation** v. **Krishna Kumar Mishra & Ors.** **(Crl.A.No.294 of 2019** arising out of **SLP(Cri.)No.9561/2017** to canvass the position that though the power to order investigation by CBI or to transfer investigation to CBI vests with this Court under Article 226 it should be done only in rare and exceptional cases as otherwise, CBI would be flooded with a large number of cases and thereby making it impossible to the premier Investigating Agency of the country to properly investigate all of them. In Crl.A.No.1502 of 2019 the challenge was against the judgment and order dated 11.8.2017 passed by the High Court of Punjab and Haryana in CRM-M-No.37066 of 2014 whereby the High Court transferred the investigation of FIR No.281 dated 21.7.2012 under Section 365, IPC, PS Sadar Palwal to CBI, Chandigarh, exercising its power under Section 482, Cr.P.C. The order of the Apex Court dated 27.9.2019 in the said criminal appeal, the copy of which is handed over for our perusal, would reveal that the respondent therein/the complainant approached the High Court to hand over the investigation to CBI alleging faulty investigation by the Haryana Police and the consequential failure to trace out his brother.

The Hon'ble Apex Court, after referring to its earlier decision in **State of West Bengal's** case (supra), held that it could not agree with the order passed by the High Court in transferring the investigation of the matter to CBI when the alternative remedy was available to respondent No.1 to approach the appropriate court against the "untraced report" filed by the Haryana Police in the matter of tracing out the brother of the first respondent/the complainant. Taking into account the decision in **State of West Bengal's** case (supra) the Apex Court evidently held that the said case viz., **Shyambir Singh's** case (supra) would not fall into the category of cases wherein the extraordinary power to order CBI to conduct investigation should be exercised as alternative remedy to approach the appropriate court against the 'untraced report' was available to the first respondent. Consequently, the impugned order was set aside and liberty was granted to the first respondent therein to approach the jurisdictional court concerned to challenge the untraced report filed by the Haryana Police. Consequential direction was also issued.

24. In Crl.A.No.294 of 2019, the challenge was against the judgment and order dated 26.5.2017 in W.P.No.20003 of 2014 passed by the High Court of Madhya Pradesh, Principal Bench at Jabalpur. The case was one relating to the disappearance of an imported technical

equipment known as 'Lock-in-Amplifier', from Raja Ramana Centre for Advanced Technology, Indore under the Department of Atomic Energy. The said equipment was claimed to have been placed by Mrs.Shylaja, Scientific Officer on the desk of respondent No.1 therein Sri.Krishna Kumar Mishra. It was from there that it had allegedly disappeared. In respect of the incident FIR was registered, but the final report laid by the Police was not accepted by the learned Chief Judicial Magistrate concerned and he ordered for further investigation. At that stage, respondent No.1 therein moved the writ petition seeking an enquiry into the matter by CBI, primarily, on the ground that the incident had caused to him humiliation and loss of prestige. As per the impugned order the High Court ordered the CBI to conduct investigation into the matter and Special Leave Petition was filed against the same by the CBI. The Apex Court held that while the jurisdiction of the High Court to order an investigation by CBI could not be doubted, the said jurisdiction should be exercised very sparingly with great care and caution, keeping in mind that the premier investigating agency is primarily engaged in investigation of anti-corruption cases and cases of vital importance for the nation. The Apex Court further held, having regard to the nature of the work that the CBI is required to perform the High Court was not justified in requiring the CBI to investigate the

said matter. It was further held that the High Court ought to have allowed the State Police to conduct and complete the further investigation ordered by the Chief Judicial Magistrate. Consequently, the order of the High Court was set aside and the further investigation ordered by the Chief Judicial Magistrate was directed to be commenced and concluded within the time stipulated thereunder. We are at a loss to understand as to how those decisions should be understood as decisions interdicting entrustment of investigation with CBI or transfer of investigation to CBI, any further till it completes investigations of crimes already undertaken by it. Rightly that is not the contention of the learned Senior Counsel. In fact, a bare perusal of those decisions of the Hon'ble Apex Court would reveal that they too, are in conformity with and consistent with the view that the extraordinary power to direct CBI to conduct investigation or to transfer investigation to it must not be exercised as a matter of routine but must be done sparingly, cautiously and only in exceptional circumstances. Thus, those decisions too, can be understood to have re-stated the position laid down by the Constitutional Bench in **State of West Bengal's** case (supra) that though High Court is vested with the extraordinary power to direct the CBI to conduct the investigation or to order transfer of investigation to CBI the said power available under Article 226 of the Constitution of

India must not be exercised as a matter of routine but must be exercised sparingly, cautiously and only in exceptional circumstances. While considering the contentions raised relying on the decisions in Crl.A.Nos.1502/2018 and 294/2019, as aforesaid, it is also relevant to bear in mind that the CBI which is fully aware of its workload itself volunteered to take up the investigation of the case on hand considering its nature.

25. We are also of the view that the contention of the appellants that the writ petitioners ought to have exhausted the remedy under section 156(3), Cr.P.C. before approaching this Court under Article 226 of the Constitution of India as also the contention that despite the laying of charge sheet, in terms of **Vinubhai Haribhai Malaviya's** case (supra), the writ petitioners could approach the Magistrate's Court concerned for further investigation cannot be reasons, either to hold that the writ petitioners viz., respondents 1 to 4 herein, had approached this Court prematurely or to hold that the writ petition ought not to have been entertained owing to the availability of remedy to seek further investigation. Obviously, at the time when the writ petitioners filed the writ petition the investigation in the crime was only progressing and after the investigation the final report was laid only during its pendency. That apart, their prayer in the writ petition

was to transfer the investigation to CBI. In such circumstances and in view of the decision of the Apex Court in **CBI** v. **State of Rajasthan [(2001) 3 SCC 333)** and in **Sakiri Vasu's** case (supra) the writ petitioners were right in not approaching the Magistrate Court with the prayer to transfer the investigation to CBI from the SIT of Crime Branch. We have only mentioned about their justifiability in approaching this Court with such a prayer and not about their entitlement to obtain the reliefs sought for. We have already noted that one of the main contentions of the appellants is that even after filing of the final report in the aforesaid crime and its production as Ext.P24 in the writ petition by the writ petitioners they had not chosen to challenge the same and still the learned Single Judge set it aside. In this context, the reply affidavit filed by the writ petitioners along with Ext.P24 assumes relevance and its last paragraph, in so far as it is relevant, reads thus:-

> "In the circumstances narrated above, in the interest of justice, it is just and necessary to pass an order directing the 4th respondent, to take over the investigation of the case FIR No.81/2019 of Bekal Police Station, Kasaragod (corresponding to re-registered FIR No.75/2019 of CB) for further investigation and file charge sheet to the competent court of jurisdiction accordingly."
>
> (emphasis added)

26. Thus, it is obvious that virtually the writ petitioners did not deviate from their prayers and the fact that they did not amend the writ petition cannot be a ground for not considering the prayer for further investigation by CBI as their prayer in the writ petition was for transfer of investigation to CBI. In this context, it is relevant to note that transfer of investigation and further investigation without setting aside the final report is not legally impossible or impermissible. But, still we will also consider the question whether the setting aside of Ext.P24 final report by the writ court despite the absence of challenge against the same, warrants interference or not.

27. In the decision in **Vinubhai Haribhai Malaviya's** case (supra) the Hon'ble Apex Court held that Magistrates got no power to direct 're-investigation or fresh investigation (de novo)' in a case initiated based on a police complaint and the Magistrates possess the power to order further investigation even after a charge sheet is filed and cognizance is taken and further that the said power would be available to the Magistrates at all stages of progress of a criminal case before trial is actually commenced. But, since the SIT of Crime Branch filed Ext.P24 final report the Magistrate concerned cannot issue a direction to conduct further investigation by CBI even on making out a case therefor as it is impermissible in view of the decisions of the Apex

Court in **CBI** v. **State of Rajasthan [(2001) 3 SCC 333]** and in **Sakiri Vasu's** case (supra). Shortly stated, in the facts and circumstances of the case and what is stated above, we propose to proceed with consideration of the challenge against the judgment on merits and in accordance with law. At this juncture, it is relevant to mention that Sri.Sasthamangalam S. Ajithkumar, the learned counsel appearing for respondents 5 and 6 submitted that CBI is willing to take over the investigation considering the nature of the case, in case if the court orders. In fact, a similar submission was made before the writ court as well. It is further submitted before us that pursuant to the direction in the impugned judgment the aforesaid crime was re-registered by the CBI and thereupon, application was also made before the Court concerned for certified copies of the documents. It is also submitted that case diary in the crime in question is not yet transferred to CBI. We do not find anything objectionable or strange in the stand of the CBI despite the contention to the contrary raised by the appellants.

