

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ASHOK MENON

WEDNESDAY, THE 7TH DAY OF JULY 2021 / 16TH ASHADHA, 1943

WP(C) NO. 30716 OF 2017

PETITIONER/S:

P.K.ABDUL SATHAR
AGED 1 YEARS
AGED 50 YEARS, SAPNAS MANZIL, PARAPPURAM PO, ANDALLUR
KADAVU, THALASSERY, KANNUR DISTRICT, KERALA.

BY ADVS.
SIDHARTH LUTHRA (SR.)
SRI.AKHIL S.VISHNU
SMT.APARNA SUKUMARAN
SUKUMARAN P.N.

RESPONDENT/S:

- 1 STATE OF KERALA
REP.BY HOME SECRETARY, GOVT.OF KERALA, SECRETARIAT,
THIRUVANANTHAPURAM -69500.
- 2 CENTRAL BUREAU OF INVESTIGATION
REP. BY THE DIRECTOR, NEW DELHI.
- 3 INSPECTOR OF POLICE SCB CBI SPE
THIRUVANANTHAPURAM.
- 4 DEPUTY SUPERINTENDENT OF POLICE
KANNUR.
- 5 DEPUTY SUPERINTENDENT OF POLICE
THALASSERY.
- 6 DEPUTY SUPERINTENDENT OF POLICE
CB, CID, KANNUR.
- 7 SUBEESH E. SO.VIJAYAN
AGED 30 YEARS, EBRANTAVIDA HOUSE, CHEMBRA, P.O.PARAL,
THALASSERY TALUK, KANNUR.

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*Addl.R8 MARIYU

AGED 40 YEARS

W/O LATE MUHAMMED FAZIL, NAFEEZA MANZIL,
MADAPEEDIKA, THALASSERY, NOW RESIDING AT FIDHA
QUARTERS, OPPOSITE MADHEENA MANZHIL, ACHARATH
ROAD, TEMPLE GATE P.O., THALASSERY, KANNUR DIST-
670001.

*Addl.R8 IS IMPEADED AS PER ORDER DATED 16.7.18 IN IA
NO.12765/2018

BY ADVS.

DIRECTOR GENERAL OF PROSECUTION

SRI.SASTHAMANGALAM S. AJITHKUMAR

SRI.SUMAN CHAKRAVARTHY, SENIOR GOVT.PLEADER

M.P. ABDUL LATHEEF

SANDEEP T.K.

ARJUN SREEDHAR

SRI.P.K.MOHAMED JAMEEL

JOSEPH GEORGE (MULLAKKARIYIL)

SRI.SASTHAMANGALAM S. AJITHKUMAR

ARUN KRISHNA DHAN

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR
ADMISSION ON 07.07.2021, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

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'CR'

ASHOK MENON, J.

W.P(C). No.30716 of 2017

Dated this the 7th day of July 2021

JUDGMENT

A writ petition under Article 226 of the Constitution of India.

2. At daybreak, about 3:30 AM, on 22/10/2006 at the J.T.road, Thalasseri, P.K.Fasalu @ Muhammad Fazal, a distributor of 'Thejus' newspaper, was allegedly hacked by his arch-rivals members of the C.P.M, and mortally wounded with twenty-odd stab injuries. Responding to an anonymous phone call, the jurisdictional Circle Inspector of Police reached there and took him to the Government Hospital, Thalasseri, only to be declared dead by the doctor on duty. Crime No.442/2006, was registered at the Thalasseri Police Station for an offence punishable under Section 302 of the Indian

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Penal Code, initially against unnamed assailants. On 03/11/2006, the investigation was handed over to the C.B.C.I.D., Kannur District. On 08/10/2007 A2 and A3 were arrested, followed by the arrest of A1 on 10/10/2007. As the investigation progressed, the accused were subjected to polygraph tests and reports obtained. In the meanwhile, Mariyu, the wife of the deceased, filed writ petition No. 11228/2007 before this Court for handing over the investigation to the Central Bureau of Investigation alleging that the investigation conducted by the C.B.C.I.D. was neither sufficient nor proper. She alleges that the deceased who had gone to collect 'Thejus' newspaper of which he was the distributor, was brutally murdered in the wee hours of 22/10/2006.

