IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
APPELLATE SIDE

BEFORE:-

THE HON'BLE JUSTICE RAJASEKHAR MANTHA

W.P.A. No. 12526 of 2012
With
CAN 9 of 2021
With
CAN 10 of 2022

Protima Dutta
Versus
The State of West Bengal &Ors.

Mr. Bikash Ranjan Bhattacharya, Senior Advocate
Mr. Sabyasachi Chatterjee,
Ms. Debolina Sarkar,
Ms. Priyanka Paul,
Mr. Sayan Banerjee.

... For the Petitioner.

Mr. SudiptoMoitra, Senior Advocate
Mr. Pradip Kumar Ray,
Mr. Vijay Verma.

... For the State.

Mr. Soumya Chakraborty, Senior Advocate
Mr. Ankit Surekha
Mr. Pawan Gupta,

...For SastiGayen.

Mr. Debasish Roy, Senior Advocate

Mr. Ankit Surekha

... For AsitGayen.

Hearing Concluded On : 20.05.2022 (Last day before summer vacation)

Judgment On : 09.06.2022

Rajasekhar Mantha, J.

1. The questions that arise for consideration in the instant writ petition are, inter alia, whether the High Court, under Article 226 can transfer the investigation from the State Police to Central Bureau of Investigation (CBI), and also order change of prosecutor; after a Division Bench of the High Court, while considering an appeal from an order of acquittal, orders retrial, after applying Section 311 of the Cr.PC.
2. The facts relevant to the instant case are that one Tapan Dutta (husband of the petitioner) who was a prominent member of the ruling party "Trinamool Congress", started agitation against the illegal filling up of water bodies in the Bally-Jagacha area in Howrah district. He also formed an association called "Bally Jagacha Jalabhumi Bachao Committee" to get others to rally behind the cause. The said water bodies were being filled up by a property developer named "Anmol South City Ltd.", a joint venture between the State Government and certain private persons, inter alia, the Anmol Group of Companies and one Maa

Tara Developers. The landfill was being undertaken for the proposed development of an industrial park at Mouja Jagadishpur and Joypur in Howrah district. The petitioner herself was also a supporter of the said ruling party as well, and a member of the local panchayat.

3. On the 6th of May, 2011, the said Tapan Dutta was shot dead at 9:45 pm in the late evening, while he was returning to his house riding a motorcycle. On the same day, FIR No. 205 of 2011 was registered by the Bally Police Station, Howrah, under Sections 302/34/120B IPC read with Sections 27 and 35 of the Arms Act. On that very day i.e. 6th May, 2011, at about 23:25 hrs, one Bablu Prasad, pillion rider on the motorcycle on which the deceased was gunned down, also registered a written complaint.

4. In course of the investigation, when the police visited the writ petitioner, she named 12 persons who were responsible for the death of her husband and also supplied a large number of documents. The said persons being Sasti Gayen, Asit Gayen, Kalyan Ghosh, Gobindo Hazra, Amit Pal Chowdhury, Ajay Pal Chowdhury, Malay Dutta, Panchu Bagani, Lakshmi kanta Haldar, Babu Mondal, Poritosh Bar, Ramesh Mahato and Arup Roy (currently a minister in the State Cabinet).The petitioner informed the police that the actual motive behind the murder of her husband was his opposition to, and agitation against, the landfill. This was confirmed by the petitioner, in writing to the Bally Police Station.

5. On the 13th of June, 2012, the writ petitioner filed WP 12171(W) of 2012 seeking transfer of investigation into Bally Police Station Case No. 205 of 2011 to the Central Bureau of Investigation (CBI). Immediately thereafter, on 18th June, 2012, the instant writ petition was filed with the same prayers but giving more particulars. W.P 12171 (w) of 2012 was not pressed thereafter.
6. The investigation was transferred by the State, from the Bally PS to the CID, West Bengal.
7. Initially, a charge sheet was filed on 13th August, 2011, against 5 persons, namely, Subhas Bhowmick, Kartick Das, Ramesh Mahato, Sasti Gayen and Asit Gayen. Subsequently, a supplementary charge sheet was submitted on 26th September, 2011, against two more persons, namely, Santosh Singh and one B. Raju. Additional witnesses were also named. It was specifically mentioned that no charges have been framed against most of the persons named by the petitioner in her written complaint.
8. Sessions Trial No. 88 of 2012 commenced, and judgment was delivered on 7th January, 2015, by the Additional District and Sessions Judge, Fast Track Court-I, Howrah, acquitting all the five accused persons (Subhas Bhowmick, Kartick Das, Ramesh Mahato, Sasti Gayen and Asit Gayen) under Section 235 of the Cr.PC, and the trial against Santosh Singh and B. Raju was deferred as they continued to remain absconding.

9. The Sessions Judge found the following improprieties in the investigation and the prosecution.

(a) Ramesh Mahato has been falsely implicated in the case since he was admittedly in a correctional home on the date of the incident.

(b) Gross and serious inconsistencies were noted in the complaint of Bablu Prasad (PW-1). It was found impossible that Bablu Prasad, who was the pillion rider of the motorcycle driven by the victim, did not sustain a single injury despite multiple shots being fired at the victim.

(c) The medical practitioner, one Dr. Sutapa Ray (PW-29) who examined the said Bablu Prasad immediately after the incident, found three abrasions in the right forearm, on the left leg and thigh, with bleeding. It was therefore difficult to believe that he jumped off the pillion of the motorcycle when shooting started, and escaped without any bullet injuries.

(d) The prosecution has not taken any steps to enquire or place evidence based on the "**last seen theory**". Bablu Prasad was not investigated or examined by the prosecution. The prosecution failed to obtain and produce the FSL report. The process of investigation was dissatisfactory.

(e) The most vital document being seizure list was produced without annexures or the list of seized articles.

10. The writ petition was mentioned before a Co-ordinate Bench for hearing and was taken up from time to time, starting from 2012 till 2015. It was finally taken up by a Co-ordinate Bench on 4th May, 2015, where the question of transfer of investigation was considered.

11. The Coordinate Bench noted with anguish that the prayer for transfer of investigation to the CBI, could unfortunately not be considered by this Court before the commencement of the trial.

12. Since the Sessions Court had delivered judgment in the meantime and the State had already filed an appeal (GA 3 of 2015) challenging the acquittal, the Co-ordinate Bench referred the instant writ petition, under Rule 26 of the Writ Rules of this Court, to be heard by a Division Bench of this Court along with the Criminal Appeal.

13. The petitioner's daughter, Priyanka Dutta, also challenged the order of acquittal in a separate appeal being CRA No. 688 of 2016.

14. The aforesaid two Criminal Appeals were being heard analogously with WP 12526(W) of 2012, by a Division Bench of this Court.

15. By an order dated 27th January, 2017, in Criminal Appeal No. 179 of 2017, filed at the instance of one of the accused Sasti Gayen, the Hon'ble Supreme Court directed that the Appeals against acquittal should be heard first, and thereafter, if required, the writ petition seeking further investigation by the CBI could be considered by the High Court.

16. By a judgment and order dated 10th April, 2017, GA 3 of 2015 and CRA 688 of 2016 were heard and allowed. The acquittal order of the

Sessions Judge in Sessions Trial No.88 of 2012 was set aside. The operative part of this judgement is set out hereinbelow:-

> "In view of the discussion and observation made hereinabove, the impugned judgment and order of acquittal are quashed and set aside with direction upon the trial court to invoke the power conferred under section 311 for limited purpose of bringing the seized document contained in Ext. 10 in accordance with law as also to allow the prosecution and/or the appellant in the former appeal (PW 25) to adduce further evidence by way of re-calling as also allowing the accused persons to cross-examine her and, thereafter, to record further statements of the respondent Nos. 2 to 6 under section 313 Cr.P.C. afresh. Needless to mention that in the event prayer is made by either of the parties for adducing further evidence, the same shall be considered by the learned Trial Judge in accordance with law in order to unearth the truth.
>
> It will not be out of context to record here that this judgment is passed pending an application filed by the appellant under Article 226 of the Constitution of India in the matter of Protima Dutta Vs. State of West Bengal (in Re: W.P. 12526 (W) of 2012) with a prayer for a direction upon the Central Bureau of Investigation to investigate in connection with the aforesaid FIR bearing Bally P.S. Case No. 205 of 2011, dated May 6, 2011. The Hon'ble Supreme Court after considering Special Leave to Appeal (Crl.) in the matter of Sasti Gayen vs. Protima Dutta &Ors. (In re:- Crl.M.P. No. 1083/2017) passed final order dated January 27, 2017 as follows:-
>
> "*CRIMINAL APPEAL NO (S). 179 OF 2017*
> (Arising out of SLP (Crl.) No. 821 of 2017)
>
> SASTI GAYEN
> ...APPELLANT (S)
>
> PROTIMA DUTTA & ORS.
> ...RESPONDENT (S)
>
> *ORDER*
>
> 1. *Application seeking permission to file special leave petition is allowed.*
> 2. *Leave granted.*
> 3. *As all the contesting parties are before us, we are inclined to pass final orders in the matter.*
> 5. *On due consideration and taking into account the order of acquittal passed by the learned trial Court, which is presently under challenge in the High Court, we are of the view that the said appeal shall be heard in the first instance and, thereafter, if required the writ petition seeking order for further investigation by the CBI may be considered by the High Court.*
> 6. *With the aforesaid modification of the order of the High Court the appeal is allowed.*
>
> *…………………,J*
> *(RANJAN GOGOI)*
>
> *……………………..,J*
> *(ASHOK BHUSHAN)*
>
> *NEW DELHI*
> *JANUARY 27, 2017"*

> According to the above order dated January 27, 2017, passed by the Hon'ble Supreme Court these appeals (CRA 688 of 2016 and GA 3 of 2015) should be heard in the first instance and, therefore, if required the writ petition seeking order for investigation by the Central Bureau of Investigation may be considered by this Court.
> These appeals are, therefore, allowed and disposed of.
> Let this judgment together with the Lower Court's records be sent back to the learned Court below expeditiously."