28. In view of the aforesaid contentions, submissions and the decisions referred hereinbefore as also the position obtained on perusal of the case diary we are of the view that the question is whether the case on hand is a befitting case for exercise of the

extraordinary jurisdiction under Article 226 of the Constitution of India. In other words, the question is whether the setting aside of Ext.P24 and the directions issued under the impugned judgment are sustainable in the given circumstances of the case. As stated earlier, the appellants heavily relied on the decision of a Division Bench of this Court in **C.P.Muhammed's** case (supra) to contend that the impugned judgment is unsustainable mainly for the failure on the part of the learned Single Judge to call for and peruse the case diary, before passing the same. It is also submitted that the decision in **C.P.Muhammed's** case (supra) was rendered almost under similar circumstances viz., similar nature of allegations of political rivalry, political patronage and participation and the learned Single Judge, even after referring to the said decision, failed to follow the dicta laid down therein. In the decision in **C.P. Muhammed's** case (supra), the impugned judgment of the learned Single Judge carrying direction for transfer of investigation to CBI was interfered with assigning various reasons. The Division Bench found that the learned Single Judge did not call for the case diary and that apart no opportunity was granted to the State Government to file counter affidavit in response to the averments in the writ petition and thereby, acted in hasty manner. It was held therein that if the writ court wanted to get further details as

regards the investigation carried out it could have asked for production of the case diary in court but, the writ court had not chosen to do so. The first contention raised by the appellants herein in the light of the said decision in **C.P.Muhammed's** case (supra) is that the failure on the part of the learned Single Judge to call for and peruse the case diary in the crime in question before passing the impugned judgment itself is sufficient to invite interference with the same.

29. To appreciate the aforesaid contention raised by the appellants, in view of the factual position obtained in this case, we think it appropriate, though it is too seminal, to look into what exactly is 'case diary' (police diary). There can be little doubt with respect to the fact that the term 'police diary' adumbrated under Section 172, Cr.P.C. is a diary to be maintained mandatorily by a Police Officer making an investigation under Chapter XII, Cr.P.C. whereon he should enter his proceedings in the investigation, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation. Such diaries may be used at the trial or enquiry, not as evidence in the case but to aid the Court in such inquiry or trial and can be used for determining the nature and bonafides of an investigation. It should contain not only the

statements of witnesses recorded under Section 161, Cr.P.C., site plan and other documents prepared by the Investigating Officer but should also contain reports or observations of the Investigating Officer or specific instructions of his supervising officers, if any. As per the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009) Sections (1A) and (1B) were inserted in Section 172, Cr.P.C. respectively with effect from 31.12.2009, to provide that the statements of witnesses recorded during the course of investigation under Section 161, Cr.P.C. shall be inserted in the case diary and that such diary shall be a bound volume and duly paginated. We may hasten to add that Section 172, Cr.P.C. does not deal with recording of statements made by witnesses though it provided that statements of witnesses recorded during the course of investigation shall be inserted. What is intended under Section 172 Cr.P.C. to be recorded is what the police officer did, namely the places where he went, the people he visited and what he saw etc. It is Section 161, Cr.P.C. that provides for recording of statements of witnesses. There can be little doubt with respect to the position that entries in the case diary cannot be used as a substantive evidence but, at the same time, there cannot be any doubt that the bar under Section 172, Cr.P.C. is inapplicable in civil and writ proceedings. (See the decision of the Apex Court in **Khatri and Others** v. **State of**

Bihar and Others (AIR 1981 SC 1068). But, then, clearly under the Cr.P.C. only a very limited use can be made of the statements to the Police and of police diaries even in the course of the trial, as set out in Sections 162 & 173, Cr.P.C. As regards the bar on the use of any statement made before the Police Officer in the course of an investigation under Chapter XII, whether recorded in police diary or otherwise the Apex Court held in **Khatri's** case thus:-

> "..... this bar is applicable only where such statement is sought to be used 'at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. If the statement made before a police officer in the course of an investigation under Chapter XII is sought, to be used in any proceeding other than an inquiry or trial or even at an inquiry or trial but in respect of an offence other than which was under investigation at the time when such statement was made, the bar of Section 162 would not be attracted."

30. Taking note of the fact that Section 172 Cr.P.C. has been enacted for the benefit of the accused, as pointed out earlier in the decision in **Tahsildar Singh** v. **State of U.P. (AIR 1959 SC 1012),** the Apex Court further held in **Khatri's** case (supra) thus:-

> "But, this protection is, unnecessary in any proceeding other than an inquiry or trial in respect of the offence under investigation and hence the bar created by the section is a limited bar. It has no application, for example in a civil proceeding or in a proceeding under Article 32 or 226 of the Constitution, and a statement made before a police officer in the course of

> investigation can be used as evidence in such proceeding, provided it is otherwise relevant under the Indian Evidence Act. There are a number of decisions of various High Courts which have taken this view and among them may be mentioned the decision of ***Jagan Mohan Reddy, J.*** in **Malakalaya Surya Rao** v. **Janakamma, AIR 1964 Andh Pra 198**. The present proceeding before us is a writ petition under Art.32 of the Constitution filed by the petitioners for enforcing their fundamental rights under Art.21 and it is neither an "inquiry" nor a trial in respect of any offence and hence it is difficult to see how Section 162 can be invoked by the State in the present case."
>
> (underline supplied)

Hence, we are of the view that ordinarily court should not disclose materials contained in police diaries and statements recorded during investigation and should refrain from disclosing them in the order especially when the investigation is in progress. In the decision in **Director CBI** v. **Niyamavedi (1995 Crl.L.J. 2917 (SC))** the Apex Court held that Division Bench of the High Court should have refrained from disclosing in its order, materials contained in the diaries and statements, especially when the investigation in the very case was in progress. It should also have refrained from making any comment on the manner in which investigation was far from complete and any observation which may amount to interference with the investigation should not be made. Furthermore, it was held that ordinarily Courts should refrain from interfering at a premature stage of the investigation

that may derail the investigation and demoralise the investigation. In the case on hand, evidently, the investigation was completed pending the writ petition and Ext.P24 final report also has been laid during its pendency. We have already dealt with the scope and limit of interference in exercise of the power under Article 226 of the Constitution of India. At the same time, we may hasten to add that when the allegation in a writ petition, seeking the prayer to transfer the investigation to a superior investigation agency like CBI, is unfair or defective or designed investigation, courts may have to go through the case diary and in the matter of such consideration may take aid from case diary for determining the nature and bonafides of an investigation, within the permissible scope and limit.

31. Reverting to the decision in **C.P.Muhammed's** case (supra) relied on by the appellants, we have seen that it was a case where the writ court did not call for the case diary and did not afford opportunity to the State Government to file counter affidavit to controvert the allegations in the writ petition. We have already taken note of the fact that in the case on hand, in the writ proceedings, on behalf of the appellants a statement has been filed as against the pleadings in the writ petition and an additional statement has also been

filed responding to the pleadings in the reply affidavit. Thus, it is obvious that there is absolutely no room for the appellants to contend that the learned Single Judge did not provide them opportunity to bring in pleadings to controvert the contentions in the writ petition. The materials on records brought in by both sides would go to show that unlike in **C.P.Mohammed's** case (supra), in the case on hand, there was no denial of opportunity to bring in materials and pleadings. As regards the contention that the learned Single Judge had failed to call for the case diary the facts expatiated hereinbefore, in detail and the materials on record would reveal that the respondents herein/the writ petitioners had produced certified copies of FIR, applications for judicial custody of accused, statements of different witnesses recorded under Section 161, Cr.P.C. and certified copies of seizure mahazars besides the certified copy of the final report in the crime in question. When certified copies of documents, indisputably, forming part of the case diary were produced and available before the writ court and when no dispute regarding the sanctity and veracity of such documents were raised in the additional statement filed on behalf of the appellants, by the Investigating Officer, SIT the appellants herein are not justified in contending that the judgment impugned invites interference on the sole score of failure to call for the case diary. True that the entire case diary

was not before the learned Single Judge. Be that as it may, the fact is that we have called for the case diary in the crime vide order dated 29.10.2019 and now, the entire case diary is before us. Therefore, having called for the police diaries and perusing them carefully and also for the reasons mentioned above we do not think it just or proper to dismiss the writ petition and to set aside the impugned judgment in the light of the decision in **C.P.Mohammed's** case (supra), citing the ground that the learned Single Judge had not called for and perused, the case diary.

32. We will, therefore, proceed with consideration of other contentions. Contentions that the double murder was planned and brutally executed and on the issue of conspiracy hatched on 14.2.2019 and 17.2.2019 no serious investigation was effected, were raised by the writ petitioners besides the contention that regarding the role played by certain persons who were there along with the accused persons, either before or during or after, the incident in question, no serious investigation was conducted. At this juncture we make it clear that we have referred to/will refer to, the features and various materials available on record or seen from the case diary, not for the purpose of determining whether it is a case of murder as it is certainly not for this

court, at this present stage, to examine and come to a conclusion on that question and it is for the court concerned conducting the trial to enter into a conclusion on that question at the appropriate stage. According to the respondents herein/the writ petitioners, serious investigation was spared to shield certain persons who involved in the criminal conspiracy and the investigation was being conducted in the manner dictated by certain CPI(M) leaders who control the Police machinery in the district. In the reply affidavit filed in the writ petition the writ petitioners produced copy of the final report and contended that it virtually, vindicated their apprehension of impartiality. In short, it was their contention that there was no fair investigation and the investigation was faulty and incomplete. It is also their case that in such circumstances, the investigation by SIT is not sufficient to instill confidence and therefore, it requires transfer of investigation to CBI for further investigation or re-investigation. Obviously, such contentions found favour with the learned Single Judge.