3. The deceased who was earlier an ardent follower of the C.P.M. switched allegiance to N.D.F. Several Muslim supporters of the C.P.M., followed the deceased to join N.D.F. The deceased

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was also instrumental in persuading several subscribers of the C.P.M party newspaper and journals to terminate their subscription and instead, subscribe to 'Thejus', the newspaper espousing the cause of N.D.F. The aforesaid activities of the deceased, irked the C.P.M. activists and invited their wrath, and led to his brutal murder. The accused had even planted tridents (thrisuls) near the body to mislead the investigation and create an impression that the members of the Rashtriya Swayam Sevak Sangh (RSS) were the actual perpetrators. It was alleged that the then Home Minister was from that constituency wielded considerable influence on the Police. After considering the allegations made by the wife of the deceased, pointing accusing fingers at the members of C.P.M., and the ground realities at Kannur, and that no investigation appears to have been conducted to pinpoint and confirm the identity of the accused numbers 1 to 3, as the assailants of

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the deceased and the recovery alleged to have been made under S.27 of the Evidence Act from an open compound adjacent to the Pankaj Talkies after months of the occurrence was found too good to be believed, this Court allowed the writ Petition and directed the investigation to be handed over to the C.B.I., vide Ext.P2 judgement. The State of Kerala challenged Ext.P2 judgement in writ appeal No.654/2008. A Division Bench of this Court dismissed the writ appeal and confirmed Ext.P2 Judgement vide Ext. P3 judgement.

4. The Central Bureau of Investigation took over the investigation, re-registered the case as RC2 (S)/2008/Chn, on 05/04/2008 vide Ext. P4 F.I.R, and proceeded with the investigation, which continued for long four years. Accused Nos.4 and 5 were arrested on 15/03/2012, A6 was arrested on 16/03/2012, while A7 and A8, against whom conspiracy is alleged, surrendered before the jurisdictional court, and arrested. On completion

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of the investigation, Ext.P5 final report was submitted by the 2nd respondent, Director of the C.B.I., alleging offences punishable under sections 120-B, 143, 147, 148, 149, 341 and 302 of the Indian Penal Code, and under Section 27 of the Arms Act, reserving their right to file supplementary charge sheet on identification of the remaining conspirators in this crime.

5. The jurisdictional Magistrate committed the case and it has been taken on the files of the Sessions Court-IV, Ernakulam (C.B.I Court II) as S.C. No.405/2012. while the trial was in progress, Ext.P6 supplementary final report was filed by the investigating officer on 04/03/2013, stating that despite thorough investigation, the remaining two accused and a bike that allegedly was used in the commission of the offence, could not be identified. However, the investigating agency still reserved its right to continue with the investigation with the permission of the Court, as and when any

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evidence in lead about the identity of the two conspirators believed to be involved in the crime, and the motorcycle used was established.

6. Things take a dramatic turn consequent to the arrest of the 7th respondent, alleged to an erstwhile member of the R.S.S., on 18-11-2016, in Crime No.1706/2016 of Koothuparamba Police Station, registered in connection with the murder of one Mohanan, a member of the C.P.M. During his interrogation, he allegedly gave Ext.P7 statement to the police confessing his involvement in two other murders. He admitted that he was involved in the murder of one Pavithran, in a pending Crime No.43/2009 of Kannavam Police Station, and further confessed his involvement in the present Crime No.442/2006 of Thalasseri Police Station, for murdering Fasal, the brother of the petitioner. The confession statement of R7 was video recorded by the investigating officer in Crime No.1708/2016. The investigating officer reported the fact to

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superior police officials. The District Police Chief, Kannur sent Ext.P8 letter to the State Police Chief, on 24-11-2016, informing of the information about the confession of R7 and requesting the matter to be taken with the C.B.I who are entrusted with the investigation of the instant Crime. Crime 43/2009 of Kannavam Police Station was at that time pending as SC No.362/2011 before the Addl. Sessions Court- III, Thalasseri. A report was filed by the investigating officer therein, for further investigation, and on being convinced, permission was granted to conduct further investigation under S.173(8) Cr.P.C., as per Ext.P9 order. R7 was produced before the JFCM, Koothuparamba, in Crime No.1708/2016, with a request for remand. Ext.P10 is that remand report. He gave Ext.P11, a statement. It is contended by the petitioner that R7 did not raise any complaints of police harassment during custody, to the Magistrate. It was only at a later stage that R7

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retracted from his confession and raised all sorts of complaints against the police about extracting a confession from him which was not voluntarily made by him. Moreover, R7 has allegedly admitted about his involvement to his friend, over the phone, two years before his confession to the police. The recordings of that conversation are also produced by the police in a pen drive. Shinoj, a co-accused has also confessed about his involvement in the crime with R7 for murdering Fasal.