17. The Division Bench deferred the hearing of WP 12526 (W) of 2012 for transfer of investigation to the CBI. The Division Bench of the High Court, in addition to agreeing with the Trial Judge as regards the serious infirmities in the investigation and the prosecution, found as follows :-

a) The evidence of PW 1, 11, 5 13, 16, 25 and 30 should have been weighed for the purpose of establishment of the conspiracy theory. The theory being, that the deceased was murdered in furtherance of a conspiracy hatched by the persons mentioned by the petitioner (being PW-25), since he opposed the Landfill for the establishment and development of the Industrial Park.

b) The chain of events linking the circumstantial evidence available, for the purpose of establishment of the of the conspiracy angle for the murder, was not effectively placed by the prosecution, or appreciated by the Trial Court.

c) The prosecution was not serious, and had not placed proper reliance on the evidence on record. The Ld. Trial Judge also failed to appreciate the evidence on record as a whole, to ascertain the guilt of the accused persons. The Trial Judge also failed to ascertain the persons actually responsible for the murder.

d) The confrontation of Section 164 statements to the PW16 and PW30 could not have discredited their evidence. The said evidence should have been assessed in the light of the fact that they had not redacted from their earlier evidence, and its consistency with the other evidence on record.

e) The Trial Judge failed to take into consideration the nexus between the seizure of the 2 maps of the Joypur Bhil (waterbody) area from the house of the accused, Sasti Gayen and Asit Gayen. The trial judge misread the evidence of PW-17 that had clearly established the nexus between the Joypur Bhil and the said maps.

f) The Trial Judge should have exercised powers under Section 311 of the Cr.PC to call for production of the documents under Exhibit 10 (Seizure List). The prosecution had failed to produce the same. The said documents were letters written by the "Jalabhumi Bachao Andolan Committee" addressed to IG, South Bengal, SP Howrah, IC Liluah PS. The said letters recorded the apprehension of the deceased about landfill of the waterbodies, and the threat to the life of the victim. The delay in making the application for recall of PW-18 for the said purpose was not fatal to exercise of powers under the Cr.PC.

g) The prayer for recall of the petitioner, PW-25, for adducing further evidence was wrongly rejected, on an incorrect interpretation of Section 311 of the Cr.PC.

h) The evidence of PW-31 and PW-32, Sub Inspectors of Police, CID, who raided accused Subhas Bhowmik and seized Ex_7/1 Mat Exhibit III, being a country made pistol, was clearly corroborating the evidence of PW 35, the 2nd IO. The evidence was discredited since no arms expert was present at the time of seizure. The Ballistic expert, PW33, had clearly stated that the weapon was a single shot improvised pistol. The evidence of PW31 and 32 was therefore wrongly discredited by the Trial Judge.

i) The trial court failed to notice that the blood stained shell, and empty cartridge, were not sent for forensic/ballistic report.

j) The findings of the Trial judge were not based on the evidence on record.

18. The judgement of the Division Bench came to be affirmed and upheld by the Hon'ble Supreme Court in SLP Criminal Nos.3661 and 3662 of 2017, dated 8th May 2017.

19. The hearing of the writ petition commenced before the same Division Bench, which disposed of CRA 688 and GA 3 of 2015. It was heard over a few days.

20. An application of accused Sasti Gayen (CAN 4437 of 2017), for being added as a party in the instant writ petition, was dismissed by this court. On 11thMay 2017, the Honble Supreme Court in SLP (Crim) 4375 of 2017 Criminal Appeal No. 1361 of 2017 upheld the same and directed

that he should be heard in the instant writ petition on all questions, but need not be added as a party.

21. By an order dated 14th March, 2022, a Division Bench of the High Court on the objection of the accused persons and the 'State', transferred the writ petition before the Single Bench for hearing and disposal. The Division Bench accepted the contention of the accused and the 'State', that they would lose one forum before the High Court if the writ petition is disposed of by a Division Bench.

ARGUMENTS ON BEHALF OF THE WRIT PETITIONER

22. Appearing for the writ petitioner, Mr. Bikash Ranjan Bhattacharyya, Ld. Senior Advocate, placed various portions of the judgment in the Sessions Trial No. 88 of 2012, to indicate the pain and displeasure of the Court at the poor and perfunctory nature of the investigation. It is also argued by reference to the records and the said judgment, that the prosecution was found lacking and wanting in effectiveness and sincerity.

23. By placing reliance on the decisions of the Supreme Court in the cases of **Pooja Pal Vs Union of India** reported in **(2016) 3 Supreme Court Cases 135, (Paragraphs 40, 41, 42, 43, 48, 49, 58, 63, 64, 79, 96, 101 and 103) Popular Muthiah Vs State** reported in **(2006) 7 SCC 296 (Paragraphs 21, 24, 26, 27, 28, 29, 33, 44, 53, 54, 55 and 56),** it is argued that both the victim and accused are all equally entitled to and conferred with a right of fair trial. Even a victim's fundamental rights

would be denied in the absence of such fair trial. A fair investigation is the basis and precondition of a fair trial. Satisfaction and confidence of the victim and the faith of the public at large in the investigation and prosecution are a vital necessity.

24. Reliance has also been placed on the decisions of the Supreme Court in the cases of **Vineet Narain Vs. Union of India** reported in **(1998) 1 SCC 226; Hasanbhai Valibhai Qureshi Vs. State of Gujarat** reported in **(2004) 5 SCC 347; Nirmal Singh Kahlon Vs. State of Punjab** reported in **(2009) 1 SCC 441 ; Mithabhai Pashabhia Patel Vs. State of Gujarat** reported in **(2009) 6 SCC 332 ; Rubbabuddin Sheikh Vs. State of Gujarat (2010) 2 SCC Pg 200; State of West Bengal Vs. Committee for Protection of Democratic Rights West Bengal and Ors; Siddharth Vashisth @ Manu Sharma Vs. State** reported in **(2010)6 SCC 106; Babu Bhai Vs. State of Gujarat (2010) 12 SCC 254; State of Punjab Vs. CBI (2011) 9 SCC 182; Disha Vs. State of Gujarat** reported in **(2011) 13 SCC 337; Sangeetaben Mahendrabhai Patel Vs. State of Gujarat (2012) 7 SCC 621; Manubhai Ratilal Patel Vs. State of Gujarat** reported in **(2013) 1 SCC Pg 314 Vinay Tyagi Vs. Irshad Ali (2013) 5 SCC 762; Dinubhai Bhogabhai Solanki Vs. State of Gujarat (2013) 4 SCC 626; Subroto Chattoraj Vs. Union of India and Ors.** reported in **(2014) 8 SCC 768; Dharam Pal Vs. State of Haryana and Ors. (2016) 2 CCr LR (SC) 520.**

25. It is also submitted that it is true that the petitioner did not submit any protest application against the charge sheet under Section 156(3), as required by the decision of **Sakiri Vasu Vs. State of UP** reported in **(2008) 2 SCC 409**. However, given that the prayer in the writ petition is for change of investigation agency, and transfer to CBI, neither of which is within the Magistrate's powers, the above decisions would not apply.

26. Mr. Bhattacharya has also argued that the Division Bench has not considered the issue of change in the investigating agency, as it was subject matter of this writ petition, hearing whereof has been deferred. This writ petition itself was taken up and heard by the Division Bench on a few occasions until the intervention of the 'State' accused Sasti Gayen. The Division Bench was bound by the Supreme Court's order dated 27th January 2017, (supra) that the CRA was to be heard first, and thereafter the Writ Petition was to be heard, if necessary. The issue of change of investigation agency must be deemed to have been left to be determined by this Court dealing with the Writ petition. The argument that the Appeals have been disposed of before the WP, rendering the latter infructuous, is therefore wholly baseless.