33. The appellants would contend that the learned Single Judge had virtually weighed the evidence in such a manner to arrive at a conclusion as to whether the accused could be convicted or acquitted and in troth, entered into findings as if in a full-fledged sessions trial. There is no basis for the findings of the learned Single Judge that the

Investigating Officer filed the charge sheet blindly without conducting a proper and effective investigation to find out the truth and believing the version of the first accused as the gospel truth, it is further contended. It is also their contention that the case diary would reveal that the investigation was conducted properly and the materials collected during the investigation would assume the form of evidence only during the trial and before that stage the learned Single Judge was not justified in arriving at conclusions and findings based on some such materials and also by making a comparison between the statements filed by the Investigating Officer in the writ petition on one hand and the charge sheet and the materials on record on the other hand. It is also the contention of the appellants that without calling for the case diary and without considering the statement and additional statement filed by the Investigating Officer in its correct perspective the learned Single Judge had entered into many definite findings on various aspects as if in a full-fledged trial without any material on record. In the context of these contentions it will not be inappropriate to refer to certain aspects which shall not go in oblivion while considering a writ petition of the nature akin to the one on hand, pertaining to a criminal offence/ offences, filed anterior to the stage of trial in the crime concerned.

34.True that traditionally writ petitions are decided on affidavits filed by the parties and certainly this is really a departure from the ordinary rule procedure applicable to trial of civil suits. But, as relates writ petitions like the one on hand, pertaining to investigation into a criminal offence filed anterior to the stage of trial in the crime concerned the same procedure cannot be adopted in toto. There can be no doubt that commission or otherwise of offences cannot be decided on affidavit evidence. In cases of this nature, even if the entire case diary is called for or some of the materials constituting the case diary are produced they cannot be given the value of substantial evidence. In such writ petitions seeking transfer of investigation to CBI, on the ground of unfair investigation, defective or incomplete investigation etc., no expression of opinion should be made on merits in regard to the culpability or otherwise of any of the accused on appreciating such materials. In the decision in **K.V.Rajendran's** case (supra) Hon'ble Apex Court held that under no circumstances the Court should make any expression or opinion on merits relating to any accusation against any individual. At the same time, on going through the said decision we find nothing which would stand in the way of usage of case diary as an aid in the aforesaid category of writ petitions calling for consideration, based on serious allegations, to find out whether fair

investigation was conducted, whether the investigation conducted instills confidence and whether on that ground or for doing justice to the party or on any other permissible ground the investigation should be transferred to CBI.

35. For appreciating the rival contentions raised it will only be appropriate for us to consider what exactly is the aim and purpose of fair and proper investigation. In the decision in **Vinubhai Haribhai Malaviya's** case (supra) the Apex Court held in paragraph 48 thus:-

> "48. What ultimately is the aim or significance of the expression "fair and proper investigation" in criminal jurisprudence? It has a twin purpose: Firstly, the investigation must be unbiased, honest, just and in accordance with law; secondly, the entire emphasis on a fair investigation has to be to bring out the truth of the case before the court of competent jurisdiction. Once these twin paradigms of fair investigation are satisfied, there will be the least requirement for the court of law to interfere with the investigation, much less quash the same, or transfer it to another agency. Bringing out the truth by fair and investigative means in accordance with law would essentially repel the very basis of an unfair, tainted investigation or cases of false implication. Thus, it is inevitable for a court of law to pass a specific order as to the fate of the investigation, which in its opinion is unfair, tainted and in violation of the settled principles of investigative canons."

The questions what is unfair investigation and what is the right of the victim in the context of Article 21 of the Constitution of India were

considered by this Court in **C.P.Muhammed's** case (supra). It was held that Article 21 of the Constitution takes within its fold not only the enforcement of rights of the accused but also the rights of a victim. The State has a duty to enforce the human rights of a citizen by providing for a fair and impartial investigation against any person accused of the commission of a cognizable offence. Accordingly, when an investigation is found to be unfair or biased, the party concerned would be entitled to avail appropriate remedies as otherwise the unfair investigation would make a mockery of the criminal justice system. In the decision in **V.K.Sasikala** v. **State, Rep. By Superintendent of Police** reported in **2013 Crl.L.J. 177 (SC)** the Apex Court held that the mandatory duty cast on the investigating agency to maintain a case diary of every investigation on a day-to-day basis and the power of the Court under Section 172(2), Cr.P.C. and the plenary power conferred in the High Courts by Article 226 of the Constitution of India are adequate safeguards to ensure the conduct of a fair investigation. In short, in the light of the decisions referred hereinbefore, we are of the considered view that when unfair investigation or defective or incomplete investigation or slackness in investigation is alleged in a writ petition and the Court calls for production of case diary or if the relevant materials which form part of case diary are produced the Court

has a duty to ensure that the investigation done is a fair investigation or that there is no slackness in the ongoing or concluded investigation. Certainly, if only some such materials are produced subject to the relevancy, sufficiency and requirement the court can call for the case dairy. The important aspect to be remembered in all such circumstances is with respect to the scope of its consideration viz., that the case dairy is not a substantive evidence and it can only be used to aid in such proceedings. What is to be eschewed is their consideration as a substantive evidence. Evidence collected during the investigation are subject to proof at the trial, as per the Evidence Act and at any rate, they cannot be taken as substantive evidence and appreciation and assessment of their evidentiary value is an exercise to be undertaken by the jurisdictional court during the trial and not by the writ court. However, the mere fact that the Investigating agency filed final report in the crime concerned by itself cannot be a reason for the writ court to refrain from making a consideration to ensure whether the final report is a product of fair investigation. When once slackness or defect or incompleteness in the investigation is found, to do justice to the parties or to instill confidence in investigation and thus ultimately to ensure fair investigation which is *sine qua non* for a fair trial the Court can mould relief unmindful of the procedural trammels.

36. As noticed earlier, the case of the appellants is that the case on hand rests on circumstantial evidence. There can be no doubt that in the event of there being only circumstantial evidence, those circumstances must be proved to be such as to be conclusive of the guilt of the accused and incapable of explanation on any hypothesis consistent with the innocence of the accused. In the case on hand, the prosecution relies on conspiracy and recovery of incriminating materials as the circumstances available to be proved against the accused. That being so, missing of any link in conspiracy would create a snap in the chain. Scientific evidence provides linkage of the criminal with the crime through clue materials and hence, only if they are collected properly, correctly preserved and sent to laboratory for evaluation and their integrity and authenticity remain unquestionable, they would form strong evidence against the culprit. In **Jamuna Chaudhary** v. **State of Bihar (1974 Cri.LJ 890)** the Apex Court held:-

> "The duty of the investigating officer is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction, but to bring out the real unvarnished truth."

We may hasten to add that for bringing out unvarnished truth the Investigating Officer has to gather the entire materials with a sense of urgency and diligence and it is incumbent on the Investigating agency

not to spare serious investigation on each and every aspect in a case where there occurred culpable homicide. We referred to such aspects solely to stress the indubitable position that a fair trial, fair both to the accused and the victim, depends upon various aspects such as, whether clue materials are collected by the investigating officer, how they were collected and whether the clue materials are collected in accordance with law etc. Therefore, slackness, malafide or any factor that makes the investigation unfair, if displayed in the process of investigation from case diary, it is a matter which could be be taken serious note of.

37. Now, we will consider the contentions of the appellants that the learned Single Judge had picked up instances and reasons to hold that the investigation culminated in Ext.P24 final report did not instill confidence, without calling for and perusing the case diary and that the learned Single Judge had not considered the statement and additional statement filed by the Investigating Officer in their true perspective and entered into many definite findings on various aspects as if in a full-fledged trial with no materials on record. The first question is whether there is any merit in the contention that there were no materials on record before the writ court. While dealing with the applicability of **C.P.Muhammed's** case (supra) we found that the writ petitioners had produced before the writ court some materials

which form part of the case diary including statements of certain witnesses of the complainant included in Ext.P25 Memorandum of evidence, recorded under section 161 Cr.P.C.. We have already taken note of the fact that though traditionally writ petitions are decided on affidavits filed by the parties giving a real departure from the ordinary rule of procedure applicable to trial of civil suits in writ petitions like the one on hand, pertaining to investigation into a criminal offence, filed anterior to the trial in that crime, the same procedure could not be adopted. So also, the position of law is that case diary cannot be used as a substantive evidence. Hence, even if the case diary was called for in writ proceedings it could have been used only to aid in the consideration of the question whether there was slackness in investigation or whether a fair investigation was conducted. Bearing in mind the aforesaid aspects and positions we will consider the question whether based on the materials available before the writ court it traversed beyond the permissible limits while arriving at conclusions or making observations that ultimately persuaded it to pass the impugned judgment. Evidently, the writ court arrived at the conclusion that there was no fair investigation in the case on hand and consequently, set aside Ext.P24 final report and transferred the investigation to CBI to continue with the investigation. We have already observed that in the

circumstances obtained in this case the fact that the case diary was not called for and perused cannot be the sole reason for interfering with the impugned judgment especially taking note of the fact that some materials, which also form part of the case dairy, were produced and available on record and in respect of such materials their sanctity, truthfulness and correctness were not objected to or questioned by the appellants. We may hasten to add that we made such a remark and such expressions solely to stress on the point that the genuineness of those documents were not disputed by the appellants. We shall not be understood to have said that by such action the appellants have conceded to the contentions of the writ petitioners/respondents herein. We also referred to such aspects solely to bring home the fact that those materials, which form part of the case diary, were available before the writ court for perusal and to use them to aid in the proceedings in accordance with law and certainly, not as substantive evidence.