7. Under the above circumstances, the petitioner states that the real culprits are not yet arraigned as accused. He, therefore, filed CrI. M.P No.877/2017 at Ext.P12, before the jurisdictional Court, requesting a further investigation by the C.B.I under S.173(8) Cr.P.C. The 3rd respondent investigating officer opposed the application for further investigation and filed Ext.P13 objections. The petitioner states that R3 is determined to proceed against C.P.M leaders

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presently arraigned as accused in this Crime. CrI.M.P.No.877/2017 was dismissed by the jurisdictional Court vide Ext.P14 Order. Aggrieved by the order refusing further investigation, the petitioner has approached this Court with this Writ Petition seeking a further investigation by a special investigation team constituted by the 2nd respondent.

8. The 7th respondent had got himself impleaded in CrI.M.P.No.877/2017 by filing CrI.M.P.No. 1501/2017 opposing the further investigation of this Crime based on an alleged confession given by him. He states that he was taken into illegal custody and forced to give a confession statement and made to admit about his involvement in Fasal's murder. He was subjected to brutal torture for two days at Azhikal Coast Guard Station, Kannur, by two Dy.S.Ps. According to him, all this was done to weaken the case against the C.P.M leaders who are presently arraigned as accused, at the instance of the C.P.M led L.D.F., presently in

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power in the State. R7 has filed a written complaint against the two officers, before the JFCM, Koothuparamba. Complaints were also made before the Human Rights Commission and Police Complaints Authority. The State Police is attempting to foist a case against R.S.S workers including R7 alleging that they had murdered Fasa1 and that no C.P.M members are involved. The petitioner who is the brother of the deceased is himself an active C.P.M worker, and he has therefore been made a pawn to dance to the tunes of the State Police and the C.P.M leaders. The petitioner had opposed the impleadment of R7 in his application for further investigation because he has no *Locus Standi*. The objection was however disregarded by the jurisdictional court and R7 was impleaded and heard because further investigation is sought based on a purported confession made by him. Ultimately, vide Ext.P14 Order, the request for further investigation was declined.

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9. Heard Sri Sidharth Luthra, the learned Senior counsel for the petitioner, Sri Suman Chakravarthy, the learned Senior G.P. for the State, Sri Arjun Sreedharan the learned counsel for the seventh respondent and Sri Sasthamangalam S. Ajithkumar, the standing counsel for the C.B.I. Records perused.

10. It is argued for the petitioner that the Police has the right to file a supplementary charge sheet even after a final report under Section 173 Cr. P.C was filed. If the Police officer after having laid the charge sheet, gets further information, he can still investigate and lay further charge sheets. Even the Magistrate's/Court's permission is not necessary for further investigation. All that is to be done by the investigating officer is to inform the jurisdictional Court about the fresh facts which have come to light. The learned counsel submits that Police has the right to reopen the

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investigation even after the filing of the charge sheet under Section 173 (1), Cr.P.C. The learned counsel relies on the decision of the Kerala High Court, *In the Matter of State Prosecutor, [1973 Cri LJ 1288]* in which several decisions of various High Courts have been referred to. The Apex Court has in *Ram Lal Narang and Ors vs. State (Delhi Administration) [AIR 1979 SC 1791]* held that notwithstanding the Magistrate taking cognizance of the offence upon a Police report submitted under Section 173 Cr. P.C, the right of the Police to further investigate was not exhausted and the Police could exercise such a right as often as necessary when fresh information came to light. Relying on the decision *Mani M.M Vs. State of Kerala and Others, [2012 (3) KHC 36]*, the learned counsel argues that investigation of the crime is within the domain of the Police. For the reason that once a crime has been investigated and charge sheet filed against one or more accused persons and

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the trial proceeded against him, ending in his conviction/acquittal, it is not postulated that where fresh evidence, throwing light on the crime previously investigated and tried by the Court comes to the notice of Police, it cannot be probed at all. In that case, speech made by the district secretary of a political party, wherein a declaration was made that some of the murders that have taken place in the district were part of a design after preparing a list naming such adversaries and finishing them off. It was held that registration of an F.I.R based on the speech was proper and further investigation in those murder cases could be conducted under Section 173 (8), Cr.P.C. The learned counsel submits that the constitutional courts are empowered to direct further investigation or even de novo or fresh investigation or reinvestigation by some other investigating agency. Commencement of trial and examination of some witnesses cannot be an absolute