27. It is also submitted that the prayer for change of investigation agency was made much before the commencement of Trial, but could not be taken up only due to paucity of judicial time, and the petitioner therefore cannot be deprived of her right to make such a prayer. The decisions of the Trial judge and the Division Bench give credence to this

apprehension of the petitioner as regards the investigation and prosecution.

28. Mr. Bhattacharya also submits that since it is the accused and the State that have sought for the Writ to be disposed of by a Single Judge, they cannot therefore pit the judgement of the Division Bench against this Court, to challenge the maintainability of the WP.

ARGUMENTS ON BEHALF OF THE ACCUSED

29. Mr Debashis Rai, Ld. Counsel appearing for the accused persons, would argue that the writ petitioner did not lodge any formal Complaint despite coming to know of the murder of her husband. She had also not raised objection to the Charge Sheet or the Supplementary Charge Sheets filed by the investigation agency before the Magistrate under Section 173 (8) of the Cr.PC, and is therefore estopped from seeking change of the investigation agency now.

30. Further, the only evidence of the Petitioner naming the other persons as accused, is the letter that was submitted to her at the first instance to the police. The names of the additional accused are not found in her statement under S. 161 of the Cr.PC, nor has she mentioned their names or conduct, at any point during the course of trial.

31. It is also argued that the Investigation cannot be transferred to any other agency once the trial has been completed, and even if a fresh trial is ordered. It is submitted that since the trial has commenced after the

framing of charges, there is even otherwise no scope of change of investigation agency.

32. Without prejudice to the above, it is next argued that once the High Court in the appeal, despite powers Section 386 of the Cr.PC, has not chosen to change the investigation agency while setting aside the order of acquittal passed by the Sessions Judge, the Writ Court cannot, and should not, entertain any prayer for such change.

33. The inherent powers of the High Court under Sections 482, 483, 386 and 391 of the Cr.PC, as well as the powers of the Sessions Court and the High Court under Sections 386 and 391 have also been placed at length by Mr. Rai.

34. It is also argued that since retrial in part has been ordered with a direction to invoke Section 311 of the Cr.PC, the Sessions Court has sufficient powers under Section 311 and 319 of the Cr.PC, to order production of any evidence and or person, and also to convict any person. Hence there is even otherwise no need for further investigation, much less a change of investigating and/or prosecuting agency.

35. It is also argued that in the **Pooja Pal case (Supra)**, a stay was granted by the Supreme Court while considering a prayer for transfer of investigation agency. No such stay has been obtained by the petitioner in the instant case. An interim application for Stay has been made and withdrawn by the petitioner.

36. On a careful reading of the orders of the Hon'ble Supreme Court and the Division Benches, this Court finds that the issue of change of investigation agency was kept alive even after the trial was over. The Hon'ble Supreme Court had directed that the writ petition, seeking transfer of investigation to the CBI, should be heard after the appeals under Section 378 of the Cr.PC is disposed of. The direction to "hear the writ petition if necessary" must be clearly be understood to mean, "depending on whether the acquittal is upheld or not by the Division Bench". The issue of transfer of investigation and prosecution to the CBI can therefore be considered by this Court in the writ petition even at this stage.

37. The Division Bench had clearly not chosen to decide the issue of transfer of investigation to the CBI in the Appeals against the orders of acquittal, as it was subject matter of this pending writ petition. The accused and the respondents therefore did not pray for disposal of the writ petition while the appeals were being disposed of. It would amount to approbation and reprobation on the part of the respondents and the accused, in now arguing that the Writ petition has become infructuous.

38. The omission of the petitioner to mention the other persons responsible for the death of her husband in the statements under Sections 161 and 164 or even in course of the trial is irrelevant now, as the Sessions Court itself has found serious lacunae in the investigation, which findings have been confirmed by the Division Bench of this Court.

39. Mr Sudipto Moitra, Ld. Senior Advocate appearing for the State, has argued that the change of investigation agency would amount to interfering with the Trial, and hence should not be done by this Court under Article 226.

40. It is next argued that the Division Bench under the powers conferred on it under Section 386, has ordered retrial, which has been upheld by the Supreme Court. Therefore there is absolute no scope for any change of investigation agency at this stage. This according to Mr. Moitra would frustrate the order of the Division Bench.

41. The writ petition, according to Mr. Moitra, has therefore attained a jural death, and has become infructuous. The appeal Court has not commented on any omission by the investigation agency. The findings of the appeal court were only directed against the omissions of the Trial judge.

42. Placing reliance on the case of **N R Govindaraji Vs. S Venkartachalam** reported in **2000 SCC OnLine 74**, it is argued that once a trial has been completed and the Magistrate has convicted a person, the High Court cannot under Section 482 of the Cr.PC order fresh investigation and trial against another person.

43. It is next argued by placing reliance on the decision of the Supreme Court in **Union of India Vs. Kirloskar Pneumatic Co. Ltd.** reported in **(1996) 4 SCC 453**, particularly paragraph 10 thereof, that the writ court cannot pass orders contrary to Statute.

44. It is also argued that Criminal Proceedings are governed by procedural law, and in view of the conclusion of the trial, the subsequent events must be noticed and the writ petition must be dismissed. The High Court cannot direct further investigation after the trial has been completed.

45. Mr. Moitra next submitted that the directions of the Supreme Court for hearing of the Writ petition cannot be mechanically followed by the High Court. It is also argued that, what the Supreme Court can do under Article 32 of the Constitution of India, the High Court is not empowered to do under Article 226. Reliance in this regard is placed on the decision of the SC in the case of **State of Punjab Vs. Sunder Singh** reported in **(1992) 1 SCC Pg 489**.

46. It is next argued that the High Courts cannot exercise the power of change of investigation agencies merely because the Supreme Court has done so. It is submitted that the **Zahira Habibulla (supra)** and the **Pooja Pal (Supra)** decisions were rendered in Criminal Appeals, and not under article 226 of the Constitution. Reference is made to the decision of **Vinubhai Haribhai Malavaia (Supra)** particularly paragraph 40 thereof, to argue that there cannot be change of investigation agency after cognizance is taken by the Magistrate.

47. By further reference to a decision of a Division Bench of this Court in **Director General of Police Vs. Gopal Kumar Agarwal** reported in **2020 SCC OnLine Cal 755**, it is argued that the transfer of investigation

to the CBI should not be resorted to based on bald and unsubstantiated allegations.

48. Taking the second last argument first, it appears from the decision of **Vinnubhai Haribhai Malaviya (Supra)** that the view taken by the earlier benches referred to in the said paragraph has been overruled, and it has been held that the power to order further investigation is available till charges are framed. The arguments of the State in this regard are therefore unacceptable.

49. The **DG Vs Gopal Kr Agarwal decision** (supra) has been rendered in a case where the Court did not have the benefit of the findings of a perfunctory investigation as available in the instant case. It further appears that it may not have been brought to the notice of the Court that the Magistrate under 156 (3) of the Cr.PC does not have the power to change the investigation agency.

50. The**State of Punjab Vs Sunder Singh** (supra) decision was rendered under service law and concerning unreasoned orders passed by the High Court. Therefore, this decision cannot have any manner of application to the facts of the instant case.

51. The **N R Govindaraji decision (supra)** is also of no relevance here, as the trial in the instant case has resulted in an acquittal, and the matter has been remanded for retrial from the Section 311 stage by the High Court under Section 386 of the Cr.PC.

52. The other arguments of Mr. Moitra are similar to those advanced by Mr. Debashish Rai, Ld. Counsel for the other accused, which have been dealt with hereinabove and below.

53. Mr Soumya Chakraborty, Ld. Senior Advocate appearing for one of the accused, namely, Sasti Gayen, has also made detailed submissions opposing the writ petition. He has submitted that the writ petition has become infructuous and the discussions have been rendered academic.

54. He has submitted that the Co-ordinate Bench in its order dated 4th May 2015, was already in belated consideration of the issues in the instant writ petition of the year 2012. The trial itself stood concluded by then, and the appeal against the order of acquittal was pending consideration before the Division Bench. The writ petition should have been dismissed on that day itself.

55. It is next argued by reference to paragraph 17 of the said order of the Co-ordinate Bench, dated 4th May 2015, that the reliance was placed before on overruled judgements like the case of **Pasupuleti Venkateswarulu Vs. Motor and General Traders** reported in **(1975) 1 SCC Pg 770**, was overruled in **Shri Kishan Vs Manoj Kumar** reported in **(1998) 2 SCC 710**. It appears to this Court that the Co-ordinate Bench merely recorded the submissions of the petitioner and had not approved the argument. On the contrary, the Coordinate Bench had relied upon the decision of **Beg Raj Singh Vs UP** reported in **(2003) 1 SCC 726,** that subsequent events must be given due consideration by Courts.