38. In the aforesaid circumstances, we will have to consider the contention of the appellants as to whether the conclusions and findings arrived at by the writ court, based on the materials available on record, are beyond the scope of power exercisable under Article 226 of the Constitution of India certainly, bearing in mind the rival contentions

and the position of law on the subject settled by such decisions. In the impugned judgment the learned Single Judge observed that Messrs Madhu, Hari (CW110), Vikraman, Chandran, Krishnan (CW150) and one Raju had taken part in the meeting convened by the first accused Peethambaran just one hour prior to the incident and still the said persons were not made accused. Does it carry an insinuation that those persons should have been arraigned as accused in the case? Going by the position settled in a writ petition seeking transfer of investigation and also further investigation the High Court would not be justified in making observation against any non-accused regarding their culpability or complicity in any particular crime. However, the fact that the ultimate aim of an investigation in any crime is to ensure that all those who have actually committed the same and those who have any kind of complicity in that crime are correctly booked is to be borne in mind and hence, if a complete and serious investigation was spared against anyone who is suspected to have had some role in connection with a serious crime like murder pointing out the said slackness in investigation cannot be said to be an act outside the jurisdiction. In any such eventuality pointing out the same is necessary to ensure and to assure a fair investigation to the victim and to decide on the necessity to transfer the investigation and/or to order further investigation or

fresh investigation/de novo investigation/re-investigation. In the case of Madhu, Hari, Vikraman, Chandran, Krishnan (CW150) and Raju, the learned Single Judge observed that they had taken part in the meeting convened by the first accused Peethambaran just one hour prior to the incident and still they were not made accused. We have already held that going by the position of law, even if the entire case diary was called for and perused, a definite conclusion or a finding suggesting their participation in the meeting allegedly held one hour prior to the incident as also an observation regarding their non-arraignment as accused in the crime could not have been made in a writ petition filed seeking the relief of transfer of investigation to CBI. When the materials available could not have been taken as substantive evidence how could such conclusion, observation or finding could be made. Taking into account the statement of CW97 that certain accused and four persons travelled in different vehicles in a convoy just before the incident the learned Single Judge has made an observation that those four persons were also not made as accused. We shall not be understood to have held that even if no serious investigation was not made in respect of vital aspects they could not have been taken into account seriously and could not have been dealt with appropriately, in a writ proceeding under Article 226 carrying prayers for transfer of

investigation or for further investigation or for fresh or de novo or re-investigation. Such materials revealed from case diary could have been used only as aid in the proceedings for the purpose of arriving at conclusions as to whether there was fair investigation or whether the investigation instills confidence or there was slackness in investigation etc. and certainly, they could not be used for making any opinion on merits on appreciation, especially regarding their admissibility and relevancy and also culpability or complicity of any accused or anyone who is a non-accused in the crime concerned. In the case on hand, the writ court took exception to the stand taken up by the Investigating Officer in the additional statement regarding the trustworthiness of CW97. We will deal with the same a little later.

39. True that the appellants got a further grievance relating the observation made by the learned Single Judge on the recovery of weapons allegedly used, under Section 27 of the Indian Evidence Act. The sum and substance of the contentions of the appellants is that virtually, the learned Single had entered into findings regarding the evidentiary value of the recovery. Paragraphs 12 to 20 of the impugned judgment would reveal that the contention cannot be said to be absolutely bereft of basis. Those paragraphs would go to show that the learned Single Judge had taken into consideration the factum of

recovery of one sword and four G.I pipes on 20.2.2019 based on the disclosure statement of A1, who allegedly used only one of the four G.I pipes and the fact that the other weapons were not recovered based on the disclosure statement of the other accused concerned who allegedly used them, the non-questioning of CW198 with reference to all the weapons recovered, the statement of CW198, the Forensic Surgeon, who conducted autopsy on the bodies of the deceased persons as also the post-mortem report wherein he stated that none of the injuries found on their bodies could be caused by any of the iron pipes, to hold that non-questioning of CW198 with reference to the weapons recovered is a circumstance indicating that there was no proper and effective investigation in the case. The learned Single Judge observed that at the time of recording the statement of CW198, the Forensic Surgeon who conducted autopsy on the bodies of the deceased, on 23.2.2019 all the seven weapons used in the attack on the victims were available and still he was not questioned with reference to those weapons. In paragraph 14 of the impugned judgment the learned Single Judge extracted the statement of the Investigating Officer made in the additional statement filed on 18.9.2019, thus:-

> "The accused 1, 5 and 8 assaulted Sarath Lal, but blunt objects had not touched his body, but it hit on the motor cycle, which was seen fallen near Sarath Lal. These injuries are scientifically noted by the FSL Office and has detected marks of beating on the motor cycle."

Evidently, the writ court also took note of the statement of CW198 recorded on 23.2.2019, the additional statement recorded on 27.3.2019 about which reference was made in the statement filed by the Investigating Officer on behalf of the appellants dated 10.4.2019, the particular statement made in the additional statement filed by him on 18.9.2019 as extracted above and extracted in paragraph 14 of the impugned judgment and the ante-mortem injuries referred to in the post-mortem certificate to arrive at certain conclusions which evidently led to the finding that the investigation did not instill confidence. The writ court took note of the ante-mortem injuries referred to in the post-mortem certificates to hold that on going through the injuries sustained by the deceased it could only be said that they could not be caused by G.I pipes. A careful scrutiny of the impugned judgment would reveal that taking into account the materials mentioned hereinbefore, the writ court made certain other conclusions and findings as well. Based on the aforesaid statement of CW198, the Forensic Surgeon, the writ court held that no injury could be inflicted on the deceased with the G.I pipes

recovered at the instance of the first accused and that the Investigating Officer had filed Ext.P24 charge sheet in a pre-conceived manner, believing and accepting the version given by the first accused, without even conducting any proper and effective investigation. Further, it was held that if the trial is permitted to be continued on the basis of the above said charge-sheet filed by the Investigating Officer, the chance for conviction would be very bleak, since the charge sheet laid is against the materials collected by the prosecution. It was also held that no recovery was effected at the instance of A2, A5 and A8; that no material was also collected by the prosecution to connect A2, A5 and A8 with the commission of the offence; that without any incriminating material against A2, A5 and A8 charge sheet was filed against them and they are remain inside the jail without taking any effective step to be enlarged on bail. The above circumstances and that accused Nos.1 to 7 were arrested only after their surrender before the Investigating Officer would also affect the credibility of the investigation as per the impugned judgment. It is not discernible as to why A2,A 5 and A8 were made as accused in the crime without having any legal material against them, it is further observed therein.

40. As regards the allegation of patronage of the political party for the planning and execution of the incident leading to the

death of the aforesaid youth it was held that if the twin murder was planned and executed by the first accused Peethambharan alone without the support of CPI(M) Party it is not discernible as to why the local party leaders reached at Velutholi and took the accused to the party office after the incident. Consequently, it was held that it is a circumstance indicating that the contention of the writ petitioners that the twin murder in this case was planned and executed not by the first accused alone, but by the CPi(M) party, is probable. The question is whether the writ court was justified in making such conclusions and findings placing reliance on the materials which were available before it and on appreciating and analyzing them or based on inferences drawn from them, in exercise of the power of the High Court under Article 226 of the Constitution of India ? Most of such findings, as mentioned above, are not of prima facie in nature and virtually, they are conclusive in nature. We have already referred to the decision of the Hon'ble Apex Court in **K.V.Rajendran's** case(supra) wherein it was held:-

> "Under no circumstances, should the court make any expression of its opinion on merit relating to any accusation against any individual. (Vide: Gudalure M.J. Cherian & Ors. v. Union of India & Ors., (1992) 1 SCC 397; R.S. Sodhi v. State of U.P. & Ors., AIR 1994 SC 38; Punjab and Haryana Bar Association, Chandigarh through its Secretary v. State of Punjab & Ors., AIR

> 1994 SC 1023; Vineet Narain & Ors., v. Union of India & Anr., AIR 1996 SC 3386; Union of India & Ors. v. Sushil Kumar Modi & Ors., AIR 1997 SC 314; Disha v. State of Gujarat & Ors., AIR 2011 SC 3168; Rajender Singh Pathania & Ors. v. State (NCT of Delhi) & Ors., (2011) 13 SCC 329; and State of Punjab v. Davinder Pal Singh Bhullar & Ors. etc., AIR 2012 SC 364)."