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impediment for exercising the said constitutional power. (See *Dharam Pal vs. State of Haryana and others*, [(2016) 4 SCC 160]). The learned counsel submits that the power of ordering further investigation would be available at all stages and that the Court is not denuded of the power to order further investigation, even in the post-cognizance stage. If fresh facts come to light, which would lead to inculcating or exculpating certain persons, arriving at the truth in doing substantial justice in a criminal case is more important than avoiding further delay being caused in concluding the criminal proceedings. (See *Hassanbhai Valibhai Qureshi vs. State of Gujarat* [(2004) 5 SCC 347]). This view has also been upheld in a later decision of the Apex Court in *Vinubhai Haribhai Malaviya and others vs. State of Gujarat and another* [2019 SCC OnLine SC 1346]. It is submitted that the petitioner being the brother of the deceased is an interested party who can question the nature of the

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investigation made in this case.

11. The learned Sessions Judge relying on the decision of the Apex Court in *Amrutbhai Shambhubhai Patel v. Sumanbhai Kantibhai Patel and Ors [(2017(1) KHC 867(SC): AIR 2017 SC 774)]*, held that further investigation under S.173(8) Cr.P.C., after taking cognizance by the Court can be ordered only on the request of the investigating agency and it cannot be ordered at the request of the defacto complainant/informant or any other person. Hence the trial court refused to order further investigation on the request of the petitioner solely based on a retracted confession allegedly made by the 7th respondent while in police custody, or an alleged extra-judicial confession made by him to his friend. The investigating agency has not considered the alleged confession statement to be valid or admissible. The wife of the deceased, at whose instance the CBI investigation was ordered by this court, has also no opinion favouring a further

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investigation in the case.

12. The learned counsel for the petitioner submits that the decision in *Amrutbhai Shambhubhai Patel* has been overruled by a Three-Judge Bench of the Apex Court in *Vinubhai Haribhai Malaviya and Ors v. State of Gujarat and Another [2019(5)KHC 352: AIR 2019 SC 5233]* and observed thus:

"38. There is no good reason given by the Court in these decisions as to why a Magistrate's powers to order further investigation would suddenly cease upon the process being issued, and an accused appearing before the Magistrate, while concomitantly, the power of the police to further investigate the offence continues right till the stage the trial commences. Such a view would not accord with the earlier judgments of this Court, in particular, *Sakiri* (supra), *Samaj Parivartan Samudaya* (supra), *Vinay Tyagi* (supra), and *Hardeep Singh* (supra); *Hardeep Singh*

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(supra) having held that a criminal trial does not begin after cognizance is taken, but only after charges are framed. What is not given any importance at all in the recent judgments of this Court is Art.21 of the Constitution and the fact that the Article demands no less than a fair and just investigation. To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate's nod under S.173(8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases midway through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a prima facie guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate,

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particularly when such powers are traceable to S.156(3) read with S.156(1), S.2(h), and S.173(8) of the CrPC, as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case before the trial commences. It would also be in the interest of justice that this power is exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law. If, for example, fresh facts come to light which would lead to inculcating or exculpating certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding, as was held in Hasanbhai Valibhai Qureshi (supra). Therefore,

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to the extent that the judgments in Amrutbhai Shambubhai Patel (supra), Athul Rao (supra) and Bikash Ranjan Rout (supra) have held to the contrary, they stand overruled. Needless to add, Randhir Singh Rana v. State (Delhi Administration), 1997 KHC 247: 1997 (1) SCC 361 and Reeta Nag v. State of West Bengal and Others, 2009 KHC 4942: 2009 (9) SCC 129 also stand overruled." (emphasis supplied)"

Given the above finding of the Larger Bench of the Apex Court, it is argued that there is scope for further investigation despite the objection raised by R7 and the CBI. The CBI has not made any investigation concerning the alleged confession statement given by R7 wherein he has stated that Fasal was murdered by RSS gangsters including himself and three others, namely Proneesh, Prabheesh and Shinoj. It is also pointed out that some of the witnesses who claim to have witnessed

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the occurrence, have later retracted from their earlier version. The confession statement of the present accused leading to recovery is also found to be faulty. The final report suggests that there was an existing RSS-NDP clash in the area on the eve of the murder of Fasal. RSS worker Shinoj was allegedly assaulted by NDF activists who had barged into the RSS office. The attack on Fasal is alleged to be in retaliation to the said attack on RSS workers.