56. It is also argued that reliance placed on the **Rita Nag** decision reported in **(2009) 9 SCC 129** by the Coordinate bench was equally erroneous, as the same was overruled in the case of **Vinubhai Haribhai Malaviya Vs State of Gujarat** reported in **(2019) 7 SCC Pg 1**. Once again it appears that, the Co-ordinate Bench was only recording the argument of the counsel for the petitioner, and the said **Rita Nag** decision was not applied. In fact, the Court did not make any final pronunciation on any of the issues raised in the writ petition.

57. It is argued that the petitioner had an opportunity to file a protest petition to invoke the powers of the Magistrate under 156(3) and 173(8) of the Cr.PC, inter alia, by applying under Section 200 thereof against the Charge sheet and 2 supplementary charge sheets filed, but chose not to do so. She cannot be permitted to now seek further investigation, more so after the trial has been concluded.

58. It is next argued by Mr. Chakraborty, that the petitioner herself, in statements under Section 161 and 164 of the Cr.PC, did not seek to implicate any new persons. Even in the evidence adduced during the trial, the petitioner had not stated anything against the persons she alleges are the real conspirators, and/or persons responsible for her husband's death. The change of investigation based on a letter and documents mentioned in Exhibit 10 of the Trial (Non production whereof was the reason why retrial has been ordered) cannot be prayed for by the petitioner, according to Mr. Chakraborty.

59. This Court has carefully considered the arguments of Mr. Chakraborty. The trial is now to recommence, in terms of the decision of the Division Bench. The petitioner's apprehensions have been vindicated by both the trial judge and the Division Bench. The omissions of the petitioner to avail remedies under Cr.PC against the charge sheets have become inconsequential.

60. In any event, the writ petition was filed seeking transfer of the investigation to the CBI, which the Magistrate is not empowered to order. The petitioner's argument that she had no faith in any investigation by the State Police, and invoking the power of the Magistrate in this regard, was an exercise in futility, and she had hence filed the writ petition, appears to be plausible.

61. This Court notes that the petitioner had already filed the writ petition seeking transfer of the investigation to the CBI. The trial could not be stopped since the Co-ordinate Bench had not so ordered. The petitioner's stand as regards faulty investigation is vindicated by the findings of the Sessions Judge, and the Division Bench of this Court. The evidence of the petitioner was led by the prosecution and she was not asked to indicate as to whether any other person was involved in the murder of her husband. The responsibility to assist the trial judge, in the process of unearthing the truth, rests in the prosecution and the State, in the current scheme of the Cr.PC. The petitioner cannot be faulted for not exercising powers that were not available to her in the first place.

62. Mr Soumya Chakraborty thereafter retired from the matter for want of instructions, and Mr. Ankit Surekha continued arguments for the accused Sasti Gayen.

63. Mr. Surekha once again placed the entire facts and contended that the writ petition has become infructuous. The question of maintainability of the writ petition is deemed to remain open as the Supreme Court in its order dated 9th August 2017 in Criminal Appeal No.1361 of 2017 permitted the petitioner to be heard in the writ petition.

64. By reference to the decisions of **T.K. Lathika Vs Seth Karsandas Jamnadas** reported in **(1999) 6 SCC Pg 632 and R.K. Roja Vs. U.S. Rayudu** reported in **(2016)14 SCC 275,** it is argued that the point of maintainability of the writ petition ought to be decided first.

65. It is next argued that the petitioner had not protested against the Charge Sheet, inter alia, under the provisions of Section 173 of the Cr.PC, and had accepted the same and hence cannot seek change the investigation agency at this stage. Reference is made to the decision of this Court in the case of **DG of Police Vs. Gopal Kr Agarwal (Supra)** specifically, **Paragraphs 51, 52, 56 and 57.**

66. There is no investigation pending as on date, and hence the question of transfer of investigation to CBI, at this stage, therefore cannot arise.

67. It is further argued that the prayers in CRA 688 of 2016 (Priyanka Dutta Vs State of WB) was for setting aside the acquittal order of the Sessions Court, and for fresh investigation by an independent and impartial agency. The said appeal having been allowed without acceding to the prayer for change of Investigation agency, the issue is barred by the principles of constructive res judicata. Reference in this regard is made to the decision of **Ravinder Singh Vs Sukhbir Singh** reported in **(2013) 9 SCC 245 Paragraph 29.**

68. Mr. Surekha has argued that the observations of the Sessions judge as regards the faulty investigation are irrelevant and non-existent, as the order of acquittal has merged into the order of the Division Bench, which set it aside. This Court therefore should not give any credence to such observations of the Sessions Judge.

69. It is lastly argued that the Division Bench has already addressed the petitioner's demand for unearthing the truth, by directing the Trial to commence afresh from the stage of calling for fresh evidence under Section 311. The prayer for change of investigation agency is no longer necessary as the Trial Judge has all the powers under Section 311 to unearth the truth.

70. The arguments of Mr. Surekha, are similar to those advanced by Mr Debashish Roy and Mr. Moitra, and his predecessor Mr. Chakraborty. The Coordinate Bench in its order dated 4th May 2015, has gone into the

writ petition at length, and hence the question of raising the maintainability of the writ petition at this stage may not be justified. The respondents including the accused have not urged the question of maintainability before the Co-ordinate Bench and hence cannot be allowed to raise the same now. The decisions of **T.K. Lathika (Supra)** and **R.K. Roja (Supra)** therefore cannot be applied here. The Hon'ble Supreme Court in its order dated 27th January, 2017 (Supra) has directed that the writ petition would be heard after the disposal of the Criminal appeals, and hence the writ petition is indeed maintainable for being heard. It is however a completely different issue as to whether the writ petition has now become infructuous.

71. The decision in the case of **DG Vs. Gopal Kumar Agarwal (Supra)** has already been dealt with while considering the arguments of Mr. Debashish Roy and Mr. Sudipto Moitra. At the risk of repetition, it is held that the said decision cannot be applied in the facts of the instant case. The petitioner had already filed the writ petition seeking transfer of investigation agency and hearing of this petition has been deferred by the Co-ordinate Bench and the Hon'ble Supreme Court, until after disposal of the Criminal Appeals. The magistrate under Section 156,173 or 200 of the Cr.PC, does not, and cannot have, the powers to transfer the investigation to another agency. The prayers made in the writ petition therefore could not have been made before the Magistrate.

72. Even otherwise on the question of maintainability of the W.P. today the dicta of the Supreme Court must be noticed. In **State of Punjab Vs CBI,** reported in **(2011) 9 SCC 182,** it was held that the inherent power of the High Court cannot be limited to provisions of the Cr.PC, but transgress far beyond it. Indeed the power was exercised under Section 482 of the Cr.PC. However at paragraphs 24 and 25 it was held as follows:-

> **"24.** It is clear from the aforesaid observations of this Court that the investigating agency or the court subordinate to the High Court exercising powers under CrPC have to exercise the powers within the four corners of CrPC, and this would mean that the investigating agency may undertake further investigation and the subordinate court may direct further investigation into the case where charge-sheet has been filed under sub-section (2) of Section 173 CrPC and such further investigation will not mean fresh investigation or reinvestigation. But these limitations in sub-section (8) of Section 173 CrPC in a case where charge-sheet has been filed will not apply to the exercise of inherent powers of the High Court under Section 482 CrPC for securing the ends of justice.
>
> **25.** This position of law will also be clear from the decision of this Court in *Nirmal Singh Kahlon* v. *State of Punjab* [(2009) 1 SCC 441 : (2009) 1 SCC (Cri) 523] cited by Mr Raval. The facts of that case are that the State Police had investigated into the allegations of irregularities in the selection of a large number of candidates for the post of Panchayat Secretaries and had filed a charge-sheet against Nirmal Singh Kahlon. Yet the High Court in a PIL under Article 226 of the Constitution passed orders on 7-5-2003 directing investigation by CBI into the case as it thought that such investigation by CBI was "not only just and proper but a necessity". Nirmal Singh Kahlon challenged the decision of the High Court before this Court contending inter alia that sub-section (8) of Section 173 CrPC did not envisage an investigation by CBI after the filing of a charge-sheet and the Court of Magistrate alone has the jurisdiction to issue any further direction for investigation before this Court."

73. The powers o f the Writ Court to consider transfer or change Investigation Agency at this stage therefore cannot be questioned. The arguments of the accused therefore cannot be accepted.

74. The need for change of investigation and prosecution agency is being dealt with in the later parts of this judgement, in the light of the powers of the Trial Court under Section 311 of the Cr.PC. Hence the argument of Mr Surekha, that the investigation stage is over, is not addressed here.