41. Certain other decisions also assume relevance while considering the aforesaid question. In the decisions in **M.M.T.C.Ltd.** v. **Medch Chemicals and Pharma(P) Ltd (AIR 2002 SC 182)** and also in **State of Madhya Pradesh** v. **Awadh Kishore Gupta (AIR 2004 SC 517)** the Hon'ble Apex Court held that in exercise of its powers under inherent jurisdiction the High Court should not embark upon an enquiry as to whether the evidence in question is reliable or not as that would be the function of the trial Court. In such circumstances, we are of the considered view that it would be wrong for the High Court to enquire into the question of reliability, sufficiency or otherwise of the materials collected during the investigation in writ proceedings under Article 226 of the Constitution like the one on hand, and certainly that would be the function of the trial Court. To fortify our view we will refer to the decision in **State of Bihar and others** v. **P.P.Sharma and others (AIR 1991 SC 1260).** In that case, writ petitions were filed in respect of criminal proceedings at a stage anterior to the trial Court's decision on taking cognizance of the offence on the basis of police

report submitted to it. The High Court appreciated the documents produced before it in the writ proceedings and drew inferences based on them and ultimately, quashed the proceedings against the writ petitioners/the respondents therein upon coming to the conclusion that the criminal proceedings against them were not justified. Paragraph 20 therein is relevant in the context, wherein the Apex Court held thus:-

> "20. We do not wish to express any opinion on the rival contentions of the parties based on their respective appreciation of material on the record. We have quoted "the annexures", the inferences drawn by the High Court and the, factual assessment of Mr. Sibal, only to show that the High Court fell into grave error in appreciating the documents produced by the respondents along with the writ petitions and further delving into disputed questions of facts in its jurisdiction under Article 226/227 of the Constitution of India."

Furthermore, it was held in paragraph 68 therein thus:-

> "The commission of offence cannot be decided on affidavit evidence. The High Court has taken short course "in annihilating the still born prosecution" by going into the merits on the plea of proof of prima facie case and adverted to those facts and gave findings on merits. Grossest error of law has been committed by the High Court in making pre-trial of a criminal case in exercising its extraordinary jurisdiction under Article 226."

In the said decision itself the Apex Court made it clear that it could not be held that under no circumstances a writ petition should be entertained in respect of criminal proceedings at a stage anterior to the

trial Court's decision on taking cognizance of the offence on the basis of police report submitted before it. The Apex Court elucidated certain circumstances, where even quashment of charge sheet or investigation itself is permissible. In the case on hand also the writ court appreciated documents produced by the writ petitioners on affidavits and also drew inferences based on them and on their basis set aside Ext.P24 charge sheet. Some of the aforesaid decisions were rendered in relation to the scope of power under Section 482 of the Code of Criminal Procedure. However, the dictum laid down in the said decisions will apply with equal force in writ proceedings under Article 226 of the Constitution of India filed in respect of criminal proceedings like the one on hand, as well. In the light of those decisions and the decisions in **P.P.Sharma's** case as also **K.V.Rajendran's** case (sura), in cases like the instant one, the case diary and other materials admissible in law to be looked into, can be looked into only for the purpose of considering the question whether the investigation done is sufficient to instill confidence or whether it was incomplete or whether there was fair investigation etc., and certainly, not for the purpose of making any opinion on the sufficiency or otherwise or reliability of the evidence collected or on the culpability or otherwise of any accused as that would be the function of the trial court. So also, such materials cannot be relied on to arrive at

any finding on the culpability or complicity of any non-accused persons as well. We have already found that materials collected during investigation are not substantive evidence and they are subject to proof as per Evidence Act and relevancy. In the said circumstances, we have no hesitation to hold that the questions of effect of recovery of weapons allegedly used for committing the offence, whether the said recovered weapons could cause the ante-mortem injuries noted on the bodies of the deceased persons, culpability or otherwise of the accused persons in the offences alleged and whether any other person/persons got culpability or complicity are not matters upon which the writ Court should have arrived at such conclusions and findings based on the materials then available before the court or by drawing inferences based on them. It is also relevant to note that such conclusions and findings were not permissible to be made in writ proceedings of this nature filed under Article 226 of the Constitution of India, even after calling and perusing the entire case diary. The same should be the position with respect to the finding that the circumstances indicating that the contention of the writ petitioners that the twin murder was planned and executed not by the first accused alone, but by the CPM party, is probable. The said finding was evidently made based on

inferences drawn from the materials then available before the writ court.

42. True that in **Khatri's** case (supra) the Hon'ble Apex Court held that the bar under Section 162 Cr.P.C. cannot have any application in a civil proceeding or in a proceeding under Articles 32 and 226 of the Constitution of India and a statement made before a police officer in the course of investigation can be used as evidence in such proceedings provided it is otherwise relevant under the Indian Evidence Act. No provision under the Evidence Act was brought to our notice which enables the materials available before the writ court to be used as evidence. Hence, the position is that the statements recorded under this section are not substantive evidence and they cannot be used for any purpose other than to contradict a witness in the manner prescribed in the proviso to section 162(1), Cr.P.C. during the trial. In short, such conclusions and findings on the aforesaid matters made by the writ court based on such statements and inferences drawn based on materials before it were impermissible to be made in writ proceedings under Article 226 of the Constitution of India and therefore, they cannot be sustained. Hence, the aforesaid conclusions and findings, mentioned hereinbefore specifically, which are of conclusive nature are set aside. We may hasten to add that in view of the reasons and decisions

mentioned hereinbefore, they could have been used only as aid to arrive at a finding as to whether investigation was fair, whether it instills confidence etc. and not for making conclusions and findings which are now set aside.

43. Now, we will consider the question whether the setting aside of the final report in Crime No.75/CB/KNR&KSD/2019 of Crime Branch, Kasaragod (Crime No.81/2019 of Bekal Police Station), by the writ court invites interference ? Quashment/setting aside of charge-sheet in a crime filed on completion of investigation can be done only in very exceptional circumstances. As noticed earlier, the Apex Court in **P.P.Sharma's** case (supra) held that quashing the charge sheet even before cognizance is taken by a criminal court amounts to 'killing a still born child'. We do not find any case for respondent Nos.1 to 4/the writ petitioners that no offence has been made out in Ext.P24 charge sheet filed in the above mentioned crime. As noticed earlier, altogether there are 14 accused persons in the aforesaid crime. Since the evidence collected during investigation are subject to proof and relevancy at the trial, in cases like the one on hand, on perusing the case diary if it is found that there are some materials in the case diary which demonstrate that a prima facie offence is made out on the face value of those materials, against any of the accused, if not against all of them,

the charge sheet does not invite quashment. Certainly, in such circumstances, it is for the competent criminal court to take cognizance on the police report and to proceed further in accordance with law. In the case on hand, we have already found that the learned Single Judge had appreciated the materials on record including the statements recorded under Section 161, Cr.P.C. of the doctor who conducted autopsy on the bodies of the deceased and also drawn inferences based on them to arrive at certain conclusions and findings. In fact, on such appreciation the writ court held that no material was collected by the prosecution to connect A2, A5 and A8 with the commission of the offence. So also, drawing inference from the materials then available before it the writ court also held that circumstances indicate that the contention of the petitioners that the twin murder in this case was planned and executed not by the first accused but by the CPM Party, is probable. We have already set aside those findings. The fact is that even after adopting such an approach the learned Single Judge had not made any similar findings against the other accused. On our careful perusal of the case diary and upon considering the rival contentions we are of the considered view that it cannot be said that no offence whatsoever was made out prima facie, in the charge sheet and hence, at the stage when the police report under Section 173, Cr.P.C. was

forwarded to the Court after completion of the investigation exercise of extra ordinary jurisdiction under Article 226 of the Constitution to set aside the said charge sheet was not warranted at all.

44. When a report under Section 173(2), Cr.P.C. is filed on completion of investigation where some substance in allegations and materials exist to substantiate the culpability or complicity of the accused, the case should be examined in its full conspectus at the trial and proceedings should not be quashed, is the position being followed in the matter of exercise of power under Section 482, Cr.P.C. We do not find any reason to deviate from the position of law even while exercising the jurisdiction under Article 226 of the Constitution of India. True that in the case on hand as per the impugned judgment the entire proceedings were not set aside and in fact, it could not be. Only the charge sheet was set aside and the investigation was transferred to CBI and CBI has been directed to continue with the investigation. Therefore, the proceedings would continue. However, we referred to the said position only to indicate that when a report under Section 173(2) Cr.P.C. is filed after completing the investigation, even if a further investigation is to be ordered, there is no need to quash the said report. If no case is made out to quash the charge sheet and to order for fresh investigation or de novo investigation a writ court is not

justified in setting aside the charge sheet on appreciation of materials produced by the writ petitioners and on drawing inferences based on them. Upon perusing the case diary we are of the considered view that in view of the materials available thereunder Ext.P24 does not require to be set aside. In short, the impugned judgment to the extent it set aside the final report in Crime No.75/CB/KNR&KSD/2019 of Crime Branch, Kasaragod (Crime No.81/2019 of Bekal Police Station) invites appellate interference. Consequently, we set aside the impugned judgment to the extent it set aside the charge sheet filed by the SIT in the aforesaid crime. We may hasten to add that our finding that Ext.P24 final report was not to be set aside cannot be taken as an affirmation that the investigation was flawless and it was fair to the core.