13. The learned Senior Government Pleader representing the State Government also points out the need for a further investigation in the case. The 6th respondent, Dy. Sp Kannur has also filed a detailed statement explaining the requirement for a further investigation in the case.

14. After having gone through the submissions made by the petitioner and the respondents, and on perusal of the materials placed, there is undoubtedly a need for examination of the

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confession statement of R7 and the attending circumstances. Without an examination of those materials by the investigating agency, it is not proper to discard them altogether. When some fresh facts come to light leading to inculpatory and exculpatory certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding, as observed by the Apex Court in *Vinubhai* (Supra).

15. It may be true that the CBI may not be satisfied with the materials now collected by the local police during the investigation in some other case involving R7. But there is no harm in examining those materials also, as a part of a further investigation under section 173(8) Cr.P.C. Such further investigation can, no doubt be sought by the petitioner, who is interested in seeing the real culprits of his brother are proceeded against.

16. The Learned Sessions Judge had dismissed

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the request of the petitioner vide Ext P14, based solely on the decision of the Apex Court in *Amrutbhai* (supra) holding that once the final report is filed, the de facto complainant or aggrieved cannot seek further investigation invoking the provisions under S.173(8) Cr. P.C, without the investigating officer asking for it. This finding cannot be justified given the subsequent dictum of the Hon'ble Supreme Court in *Vinubhai* (Supra) and has to be set aside.

The writ Petition is allowed. The second respondent is hereby directed to constitute a special team of the CBI to further investigate Crime No.RC2(S)/2008/Chn pending as S.C. 405/2012 on the files of the Sessions Court-IV(CBI-II), Ernakulam.

Sd/-

ASHOK MENON
JUDGE

jg

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APPENDIX OF WP(C) 30716/2017

PETITIONER ANNEXURE

- EXHIBIT P1 TRUE COPY OF THE FSL REPORT DATED
01.01.2008
- EXHIBIT P1 (A) TRUE COPY OF THE FSL REPORT DATED
04.01.2008
- EXHIBIT P2 TRUE COPY OF THE JUDGMENT IN WRIT
PETITION NO.11228/2007.
- EXHIBIT P3 TRUE COPY OF THE JUDGMENT IN WRIT APPEAL
NO.654/2008 IN WRIT PETITION
NO.11228/2017.
- EXHIBIT P4 TRUE COPY OF THE FIR NO.RC2
(S)/2008/CHN, DATED 05.04.2008
REGISTERED BY THE CBI.
- EXHIBIT P5 TRUE COPY OF THE FINAL REPORT DATED
08.06.2012 SUBMITTED BY THE CBI.
- EXHIBIT P6 SUPPLEMENTARY FINAL REPORT DATED
02.02.2013, SUBMITTED BY CBI
- EXHIBIT P7 TRUE COPY OF THE CONFESSIONAL STATEMENT
OF RESPONDENT NO.7
- EXHIBIT P8 TRUE COPY OF THE LETTER DATED 24.11.2016
SEND BY THE DISTRICT POLICE CHIEF,
KANNUR TO THE STATE POLICE CHIEF.

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- EXHIBIT P9 TRUE COPY OF THE ORDER DATED 23.11.2016 PASSED BY THE ADDL. DISTRICT AND SESSIONS COURT-III, THALASSERY. GRANTING PERMISSION FOR FURTHER INVESTIGATION.
- EXHIBIT P10 TRUE COPY OF THE REMAND REPORT.
- EXHIBIT P11 TRUE COPY OF THE STATEMENT OF 7TH RESPONDENT.
- EXHIBIT P12 TRUE COPY OF THE APPLICATION FILED BY THE PETITIONER AS CRL. M.P.NO.877/2017 IN SC NO.405/2012, BEFORE THE ADDL. DISTRICT AND SESSIONS JUDGE-IV, ERNAKULAM.
- EXHIBIT P13 TRUE COPY OF THE OBJECTION FILED BY THE INVESTIGATING OFFICER - CBI IN CRIMINAL MP NO.877/2017
- EXHIBIT P14 TRUE COPY OF THE ORDER, DATED 15.06.2017 PASSED BY THE ADDL DISTRICT AND SESSIONS JUDGE-IV (CBI-II) ERNAKULAM IN CRL.M.P. NO.877/2017