75. Indeed it is true as argued by Mr. Ankit Surekha, as held by the Supreme Court in **Bhagat Ram Vs. State of Rajasthan** reported in **(1972) 2 SCC 466,** that the principle of res judicata applies to criminal proceedings. The law embodied in Section 300 (old Section 403) of the Cr.PC has been interpreted by the Supreme Court in the said decision. However in the said case the principle was applied to a decision rendered by one Ld. Judge of a Division Bench to a third Judge on reference. In the instant case, the change of investigation agency was not in issue or even argued by the parties in the Appeals. The issue was not pending in a separate writ petition pending hearing before the same Division Bench. The writ petition could not be heard in terms of the directions of the Hon'ble Supreme Court, until disposal of the Criminal Appeals. The principle of Constructive Res-judicata and issue estoppel, and the principle of "auterefois acquit" under Section 300 of the Cr.PC as explained in the **Ravinder Singh decision (Supra)** is not applicable in

the facts of the instant case. In the said case, a finding of fact in an earlier and independent Criminal Contempt proceeding, was held binding in a subsequent proceeding, continuing under the exceptions to Section 300 of the Cr.PC. In the instant case, the Coordinate Bench as well as the Hon'ble Supreme Court, had kept the instant writ petition alive for being dealt with after the disposal of the Criminal Appeals, albeit if necessary. Hence the writ petition cannot be rejected on the ground of constructive res-judicata.

76. The doctrine of merger cannot be applied to extinguish the observations of the Sessions Judge as regards faulty investigation and prosecution. Such extinction could have been argued if the Division Bench would have arrived at any conclusive proof of guilt or acquittal, on the basis of the evidence on record, after reversing the findings of the Trial Judge. The Division Bench on the contrary has found favour with some observations of the Trial Judge in remanding the matter for retrial, with a direction to exercise powers under Section 311 of the Cr.PC.

77. This Court has heard, and taken into account all the arguments and contentions of both sides, as well as the accompanying decisions cited by the parties in furtherance of their arguments. Having dwelt on the on preliminary issues raised by the parties, the following issues remain for consideration:

a. ***The need for an impartial and effective investigating agency in the criminal justice delivery system and the circumstances which warrant the need for change of investigating agency.***

b. ***The role of an effective and independent prosecutor and the prosecution in criminal trials.***

c. ***The nature and scope of S. 311 of the Cr.PC, and the extreme care and caution to be exercised in invoking and wielding these powers.***

d. ***The jurisdiction of the High Court under Article 226 in respect of criminal proceedings, in the backdrop of the inherent powers vested on the High Court, under Sections 482, 483 and 386 of the CrPC*.**

THE NEED FOR AN IMAPRTIAL AND EFFECTIVE INVESTIGATION AGENCY:

78. A comprehensive, honest, sincere and fair investigation, is imperative and indispensable for an effective and fair prosecution, as well as trial. A proper and effective investigation is a *sine quo non* to a fair trial. It is necessary for arriving at the truth, which is the fundamental object and purpose of the Criminal Justice delivery system. Neither should any innocent person be punished, nor should any of the real culprits escape the long arm of the law.

79. The right of an accused to a fair trial, has been recognised under Art. 21 of the Constitution. Such right is equally recognised as available to an

informant/victim/complainant as well. A pre-condition of, and integral part of the Right to a Fair Trial, is a fair investigation, since the absence of the latter contaminates any possibility of the former. This has been observed in the decision of **Babubhai vs. State of Gujarat,** reported in **(2010) 12 SCC 254,** in para 45 as follows:

> **"**45. Not only fair trial but fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Therefore, investigation must be fair, transparent and judicious as it is the minimum requirement of rule of law. The investigating agency cannot be permitted to conduct an investigation in a tainted and biased manner. Where non-interference of the court would ultimately result in failure of justice, the court must interfere. In such a situation, it may be in the interest of justice that independent agency chosen by the High Court makes a fresh investigation."

80. In, **Nirmal Singh Kahlon Vs. State of Punjab** reported in **(2009) 1 SCC 441,** the subject matter of the complaint was corruption and nepotism in appointments to the post of Panchayat Secretaries, committed by the previous regime in the State of Punjab. The High Court directed CBI investigation into the scandal in a PIL, and at Paragraph 28 has held as follows:

> **"28.** An accused is entitled to a fair investigation. Fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India. But the State has a larger 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. When serious allegations were made against a former Minister of the State, save and except the cases of political revenge amounting to malice, it is for the State to entrust one or the other agency for the purpose of investigating into the matter. The State for achieving the said object at any point of time may consider handing over of investigation to any other agency including a Central agency which has acquired specialisation in such cases."

81. In, **State of West Bengal Vs. Committee for the Protection of Democratic Rights** reported in **(2010) 3 SCC 571,** the subject matter was the infamous “Garbeta Murders” in West Bengal. The Supreme Court while upholding the transfer of the investigations from the State to the CBI by the High Court under Article 226, observed at paragraph 68 (ii) as follows:-

> *“(i)…………*
> *(ii)* Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State.
> *(iii)………..”*

82. In the case concerning the ‘Sarada Chit Fund’ Scam in the State of West Bengal, i.e. **Subrata Chattaraj Vs Union of India** reported in **(2014) 8 SCC Pg 768 ,** at paragraph 1 and 9 it was held as follows :

> “Writ petitions seeking transfer of investigation from the State Agencies to the Central Bureau of Investigation (CBI) under the Delhi Special Police Establishment Act, is by no means uncommon in the High Courts in this country. Some, if not most of such cases in due course travel to this Court also, where, issues touching the powers of the High Courts and at times the power of this Court to direct such transfers are raised by the parties. The jurisdictional aspect is, however, no longer res integra, the same having been answered authoritatively by a Constitution Bench of this Court in *State of W.B.* v. *Committee for Protection of Democratic Rights* [(2010) 3 SCC 571 : (2010) 2 SCC (Cri) 401] . This Court in that case was examining whether the federal structure and the principles of separation of powers, made it impermissible for the superior courts to direct transfer of investigation from the State Police to CBI. Rejecting the contention, this Court held that the power of judicial review itself being a basic feature of the Constitution, the writ courts could

issue appropriate writ, directions and orders to protect the fundamental rights of the citizens. This Court observed: (SCC pp. 593-94, paras 51-53)

> "*51.* The Constitution of India expressly confers the power of judicial review on this Court and the High Courts under Articles 32 and 226 respectively. Dr B.R. Ambedkar described Article 32 as the very soul of the Constitution—the very heart of it—the most important article. By now, it is well settled that the power of judicial review, vested in the Supreme Court and the High Courts under the said articles of the Constitution, is an integral part and essential feature of the Constitution, constituting part of its basic structure. Therefore, ordinarily, the power of the High Court and this Court to test the constitutional validity of legislations can never be ousted or even abridged. Moreover, Article 13 of the Constitution not only declares the pre-Constitution laws as void to the extent to which they are inconsistent with the fundamental rights, it also prohibits the State from making a law which either takes away totally or abrogates in part a fundamental right. Therefore, judicial review of laws is embedded in the Constitution by virtue of Article 13 read with Articles 32 and 226 of our Constitution.
>
> *52.* It is manifest from the language of Article 245 of the Constitution that all legislative powers of Parliament or the State Legislatures are expressly made subject to other provisions of the Constitution, which obviously would include the rights conferred in Part III of the Constitution. Whether there is a contravention of any of the rights so conferred, is to be decided only by the constitutional courts, which are empowered not only to declare a law as unconstitutional but also to enforce fundamental rights by issuing directions or orders or writs of or 'in the nature of' mandamus, certiorari, habeas corpus, prohibition and quo warranto for this purpose.
>
> *53.* It is pertinent to note that Article 32 of the Constitution is also contained in Part III of the Constitution, which enumerates the fundamental rights and not alongside other articles of the Constitution which define the general jurisdiction of the Supreme Court. Thus, being a fundamental right itself, it is the duty of this Court to ensure that no fundamental right is contravened or abridged by any statutory or constitutional provision. Moreover, it is also plain from the expression 'in the nature of' employed in clause (2) of Article 32 that the power conferred by the said clause is in the widest terms and is not confined to issuing the high prerogative writs specified in the said clause but includes within its ambit the power to issue any directions or orders or writs which may be appropriate for enforcement of the fundamental rights. Therefore, even when the conditions for issue of any of these writs are not fulfilled, this Court would not be constrained to fold its hands in despair and plead its inability to help the citizen who has come before it for judicial redress (per P.N. Bhagwati, J.

> in *Bandhua Mukti Morcha* v. *Union of India* [(1984) 3 SCC 161 : 1984 SCC (L&S) 389])."
>
> **9.** It is unnecessary to multiply decisions on the subject, for this Court has exercised the power to transfer investigation from the State Police to CBI in cases where such transfer is considered necessary to discover the truth and to meet the ends of justice or because of the complexity of the issues arising for examination or where the case involves national or international ramifications or where people holding high positions of power and influence or political clout are involved. What is important is that while the power to transfer is exercised sparingly and with utmost care and circumspection this Court has more often than not directed transfer of cases where the fact situations so demand."