45. The next question is whether consequent to the setting aside of the aforesaid conclusions and findings of the writ court and also setting aside of the impugned judgment to the extent it set aside the charge sheet laid in the aforesaid crime the writ appeal is liable to be allowed in toto and the writ petition is liable to be dismissed. The answer is bound to be in the negative for various reasons. It is a case where two youth, aged 21 and 24 years lost their lives in a brutal attack and their parents were the writ petitioners therein/respondents

herein. In **Vinubhai Haribhai Malaviya's** case (supra) the Apex Court held that the ultimate aim of all investigation is to ensure that those who have actually committed a crime are correctly booked and those who have not are not arraigned to stand the trial and it is the minimal procedural requirement which is the fundamental requirement of Article 21 of the Constitution of India. A fair investigation is also committed to preservation of fundamental right of an accused as also that of a victim of a crime under Article 21 of the Constitution of India. In this case, the materials on record available before the writ court, for the reasons mentioned earlier, could have been used to aid in finding whether there was fair investigation from the point of the victims and if they were not sufficient case diary could have been called for. But when the fact is that the writ court failed to call for the case diary and at the same time went beyond the scope of power by arriving at conclusions and findings relying on materials available before it, taking note of the fundamental right of the victims under Article 21 of the Constitution of India and the Appellate Court's power we are of the view that instead of putting the writ petitioners to suffer for the same, the Appellate Court is having a duty to consider the materials on record in accordance with the law, based also on the principle of '*actus curiae neminem gravabit' as well,* especially after calling for the case diary. There can be no doubt with

respect to the position that an appellate Court could pass an order or judgment which ought to have been passed by the court of first instance. Since the writ court did not call for the case diary and at the same time we have called and perused the case diary the consideration of this appeal is bound to cover the question whether there was fair investigation by looking into the case diary, in accordance with law, for the reason that it is a fundamental right available to the victim, as well, under Article 21 of the Constitution of India and that respondent Nos.1 to 4/the writ petitioners have specifically raised various instances to point out slackness or incompleteness in the investigation which culminated in Ext.P24 first report, for seeking transfer of investigation to CBI and for further investigation. It is to be noted that writ court also ultimately reached into a finding that there was no fair investigation in the case on hand.

46. We have already held that a fair investigation is essential for a fair trial and therefore, bearing in mind the decisions referred (supra) we will consider the question whether a fair investigation had actually, preceded Ext.P24 or not. If slackness or incompleteness had infected the investigation and it is capable of creating a reasonable apprehension about justice becoming a victim it could be said that the investigation is not a fair investigation. In that

pursuit we cannot lose sight of the position that the fundamental requirement of Article 21 of the Constitution of India, as per the decision of the Hon'ble Apex Court in **Vinubhai Haribhai Malaviya's case** (supra) is to ensure that all those who have actually committed a crime are correctly booked and those who have not are not arraigned to stand trial. It was held thus:-

> "It is clear that a fair trial must kick off only after an investigation is itself fair and just. The ultimate aim of all investigation and inquiry, whether by the police or by the Magistrate, is to ensure that those who have actually committed a crime are correctly booked, and those who have not are not arraigned to stand trial. That this is the minimal procedural requirement that is the fundamental requirement of Article 21 of the Constitution of India cannot be doubted. It is the hovering omnipresence of Article 21 over the CrPC that must needs inform the interpretation of all the provisions of the CrPC, so as to ensure that Article 21 is followed both in letter and in spirit."
>
> (Underline supplied)

47. Paragraphs 83 and 86 of the decision in **Pooja Pal** v. **Union of India [(2016) 3 SCC 135)** were quoted with approval in **Vinubhai Haribhai Malaviya's** case and they read thus:-

> "83. A "speedy trial", albeit the essence of the fundamental right to life entrenched in the Article 21 of the Constitution of India has a companion in concept in "fair trial", both being in alienable constituents of an adjudicative process, to culminate in a judicial decision by a court of law as the final arbiter. There is indeed a qualitative difference between right to speedy trial and

fair trial so much so that denial of the former by itself would not be prejudicial to the accused, when pitted against the imperative of fair trial. As fundamentally, justice not only has to be done but also must appear to have been done, the residuary jurisdiction of a court to direct further investigation or reinvestigation by any impartial agency, probe by the state police notwithstanding, has to be essentially invoked if the statutory agency already in-charge of the investigation appears to have been ineffective or is presumed or inferred to be not being able to discharge its functions fairly, meaningfully and fructuously. As the cause of justice has to reign supreme, a court of law cannot reduce itself to be a resigned and a helpless spectator and with the foreseen consequences apparently unjust, in the face of a faulty investigation, meekly complete the formalities to record a foregone conclusion. Justice then would become a casualty. Though a court's satisfaction of want of proper, fair, impartial and effective investigation eroding its credence and reliability is the precondition for a direction for further investigation or reinvestigation, submission of the charge-sheet ipso facto or the pendency of the trial can by no means be a prohibitive impediment. The contextual facts and the attendant circumstances have to be singularly evaluated and analyzed to decide the needfulness of further investigation or reinvestigation to unravel the truth and mete out justice to the parties. The prime concern and the endeavour of the court of law is to secure justice on the basis of true facts which ought to be unearthed through a committed, resolved and a competent investigating agency.

.....

86. A trial encompasses investigation, inquiry, trial, appeal and retrial i.e. the entire range of scrutiny including crime detection and adjudication on the basis thereof. Jurisprudentially, the guarantee under Article 21 embraces both the life and liberty of the accused as well as interest of the victim, his near and dear ones as well as of the community at large and therefore cannot

> be alienated from each other with levity. It is judicially acknowledged that fair trial includes fair investigation as envisaged by Articles 20 and 21 of the Constitution of India. Though, well demarcated contours of crime detection and adjudication do exist, if the investigation is neither effective nor purposeful nor objective nor fair, it would be the solemn obligation of the courts, if considered necessary, to order further investigation or reinvestigation as the case may be, to discover the truth so as to prevent miscarriage of the justice. No inflexible guidelines or hard and fast rules as such can be prescribed by way of uniform and universal invocation and the decision is to be conditioned to the attendant facts and circumstances, motivated dominantly by the predication of advancement of the cause of justice."
>
> (underline supplied)

In **Nirmal Singh Kahlon** v. **State of Punjab** **[(2009) 1 SCC 441]** the Apex Court held:-

> "An accused is entitled to a fair investigation. Fair investigation and fair trial are con committed to preservation of fundamental right of an accused under Article 21 of the Constitution of India. But the State has a large obligation i.e. to maintain law and order, public order and preservation of peace and harmony in the society. A victim of a crime, thus, is equally entitled to a fair investigation."
>
> (underline supplied)

48. We are not oblivious of the position that a completely flawless investigation is nearly impracticable and very difficult to happen. But, while dealing with a case like the one on hand and the court has a duty to see that if at all the investigation agency has erred the err is on the right side and there is nothing vital, which would make

the investigation short of fair investigation, infected the investigation. To state it pithily the investigating agency is duty bound to make an investigation that leaves no virus of reasonable doubt. This is because of the position which so plain as a pikestaff that both the accused as also the victim are entitled to fair investigation and besides fair trial, fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India and further that a fair trial is not possible without a fair investigation.

49. The decisions referred supra would reveal that a complete and serious investigation could not be spared against anyone who is suspected to have had some role in connection with a serious crime, alleging commission of murder to ensure and to assure fair investigation to the victim. This is because result of such an action/omission would make 'justice' the victim. When regarding the complicity of someone if some of the persons whose statements were recorded under Section 161, Cr.P.C. spoke, how can the mere denial of any such allegation or accusation by that person against whom it was spoken, be taken as a gospel truth regarding his non-involvement. In such circumstances, the question is whether serious investigation in respect of the culpability or complicity of such persons in the crime is required, especially when its commission had caused loss of lives and

whether it was conducted ? So also when someone from the array of accused, in a confessional statement, spoke about knowledge of or participation of, someone else in the crime and that is probabilised by the statements of some of the persons whose statements were recorded during investigation how can serious investigation in regard to their role in the crime of this nature, be spared ?

50. We have already held that persons in respect of whom the learned Single judge made the observation that 'they were not made accused' the said observation should not be taken as a direct or indirect indication regarding their culpability or complicity in the crime, even in case fresh investigation or further investigation is to take place. Having clarified the position thus, we will proceed to consider the situation that compelled the learned Single Judge to make such an observation solely for the purpose of ascertaining as to whether such situations are available from the materials in the case diary and they would disclose slackness or incompleteness in investigation or lack of serious investigation. The question is whether anyone included in the list of witnesses whose statement has been recorded under Section 161 Cr.P.C spoke about the complicity of those persons in any manner, in the incident and if so, whether serious investigation was made in the matter. True that even if anyone had spoken about their complicity in

the matter they would not form substantive evidence against them and they could only aid the Court in the proceedings to find out whether there was a situation requiring transfer of investigation and/or fresh investigation or further investigation. As noticed earlier, the aforesaid observation was made by the learned Single Judge in respect of Messrs. Madhu, Hari (CW110), Vikraman, Chandran, Krishnan (CW150) and Raju. Along with the reply affidavit filed by the writ petitioners the confession extract of 9th accused Sri.Murali has been produced and the said extract is there in the case diary, as well. Going by the same, on the date of occurrence from the bus stop and in the office of Saji as also in the evening of that day, a discussion was made to do away with Joshy and Kripesh and Sri.Madhu, the younger brother of Sri.Sastha Gangadharan and Sri.Hari knew about the same. The statement of CW150 Krishnan also assumes relevance in the context as he also spoke regarding the attendance of the aforesaid Madhu and Hari in the said meeting. CW146 Reji Varghese @ Reji also spoke about the presence of Madhu in the said meeting. A scanning of the 161 statements of certain other complainant witnesses would also reveal that they also mentioned about these persons. We shall not be understood to have said anything about the culpability or complicity of those persons in the crime considering such statements as substantive

evidence and obviously, it is impermissible. We only referred to those materials to make use of them as aid in this proceedings, to the extent mentioned hereinbefore and in view of the decision in **Vinubhai Haribhai Malaviya's case** (supra) holding that the ultimate aim of all investigation is to ensure that those who have actually committed a crime are correctly booked, and those who have not are not arraigned to stand trial and that is the minimal procedural requirement which is the fundamental requirement of Article 21 of the Constitution of India. The case diary did not reveal any serious investigation in the aforesaid matters and taking into account the fact that prosecution depends on circumstantial evidence only to establish its case such failures may ultimately result in miscarriage of justice.