83. In light of the omissions on the part of the CID, West Bengal recorded by the trial judge and as found by the Division Bench of this Court, referred to hereinabove, it is quite clear that investigation in the instant case by the CID, West Bengal, has been perfunctory. The petitioner's contentions and apprehensions have thus been vindicated. The State agencies have clearly failed to effectively investigate the crime and bring the actual culprits to book. There is thus, an urgent and immediate need to instil public faith in the investigation and trial, which provides sufficient impetus for the change in the investigation agency.

THE NEED FOR AN IMAPRTIAL AND EFFECTIVE PROSECUTION

84. The role of a prosecutor in ensuring a fair and speedy trial cannot be overemphasized. While it is true that prosecutors in general, and public prosecutors in particular, are appointed by the State to represent the interests of the victim, they are not part of the 'Executive'. The Superior Courts have repeatedly held that Prosecutors are meant to function as 'ministers of justice' under the Scheme of the Code of Criminal

Procedure, and any indication of bias or external control over the Prosecutor, is material enough for judicial intervention.

85. The Kerala High Court in the case of **Babu vs. State of Kerela,** reported in **1984 Cr L.J. 499,** as follows:

> "8. Under S. 301, a Pleader engaged by a private person can assist the Public Prosecutor or the Assistant Public Prosecutor, as the case may be, in the conduct of the prosecution while under S. 302 the Magistrate may permit the prosecution itself to be conducted by any person or by a pleader instructed by him. The distinction is when permission under S. 302 is given, the Public Prosecutor or the Assistant Public Prosecutor as the case may be disappears from the scene and the pleader engaged by the person who will invariably be the de facto complainant will be in full charge of the prosecution. The question is even if the Magistrate has got the discretion to grant the permission is it to be granted as a matter of course. There is an ocean of difference between assisting the Public Prosecutor under S. 301 and conducting the prosecution on the basis of a permission granted under S. 302. Public Prosecutors are really ministers of justice whose job is none other than assisting the State in the administration of justice. They are not representatives of any party. Their job is to assist the court by placing before the court all relevant aspects of the case. They are not there to see the innocents go to the gallows. They are also not there to see the culprits escape a conviction. But the Pleader engaged by a private person who is a de facto complainant cannot be expected to be so impartial. Not only that, it will be his endeavour to get a conviction even if a conviction may not be possible. So, the real assistance that a Public Prosecutor is expected to render will not be there if a pleader engaged by a private person is allowed to take the role of a public prosecutor by granting permission under S. 302 of the Code. This does not mean that permission cannot at all be granted under S. 302. Under very very exceptional circumstances permission can be granted under S. 302. Otherwise, there is no reason why the provision is there in the Code. But that is to be done only in cases where the circumstances are such that a denial of permission under S. 302 will stand in the way of meeting out justice in the case. A mere apprehension of a party that the Public Prosecutor will not be serious in conducting the prosecution simply because a conviction or an acquittal in the case will affect another case pending will not by itself be enough. At the same time, if the apprehension of the party is going to materialism, the court can, pending the trial, grant permission under S. 302 even if a request for permission was rejected at the outset."
>
> (emphasis added)

86. Further, the Prosecution is not only meant to be free of the executive control of the State, it is also supposed to be free of the administrative

control of the police/investigating agency, since it would lead to the investigating agency effectively subsuming the duties of the Prosecution, which is against the scheme of the Cr.PC.In **R. Sarala vs. T.S. Velu,** reported in **AIR 2000 SC 1731: (2000) 4 SCC 459,** the Apex Court noted that:

> "**12.** A Public Prosecutor is appointed, as indicated in Section 24 of the Code, for conducting any prosecution, appeal or other proceedings in the court. He has also the power to withdraw any case from the prosecution with the consent of the court. He is the officer of the court. *Thus the Public Prosecutor is to deal with a different field in the administration of justice and he is not involved in investigation. It is not in the scheme of the Code for supporting or sponsoring any combined operation between the investigating officer and the Public Prosecutor for filing the report in the court."* (emphasis added)

87. The reasons behind the separation of powers between the investigation and the prosecution has been specifically addressed by the Supreme Court in ***S.B. Shahane v. State of Maharashtra*,** reported in **1995 Supp (3) SCC 37**as follows:

> "6. As the above section was undisputedly inserted by Parliament in the Code because of the fault found by the Law Commission in the conduct of prosecutions in Magistrates' courts of the country by Police Prosecutors and remedial suggestions made by it in its 14th Report, we can, to our advantage, advert to them at the first instance, thus:
> " 12. Police Prosecutors and their functioning.— *It is obvious that by the very fact of their being members of the police force and the nature of the duties they have to discharge in bringing a case in court, it is not possible for them to exhibit that degree of detachment which is necessary in a prosecutor. It is to be remembered that a belief prevails amongst the Police Officers that their promotion in the Department depends upon the number of convictions they are able to obtain as prosecuting officers. Finally, they only control or supervision of the work of these prosecuting officers is that exercised by the Department Officials.*
> "15. Suggested remedial measure.— We therefore suggest that as a first step towards improvement, the prosecuting agency should be completely separated from the Police Department. In every district a separate Prosecution Department may be constituted and placed in charge of an official who may be called a "Director of Public Prosecutions". The entire

prosecution machinery in the District should be under his control. In order to ensure that he is not regarded as a part of the Police Department he should be an independent official directly responsible to the State Government. The departments of the machinery of criminal justice, namely, the Investigation Department and the Prosecuting Department should thus be completely separated from each other."

7. It becomes clear from what is stated by the Law Commission in para 12 above that the conduct of prosecutions in courts in India, as it then prevailed, was carried on by police officers who were designated as Police Prosecutors. *Those Police Prosecutors were functioning under the administrative and disciplinary control of the superior officers of the police force or department itself. Since their promotions to the higher posts in the department depended on the number of convictions they were able to obtain from courts in the prosecutions conducted by them, they were not able to exhibit the needed degree of detachment expected of prosecutors. In other words, the Law Commission strongly felt the need of Prosecutors conducting the prosecutions in courts independently of the Police Department that had investigated the cases in respect of which prosecutions were launched or of officers of the Police Department who were very much interested in such investigations so as to conform to the basic salutary rule of prosecution of criminal cases that the prosecutors must conduct the prosecutions fairly and impartially.*

8. Then, we find from para 15 above, the remedial measures suggested by the Law Commission for conducting prosecutions by prosecutors fairly and impartially. *Firstly, it is suggested that the Police Department shall not continue as the prosecuting agency as the practice prevailed. Secondly, the prosecuting agency must have its own Prosecution Department separate and distinct from the Police Department, of which it was a part. Thirdly, the Prosecutors of Prosecution Departments must have their own heads who can exercise administrative and disciplinary control over them being directly responsible to the Government concerned. It is ultimately, suggested in unequivocal terms that the machinery of criminal justice though comprised of Investigation Department and the Prosecuting Department, there should be complete separation between them. The object of such separation suggested is obviously to see that the officers of the Police Department who will have investigated the cases to be prosecuted in courts shall have no manner of control or influence over the prosecutors who conduct the cases in courts based on the investigations made by the Police Department.*

…….

10. Thus, when all the sub-sections of Section 25 of the Code are seen as a whole, it becomes clear therefrom, that there is a statutory obligation imposed on the State Govt. or the Central Govt., as the case may be, to appoint one or more Assistant Public Prosecutors in every district for conducting the prosecutions in the Magistrates' courts concerned, and of making such Assistant Public Prosecutors independent of the Police Department or its officers entrusted with the duty of investigations of cases on which prosecutions are to be launched in courts, by constituting a separate cadre of such Assistant Public Prosecutors and creating a

> *separate Prosecution Department for them, its head made directly responsible to the Government for such department's work.”*
>
> *(emphasis added)*

88. In the case of **National Human Rights Commission Vs. State of Gujarat,** reported in **(2009) 6 SCC 767,** the Supreme Court had addressed the importance and need for the separating the investigation from the prosecution agencies. An extensive cross-jurisdictional analysis was undertaken, to find that in other commonwealth jurisdictions, inter alia, Australia, Republic of Ireland, and England and Wales, Prosecutors are all placed under the control of independent bodies, such as the Director of Public Prosecution.

89. In India as well, following a recommendation of the Law Commission of India, in its 154th Report, published in 1996, had proposed for a statutory amendment to the Cr.PC that would allow for the establishment of an independent prosecuting agency, called the Directorate of Prosecutions. This was effectuated by an amendment in 2006, that inserted Section 25-A into the Cr.PC, setting up Directorates of Prosecution in every State.