51. There is yet another aspect which assumes relevance in the context of consideration of the aforesaid questions. A list of witnesses of the complainant and the points to be proved by each of them are produced along with the charge sheet under the caption 'Memorandum of Evidence'. It is produced as Ext.P25 in the writ petition. It evidently includes the name of one Kunjiraman as CW97. After citing him as CW97 to establish that he had seen at about 7 O' clock in the evening on 17.2.2019 three cars and one jeep going towards Thannithodu region in convoy in great speed in the additional

statement dated 18.9.2019 filed by the Investigating Officer of SIT, on behalf of the appellants/respondents 1 to 3 in the writ petition about his trustworthiness it is stated thus:-

> ".....The CW97 has seen these vehicles. But the other vehicle seen by him is not at the same time, but may be before or after it. The allegations raised by the petitioners were verified by investigation and that the statement by CW97 Kunhiraman is not fully believable."

When the Investigating Officer himself upon recording his statement thought it fit to rely on his statement to establish certain crucial aspects, as mentioned above, in regard to the commission of the offence and cited him as CW97 and produced such a list before the Court how can he take up a stand that CW97 could not be fully believed. True that, normally, it is for the prosecution to decide who all are to be examined to establish its case during the trial. At the same time, having included him in the list of witnesses as CW97 the Investigating Officer is not justified in taking such a stand. Trustworthiness of a witness is a matter for the Court to decide, if that witness is examined before the Court.

52. Yet another aspect in fact, more crucial, is the failure to investigate seriously on the possibility of obtaining ocular evidence. We have earlier, held that the case diary should contain observations or

instructions of Supervising Officer, if any, as well. In this regard it is relevant to note that there was specific direction of the Supervising Officer appointed in the case on hand to investigate whether there were eye witnesses to the incident. The chance of spotting someone who had actually witnessed the occurrence in a serious investigation of a case of this nature in view of the materials on record cannot be ruled out and that is why such a specific direction was issued. In this context, it is to be noted, though the incident occurred on a Sunday, it took place at about 7.45 p.m. and the materials on record would suggest that prior to the incident there was attendance of people in the locality. Same was the case immediately after the same. Materials also suggest availability of some persons in the locality during the occurrence as well. Though the materials in the case diary are not substantive evidence, we can take aid from the case diary, including from the statements recorded under Section 161, Cr.P.C. and they would further reveal that the Supervising Officer has also instructed the Investigating Officer to check the CCTV footage available in the locality essentially to ascertain that fact and with a view to obtain ocular evidence in case of identifying any such eye witness. In that regard, it is to be noted that in the 161 statement CW93 stated that in December, 2018 in a meeting of the Vyapari Vyavasai Organization a decision was taken to install CCTV

cameras in shops in the area and in pursuance thereof in his shop a CCTV Camera was fitted. CW108 stated that it was he who installed CCTV in the shop room of CW93. We took note of those aspects only to look into the question whether there occurred serious investigation on such aspects. It is not discernible as to what exactly was the serious investigation conducted in this regard in tune with the direction of the Supervisory Officer. We are not saying this only with respect to CCTV which was fixed in the shop of CW93 and the question is whether someone else was also installed CCTV in pursuance of the decision of the Vyapari Vyavasayi Organization, in the locality and whether any crucial footage was available in any one of them? If so, whether it could be retrieved? It is also relevant to note that some of the complainant's witnesses viz., Sri.Sudhakaran and Nirmala in their statements under Section 161, Cr.P.C. appear to have stated that they had seen persons running from the place of occurrence. When the said witnesses were proceeding to the place of occurrence if they stated to have seen persons running from the place of occurrence it would suggest presence of persons at the time of occurrence. At any rate, the said circumstances require serious in depth investigation. The Supervisory Officer instructed to take further statements from such persons to explore the possibility of obtaining eye witnesses to the incident. What

was the investigation conducted in that regard despite such specific instructions and in what manner they were questioned again? If serious investigation was done on the aforesaid aspects the possibility of the case, now based on circumstantial evidence turning to a case of direct evidence, cannot be ruled out.

53. One suspicious circumstance which appears to have escaped serious investigation and which may also form a link in the chain of circumstances, if successfully investigated, is the role, if any, of CW93. The material available in the case diary is to the effect that A1 had contacted him over phone in the evening of the date of occurrence, of course prior to the occurrence, and enquired whether there was traffic block in the locality. Going by materials, when heavy traffic was eased out CW93 contacted A1 over phone and appraised him of the said situation. Certain witnesses cited by the prosecution such as CW29, CW30 and CW38 and CW43 gave some statements against CW93 as also against CW84. Here also, it is made clear that none of the said circumstances can be taken as evidence against him by this Court and we referred to such aspects to take note of the fact that such dubious circumstances were not seen seriously investigated. This failure may create a missing link in the chain of the circumstances. It is to be noted that it is a case where two youngsters in their twenties lost their lives in

a brutal attack. In such circumstances, we are of the firm view that to avoid justice becoming a victim the aforesaid aspects, require to be investigated seriously. We have pointed out such instances only to hold that those circumstances made the investigation one suffering from slackness and incompleteness. To that extent it can also be said that there is lack of fairness. In short, the circumstances, are such that the investigation culminated in Ext.P24 may result in miscarriage of justice, if such aspects were left uninvestigated.

54. In view of our conclusions and findings in pre-paragraphs we are inclined to think that solely because we interfered with the impugned judgment to the extent it set aside Ext.P24 charge-sheet it shall not result in upturning the judgment in toto. The reasoning, conclusions and findings in pre-paragraphs 49 to 53, in the light of various decisions referred (supra), should inevitably invite further consequential orders in the matter of investigation so as to have ultimately a fair trial. At the same time, in view of our interference with the impugned judgment to the aforesaid extent there is absolutely no scope for ordering fresh investigation or de novo investigation or re-investigation. In the contextual situation it is apposite to refer to the decision of the Hon'ble Apex Court in **Vinay Tyagi's** case (supra). In that case the Apex Court held thus:-

"....Investigation can be of the following kinds:-

(i) Initial Investigation.
(ii) Further Investigation.
(iii) Fresh or de novo or re-investigation

14. The initial investigation is the one which the empowered police officer shall conduct in furtherance to registration of an FIR. Such investigation itself can lead to filing of a final report under S.173(2) of the Code and shall take within its ambit the investigation which the empowered officer shall conduct in furtherance of an order for investigation passed by the Court of competent jurisdiction in terms of S.156(3) of the Code.

15. 'Further investigation' is where the Investigating Officer obtains further oral or documentary evidence after the final report has been filed before the Court in terms of S.173(8). This power is vested with the Executive. It is the continuation of a previous investigation and, therefore, is understood and described as a 'further investigation'. Scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the Court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as 'supplementary report'. 'Supplementary report' would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a

'reinvestigation', 'fresh' or 'de novo' investigation.

However, in the case of a 'fresh investigation', 'reinvestigation' or ''de novo investigation' there has to be a definite order of the Court. The order of the Court unambiguously should state as to whether the previous investigation, for reasons to be recorded, is incapable of being acted upon. Neither the Investigating agency nor the Magistrate has any power to order or conduct 'fresh investigation'. This is primarily for the reason that it would be opposed to the scheme of the Code. It is essential that even an order of 'fresh'/'de novo' investigation passed by the higher judiciary should always be coupled with a specific direction as to the fate of the investigation already conducted. The cases where such direction can be issued are few and far between. This is based upon a fundamental principle of our criminal jurisprudence which is that it is the right of a suspect or an accused to have a just and fair investigation and trial. This principle flows from the constitutional mandate contained in Art.21 and Art.22 of the Constitution of India. Where the investigation ex facie is unfair, tainted, mala fide and smacks of foul play, the Courts would set aside such an investigation and direct fresh or de novo investigation and, if necessary, even by another independent investigating agency. As already noticed, this is a power of wide plenitude and, therefore, has to be exercised sparingly. The principle of rarest of rare cases would squarely apply to such cases. Unless the unfairness of the investigation is such that it pricks the judicial conscience of the Court, the Court should be reluctant to interfere in such matters to the extent of quashing an investigation and directing a 'fresh investigation'."