90. The independence of both the Investigation and the Prosecution from the executive control of the State, and of the Prosecution from the investigating agency becomes all the more crucial and necessary in crimes involving ‘influential persons’, like public figures, members of political parties, and persons related to them. They enjoy huge control

and clout that could influence the investigation and prosecution, and consequently the direction of the case. This issue was specifically dealt with by the Law Commission of India in its **239th Report submitted to the Supreme Court, in light of the writ petition filed in *Virender Kumar Ohri vs. Union of India* in WP (C) No. 341/2004.** In that writ petition as well, the Court was concerned with a case wherein serious offences had been committed by the 'influential persons in public life' and their henchmen, who had then attempted to interfere with the investigation, prosecution and trial in various ways, raising questions about the efficacy of the existing systems in counter-balancing against such delays, subversions and interferences.

91. The relevant parts of the abovementioned **239th Report** are set out hereinbelow:

> " 2.2 The causes for delay before the case reaches the Court for trial:
>
> ....
>
> 2. Police are either hesitant to proceed with the investigation against important/influential persons or they are under pressure not to act swiftly especially if the person accused is in power or an active member of the ruling party. They adopt a pusillanimous attitude when the accused are such persons.
>
> 3. Corruption at Police Station level is affecting the timely and qualitative investigation. Further, the Police Stations are understaffed and the police personnel lack motivation to act without fear or favour.
>
> ....
>
> 7. Sanctions for prosecution are unduly delayed by the Governments. These reasons are not peculiar to cases of public men – they are all problems surrounding the Criminal Justice system as a whole.
>
> ....
>
> 2.5 Public Prosecutors:

> (i) Vacancies in the offices of PP/APP resulting in one PP/APP shuttling from one Court to another thereby causing dislocation of Court work. There is no effective mechanism to oversee the functioning of Public Prosecutor. The recruitment process is either deficient or politically manipulated. The provision in Section 24(4) of Cr.P.C. which requires the District Magistrate to prepare a panel of names fit to be appointed as PPs/Addl.PPs for the district in consultation with the Sessions Judge, has been deleted or amended by many States. It is the sole prerogative of State Government to appoint PPs and Addl.PPs of their choice in many States"

92. In light of the findings of both the Trial Judge as well as the Division Bench of the High Court on the failure of and the laxity exhibited by the Prosecutor in placing evidence before the Court, and adequately questioning witnesses; combined with the above decisions and Law Commission Reports, this Court is of the view that the Prosecutor has failed in adequately discharging duties. The prosecution must be kept away from the reach of any State or political influence in view of the likely involvement of powerful and politically influential persons .This Court is this of the view that a change in the Prosecution or Prosecution Agency is vital and imperative to ensure that the truth emerges in the matter.

CARE AND CAUTION TO BE EXERCISED BY THE TRIAL COURT IN THE EXERCISE OF POWERS UNDER SECTION 311 AND 319

93. Section 311 of the Cr.PC is meant to enable the Trial Court to arrive at the truth, and to render a just decision in the case. The Trial Court achieves this after discovering all relevant facts based on proper proof of

the same, by summoning and examining the witness or witnesses who can give relevant evidence, irrespective of the fact whether they have been named as witnesses in the charge sheets. This Section consists of two parts, the first part gives any Court discretion at any stage of any inquiry, trial or other proceeding under the Cr.PC to examine any person in attendance, or to re-call/re-examine any person already examined; while the second part makes it mandatory for the Court to do so, if it appears essential to the just decision of the case.

94. While it may appear that the powers under this Section are extremely wide and discretionary, the Apex Court has repeatedly held that it must be exercised with extreme care, caution and circumspection, and only in certain circumstances, based on whether the facts and circumstances of the case demands so. A few of these decisions have been laid down below.

95. The nature and scope of the powers of the Trial Court under S. 311, as well as the care and caution to be exercised by the Court in the same, was laid down in great detail in the decision of **VN Patil v. K. Niranjan**reported in **(2021) 3 SCC 661,** as follows:

> *" 14. The object underlying Section 311 CrPC is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that the discretionary power conferred under Section 311 CrPC has to be exercised judiciously, as it is always said "wider the power, greater is the necessity of caution while exercise of judicious discretion".*

15. The principles related to the exercise of the power under Section 311 CrPC have been well settled by this Court in Vijay Kumar v. State of U.P. [Vijay Kumar v. State of U.P., (2011) 8 SCC 136 : (2011) 3 SCC (Cri) 371 : (2012) 1 SCC (L&S) 240] : (SCC p. 141, para 17)

> *"17. Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of the Code and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously. Before directing the learned Special Judge to examine Smt Ruchi Saxena as a court witness, the High Court did not examine the reasons assigned by the learned Special Judge as to why it was not necessary to examine her as a court witness and has given the impugned direction without assigning any reason."*

16. This principle has been further reiterated in Mannan Shaikh v. State of W.B. [Mannan Shaikh v. State of W.B., (2014) 13 SCC 59 : (2014) 5 SCC (Cri) 547] and thereafter in Ratanlal v. PrahladJat [Ratanlal v. PrahladJat, (2017) 9 SCC 340 : (2017) 3 SCC (Cri) 729] and Swapan Kumar Chatterjee v. CBI [Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839] . The relevant paragraphs of Swapan Kumar Chatterjee [Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839] are as under: (Swapan Kumar Chatterjee case [Swapan Kumar Chatterjee v. CBI, (2019) 14 SCC 328 : (2019) 4 SCC (Cri) 839] , SCC p. 331, paras 10-11)

> *"10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine, or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.*
>
> *11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power*

under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."

17. The aim of every court is to discover the truth. Section 311 CrPC is one of many such provisions which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 CrPC has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice."

96. Similarly, in the case of **Ratanlal vs. Prahlad Jat,** reported in **(2017) 9 SCC 340**, the Apex Court had observed as follows:

" **17.** *In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section.311 are enacted where under any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or re2call or reexamine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order."*

(emphasis added)

97. In **Natasha Singh V. CBI** , reported in **(2013) 5 SCC 741,** the Supreme Court noted that powers under Section 311 if exercised in a casual and cavalier manner, and invoked without caution, can indeed lead to undesirable results, such as changing the nature of the case in a manner that is detrimental to the interests of either/both parties. The relevant paragraphs have been set out below:

" 15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not

> capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as "any court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case."
>
> (emphasis added)

98. Further, S. 311 cannot be a disguise for retrial, or for filling up a lacunae in the case of a prosecution or the defence. The meaning of a lacunae in the case of either party has been explained by the Supreme Court in **Rajendra Prasad vs. Narcotic Cell Through Its Officer in-Charge, Delhi,** reported in **(1999) 6 SCC 110 as follows:**

> "8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."
>
> (emphasis added)

99. However, given the broad contours of what can be understood as the 'lacunae in the prosecution case", an application for adducing more evidence under S. 311 by the prosecution after the defence has adduced evidence and build its case, has been left out of its ambit, as it would severely curtail the powers of the prosecution to adduce further evidence. This can be observed from the case of **U.T. of Dadra & Haveli & Anr V. Fatehsinh Mohansinh Chauhan,** reported in **(2006) 7 SCC 529,** which states that:

> "15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice.
>
> 16. The charge-sheet submitted by the police under Section 173 CrPC after completion of investigation contains the statements of the witnesses as recorded under Section 161 CrPC, and in a case exclusively triable by the Court of Session there is a duty enjoined on a Magistrate to furnish to the accused, free of cost, a copy of the police report including a copy of the FIR, statement of the witnesses under Section 161 CrPC and other documents as mentioned in Section 207 CrPC. It is on the basis of the charge-sheet that the Magistrate takes cognizance of the offence under Section 190(1)(b) CrPC. Normally, the investigating agency cannot visualise at that stage what will be the nature of defence which an accused will take in his statement under Section 313 CrPC as the said stage comes after the entire prosecution evidence has been recorded. The prosecution is only required to establish its case by leading oral and documentary evidence in support thereof. While leading evidence the prosecution may not be in a position to anticipate or foresee the nature of defence which may be taken by the accused and evidence which he may lead to substantiate the same. Therefore, it is neither expected to lead negative evidence nor is it possible for it to lead such evidence so as to demolish the plea which may possibly be taken by the accused in his

defence. This being the normal situation, an application moved by the prosecution for summoning a witness under Section 311 CrPC, after the defence evidence has been recorded, should not be branded as "an attempt by the prosecution to fill in a lacuna".

(emphasis added)

100. The principles discussed above have also been noted in great detail by the SC in **Manju Devi Vs The State Of Rajasthan** reported in **(2019) 6 SCC Pg 203** it was held at paragraph 10 as follows:-

> **"**15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section.311 Cr.P.C must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section.311 Cr.P.C must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as "any Court", "at any stage, or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case"

(emphasis added)

101. In addition to the above cases, the Supreme Court in the case of **Rajaram Prasad Yadav v. State of Bihar,** reported in **(2013) 14 SCC 461,** derives the following guidelines for the application of Section 311 by the Trial Court, which are as follows:

“ **17.** From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the courts:

17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?

17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.

17.7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an

> opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.
> 17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.
> 17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.
> 17.14. The power under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."
>
> (emphasis added)

102. It can be concluded from the above decisions, that while the powers of the Trial Court under S. 311 are partly discretionary, and partly mandatory, it must be exercised with extreme care, caution and circumspection. Its indiscriminate use, especially in situations where there are glaring holes in the efforts of the investigation and the prosecution case- as in the case before us- it would only be equivalent to attempting to filling up the "lacunae" in the prosecution case.

103. Section 311 therefore aims at empowering any Criminal Court with the means to ascertain and arrive at the truth. The real offenders must be found, tried and the charges must be proved against them. The innocent must be determined and left out. The Court alone cannot discharge this onerous task given the huge restrictions, and requirements for care and caution, involved. It must therefore be assisted by an effective

prosecutor. It must be suitably and properly guided by an able, sincere and honest prosecutor.

104. In the backdrop of the above dicta/decisions of the Supreme Court, relating to Section 311 of the Cr.PC, this court is of the view that the task imposed on a Trial judge would be extremely onerous, if the burden is placed entirely on the Trial Court to proceed with the Trial without an honest, effective and comprehensive/dedicated assistance of an agency to assist with effective investigation, as well as an effective prosecution.

105. This becomes all the more relevant in light of the fact that the all Courts in the country, and Trial Courts in particular, are already extremely over-burdened with the ever increasing case load.

THE POWER OF THE WRIT COURT UNDER ARTICLE 226 OF THE CONSTITUTION TO ORDER FRESH/DE NOVO INVESTIGATION/PROSECUTION BY A DIFFERENT AGENCY AFTER THE TRIAL HAS COMMENCED.

106. The powers vested in this Court under Article 226 shall be rendered essentially defunct, unless it is exercised to its full potential to ensure that the persons responsible for the murder of Tapan Dutta, and the motives behind the same are unearthed. However, it has been argued by the Respondent that exercise of this power under the present facts and circumstances would not be proper for reasons such as, inter alia, the existence of alternative remedies; the inherent jurisdiction of the High

Court under S. 482 of the Cr.PC; the fact that trial has ended, and even if it can be considered to be in progress under S. 311 of the Cr.PC, it can at least be said to have already commenced.

107. In **Pooja Pal Vs Union of India** reported in **(2016) 3 SCC 135,** the Supreme Court, in the context of the competing interests to be maintained in ensuring a 'speedy trial' versus a 'fair trial', in the powers of the High Court to order fresh investigation by a different investigation agency, noted as follows:

> **"82.** The exhaustive references of the citations seemingly repetitive though, assuredly attest the conceptual consisting in the expositions and enunciations on the issue highlighting the cause of justice as the ultimate determinant for the course to be adopted.
>
> **83.** A "speedy trial", albeit the essence of the fundamental right to life entrenched in Article 21 of the Constitution of India has a companion in concept in "fair trial", both being inalienable 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 analysed 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.

> **101.** Judged in these perspectives, we are of the firm opinion that notwithstanding the pendency of the trial, and the availability of the power of the courts below under Sections 311 and 391 of the Code read with Section 165 of the Evidence Act, it is of overwhelming and imperative necessity that to rule out any possibility of denial of justice to the parties and more importantly to instil and sustain the confidence of the community at large, CBI ought to be directed to undertake a de novo investigation in the incident. We take this view, conscious about the parameters precedentially formulated, as in our comprehension in the unique facts and circumstances of the case any contrary view would leave the completed process of crime detection in the case wholly inconsequential and the judicial process impotent. A court of law, to reiterate has to be an involved participant in the quest for truth and justice and is not expected only to officiate a formal ritual in a proceeding far-seeing an inevitable end signalling travesty of justice. Mission justice so expectantly and reverently entrusted to the judiciary would then be reduced to a teasing illusion and a sovereign and premier constitutional institution would be rendered a suspect for its existence in public estimation. Considering the live purpose for which judiciary exists, this would indeed be a price which it cannot afford to bear under any circumstance."

108. The commencement of trial and examination of witnesses cannot in and of itself, negate or create and impediment to the powers of the High Court under Art. 226 as was observed in **Dharam Pal vs. State of Haryana,** reported in **(2016) 4 SCC 160,** as follows:

> **"24.** 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.

" **25.** We may further elucidate. The power to order fresh, de novo or reinvestigation 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 set-up 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 "idée 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 harbour the feeling that he is an "orphan under law".

109. In the facts of the case it is noticed that the omissions of the petitioner, therefore, are hardly relevant in the process of ascertaining and finding the truth. The failure of the investigators and prosecutors, as already found by the Sessions Court and the High Court calls for necessary

intervention by this Court, in the facts of this case. After all, the responsibility of punishing the real wrong doers, with or without exercise of powers under Section 311 and 319 of the CrPC, is that of all stakeholders under the Cr.PC.

110. The contention of Mr Chakraborty that change of an investigator and prosecutor has never happened in a proceeding under article 226 after the trial has been completed, cannot inhibit, and should not stand in the way of ordering measures for ensuring that the wheels of justice move in the right direction. The truth and nothing but the truth has to be ascertained. This is indeed a rare and extraordinary case calling for extraordinary measures.

111. The accused persons and the State may have also been partially responsible for the delay in the hearing of this petition. The accused and State had challenged the order of the Coordinate Bench dated 4th May 2015, referring the writ petition to be heard before a Division Bench. The Supreme Court has upheld the same and directed this writ petition to be heard after disposal of the CRA 688 of 2016 and GA 3 of 2015 by order dated 27th January 2017 passed in Criminal Appeal No. 179 of 2017. The accused was unsuccessful thereafter, in sustaining the acquittal order before this Court (Division Bench Judgment dated 10th April 2017) and were also unsuccessful before the Supreme Court (order dated 8th May 2017 in SLP (Crim) 3661 and 3662 of 2017). They sought to participate in the hearing of the writ petition before the Division Bench and sought to

formally intervene. At their instance they were directed by the Hon'ble Supreme Court (order dated 9.8.2017 in Criminal Appeal 1361 of 2017) to make all submissions in the writ petitions without being added as parties. They applied before the Division Bench hearing this writ petition for retransfer to the Single Bench which was allowed (14th March 2022). The respondents therefore cannot complain of any belatedness in consideration of the prayer for transfer of investigation/prosecution to an independent agency.

112. The subsequent events, i.e. the completion of the trial and the order of the Division Bench for the same to be conducted afresh, are indeed relevant. The observations of the Division Bench confirming the observations of the Trial judge and finding further omissions must be taken note of by this Court. This is in line with the decision in the **Shri Kishan case (Supra)** cited by Mr Chakraborty, Ld Counsel.

113. This Court's mind is not free from doubt that the murder in question might have been the result of a rivalry and a conspiracy. The victim may have been obstructing huge monetary and/or political gain that some persons were after. Such persons are politically powerful and well connected. A fair and effective investigation may indeed open a can of worms, or expose any likely role of influential persons. The pressure on the State police and the investigation agencies to shield certain persons and their nefarious actions cannot therefore be ruled out. Change of the

investigating and prosecuting agency in the instant case is also necessary to instil faith in the family of the victim and the public at large.

114. This Court directs that, investigation and prosecution in the matter is to be transferred to the Central Bureau of Investigation forthwith. The CBI may, in its discretion, conduct further investigation, as it deems necessary.

115. Although there is no specific prayer for change of prosecutor, the orders are made on the basis of the prayer for 'any other relief' made by the petitioner and in exercise of the powers of this Court under Article 226 of the Constitution of India. As noted by the Supreme Court in the case of **State of Rajasthan vs. Hindustan Sugar Mills Ltd.** reported in **1988 AIR 1621: 1988 SCR Supl. (1) 461,** that the High Court while exercising its high prerogative jurisdiction under Article 226 has the power to mould the reliefs in a just and fair manner as necessitated by the demands of the situation. In the present case, this Court finds that the change of the prosecution agency is also necessary

116. The CID West Bengal shall therefore forthwith handover all the cause papers and evidence collected, both those on record, but not produced in the Trial. The CBI shall be entitled to access, inspect and make copies of all the evidence in the Trial.

117. It is ordered that the Trial shall be taken up, and completed within a period of 6 months from the date of its commencement afresh, in terms of the order of the Division Bench dated 10th April 2017 passed in GA 3

of 2015 and CRA 688 of 2016. The Trial Court shall however proceed in the matter uninfluenced by any observation made by this Court on the merits of the subject matter of the main case before it.

118. In light of the above findings, W.P.A. No. 12526 of 2012, CAN 9 of 2021, CAN 10 of 2022 are accordingly disposed of. Any and all existing and connected applications shall stand disposed of as well.

119. In the facts and circumstances of the case, there shall be no order as to costs.

120. All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

(*Rajasekhar Mantha, J.*)

09.06.2022

After the judgment is dictated in open Court, Mr. Ankit Surekha, learned Counsel for the accused, prays for stay of operation of the order.

Prayer is considered and refused.

(*Rajasekhar Mantha, J.*)