(underline supplied)

55. Thus, it is evident that after the initial investigation a final report under Section 173(2), Cr.P.C. is filed and once it is found

that the final report is not liable to be interfered with in a proceedings by a writ court, still to ensure a fair trial based on a fair investigation it would be open to the Court to order further investigation in a case where it is warranting. Further investigation certainly is continuation of the earlier investigation and not a fresh investigation or a re-investigation or a de novo investigation, to be started ab initio wiping out the earlier investigation. Fresh investigation, re-investigation or de novo investigation, going by the decision in **Vinay Tyagi's** case (supra) could be ordered only if the unfairness of the investigation is such that it pricks the judicial conscience of the Court. Since we have interfered with the impugned judgment to the extent it set aside the final report and in view of our reasoning, conclusions and findings made in pre-paragraphs 49 to 53 what is required in the case on hand is 'further investigation'. From the aforesaid paragraphs of the decision in **Vinay Tyagi's** case (supra) it is evident that the scope of such investigation is restricted to the discovery of further oral and documentary evidence and its purpose is to bring true facts before the Court even if they are discovered at a subsequent stage to the initial investigation. Though we have picked out certain instances warranting further investigation, taking note of the fact that investigation is a province of police we think it only appropriate to make it clear that such instances were culled out

with aid of materials in the case diary only to bring home the fact that there was slackness in the investigation and without a further investigation if trial is conducted it might in all probability result in miscarriage of justice. In such circumstances, the fact that we have picked out certain instances shall not be taken as the areas where further investigation could be conducted and certainly, it will be open to conduct further investigation in accordance with law without being tied out to the aforesaid specific instances. Though in view of our revival of Ext.P24 final report which is now available for the Court concerned to take cognizance of we are of the view that it is only proper, in the circumstances obtained in this case, not to proceed with taking cognizance on Ext.P24 report and it is only appropriate to wait for the supplementary report to be submitted in terms of the provisions under Section 173(8), Cr.P.C. pursuant to further investigation. We have also made it very clear that the conclusions and findings as also observations made in pre-paragraphs shall not be taken as findings regarding the culpability or complicity of persons whose names were referred to therein. We refer to such aspects, as mentioned earlier, solely for the purpose of considering the question whether it is inevitable to conduct further investigation.

56. For ordering further investigation it is not necessary to issue notice to persons who may fall within the category of suspects in view of the decision of the Hon'ble Apex Court in **Bharathi Taman** v. **Union of India and Others** reported in **2014 Crl.L.J. 156 (SC)**. In that decision, the Apex Court held a suspect could not be heard to contend that principle of *audi alteram partem* should be followed at the investigation stage. This is because an Investigating Officer is not deciding any matter expect collecting the materials for ascertaining whether prima facie case is made out or not. A full-fledged enquiry in case of the filing of a charge-sheet under Section 173(2) Cr.P.C. would follow the process of trial before competent court.

57. The question now to be considered is whether 'further investigation' should be entrusted to the same investigating agency which investigated and filed a final report under Section 173(2), Cr.P.C. The answer is bound to be in the negative. In **Sudipta Lenka's** case (supra) the said question was considered. It was held therein:-

> "It cannot be said that after the charge-sheet is submitted, the court is not empowered, in an appropriate case, to hand over the investigation to an independent agency like CBI."

In **Dharam Pal** v. **State of Haryana and Others** reported in **AIR 2016 SC 618**, in the matter of handing over the investigation to CBI

the Hon'ble Apex Court held thus:-

> "20. Be it noted here that the constitutional courts can direct for further investigation or investigation by some other investigating agency. The purpose is, there has to be a fair investigation and a fair trial. The fair trial may be quite difficult unless there is a fair investigation. We are absolutely conscious that direction for further investigation by another agency has to be very sparingly issued but the facts depicted in this case compel us to exercise the said power. We are disposed to think that purpose of justice commands that the cause of the victim, the husband of the deceased, deserves to be answered so that miscarriage of justice is avoided. Therefore, in this case the stage of the case cannot be the governing factor.
>
> 21. We may further elucidate. The power to order fresh, de-novo or re- investigation being vested with the Constitutional Courts, the commencement of a trial and examination of some witnesses cannot be an absolute impediment for exercising the said constitutional power which is meant to ensure a fair and just investigation. It can never be forgotten that as the great ocean has only one test, the test of salt, so does justice has one flavour, the flavour of answering to the distress of the people without any discrimination. We may hasten to add that the democratic setup has the potentiality of ruination if a citizen feels, the truth uttered by a poor man is seldom listened to. Not for nothing it has been said that Sun rises and Sun sets, light and darkness, winter and spring come and go, even the course of time is playful but truth remains and sparkles when justice is done. It is the bounden duty of a Court of law to uphold the truth and truth means absence of deceit, absence of fraud and in a criminal investigation a real and fair investigation, not an investigation that reveals itself as a sham one. It is not acceptable. It has to be kept uppermost in mind that impartial and truthful

> investigation is imperative. If there is indentation or concavity in the investigation, can the 'faith' in investigation be regarded as the gospel truth? Will it have the sanctity or the purity of a genuine investigation? If a grave suspicion arises with regard to the investigation, should a Constitutional Court close its hands and accept the proposition that as the trial has commenced, the matter is beyond it? That is the "tour de force" of the prosecution and if we allow ourselves to say so it has become "'id'ee fixe" but in our view the imperium of the Constitutional Courts cannot be stifled or smothered by bon mot or polemic. Of course, the suspicion must have some sort of base and foundation and not a figment of one's wild imagination. One may think an impartial investigation would be a nostrum but not doing so would be like playing possum. As has been stated earlier facts are self- evident and the grieved protagonist, a person belonging to the lower strata. He should not harbor the feeling that he is an "orphan under law".
>
> (underline supplied)

In the decision in **Sivakumar.E.** v. **Union of india and others (AIR 2018 SC 2486)** the Apex Court, in agreement with the decision in **Dharam Pal's** case held that a constitutional Court could direct investigation by CBI or some other Investigating Agency for the purpose of ensuring that there is fair investigation and fair trial.

58. In the case on hand, originally, crime was registered by the local police, on the date of occurrence itself. On the next day, viz., on 18.2.2019, the District Police Chief, Kasaragod constituted a Special Investigation Team SIT, for investigation. On 21.2.2019 the case was transferred to Crime Branch and it was re-registered as Crime

No.75/CB/KNR&KSD/2019 of Crime Branch, Kasaragod. The SIT was subsequently, reconstituted with 21 members. The Supervisory Officer's instructions mentioned hereinbefore, were not carried out imbibing the true spirit and purpose. Whatever that be, the fact that the investigation conducted does not instill full confidence and the slackness and incompleteness in investigation or lack of serious investigation had occurred in respect of some vital aspects, at least some of which may result in miscarriage of justice. This has happened in a case investigated by a comparatively big SIT. As noticed hereinbefore, the learned counsel for CBI submitted before this Court that CBI is prepared to take over the investigation considering the nature of the case if this Court orders for that and further that pursuant to the impugned judgment the crime was re-registered by the CBI and thereupon application was made before the Court concerned for certified copies of the documents and the case diary in the crime in question is yet to be transferred to CBI.

59. Taking note of the serious slackness and incompleteness that occurred in the matter of investigation which if investigated seriously, some times would have turned this case now rests on circumstantial evidence, to a case of a direct evidence tends us to think that to instill confidence and also to do justice to the parties it is only

proper in the said circumstances to transfer the investigation to CBI. That has already been ordered by the writ Court. Hence, it is upheld. As already noticed, after the passing of the impugned judgment the CBI has already re-registered the crime. Hence, we will have to permit CBI to conduct further investigation based on re-registration of the aforesaid case already done by them pursuant to the impugned judgment. In the decision in **Hasanbhai Valibhai Qureshi** v. **State of Gujarat and others** reported in **AIR 2004 SC 2078** the Hon'ble Apex Court held that further investigation could not be ruled out merely because it may delay the trial. The Apex Court held:-

> "In view of the aforesaid position in law if there is necessity for further investigation the same can certainly be done as prescribed by law. The mere fact that there may be further delay in concluding the trial should not stand on the way of further investigation if that would help the Court in arriving at the truth and do real and substantial as well as effective justice."

In the circumstances, consequent to the revival of the final report by setting aside the impugned judgment to the extent it set aside the final report laid in Crime No.75/CB/KNR&KSD/2019 of Crime Branch, Kasaragod (Crime No.81 of 2019 of Bekal Police Station) and upholding of the transfer of the investigation to CBI we direct the CBI to conduct 'further investigation' based on the re-registration of the case and file supplementary report in terms of the provisions under Section

173(8), Cr.P.C. This shall be done as expeditiously as possible, taking note of the fact that already a report under Section 173(2), Cr.P.C. has been filed by SIT of Crime Branch, Kasaragod. Though we brought back life to the said report and held that cognizance has to be taken thereon we are of the view that, in view of the nature of the case, the court must wait till the receipt of the 'supplementary report' of the CBI to be submitted after 'further investigation'. Upon receipt of the supplementary report the trial court has to consider both the reports, idest, the report filed by the SIT of Crime Branch, Kasaragod under Section 173(2), Cr.P.C. and the 'supplementary report' of the CBI filed under Section 173(8), Cr.P.C. and shall proceed with the case further in accordance with law.

The impugned judgment passed in W.P.(C)No.10265 of 2019 stands modified to the above extent. The appeal is partly allowed as above.

Sd/-
S.MANIKUMAR
Chief Justice

Sd/-
C.T.RAVIKUMAR
Judge

TKS