(2008) CriLJ 455 : (2007) 4 ILR (Ker) 201 : (2008) 1 KLJ 9 : (2008) 1 RCR(Criminal) 778

High Court Of Kerala

Case No: WP (C) No. 24258 of 2007 (K)

J. Prabhavathiamma — APPELLANT

Vs

The State of Kerala — RESPONDENT

Date of Decision: Sept. 20, 2007

Acts Referred:

- Constitution of India, 1950 - Article 226
- Criminal Procedure Code, 1973 (CrPC) - Section 156(3), 161, 173, 173(2), 173(3)
- Evidence Act, 1872 - Section 132
- General Clauses Act, 1897 - Section 21
- Kerala High Court Act, 1958 - Section 3, 4, 6
- Penal Code, 1860 (IPC) - Section 302, 323, 331, 34, 341

Citation: (2008) CriLJ 455 : (2007) 4 ILR (Ker) 201 : (2008) 1 KLJ 9 : (2008) 1 RCR(Criminal) 778

Hon'ble Judges: K. Hema, J; J.B. Koshy, J

Bench: Division Bench

Advocate: Siraj Karoly, for the Appellant; P.G. Thampi, DGPP and S. Sreekumar, SC, for the Respondent

Judgement

J.B. Koshy, J.

Expressing doubts regarding the correctness of dicta laid down by the Division Bench in Antony Scaria v. State of Kerala 2001 (2) KLT 93 and by the single Bench in Vijayakumar v. Kamarudhin 1999(1) KLT 184 that further investigation u/s 173(8) of the Code of Criminal Procedure can be conducted only by the very same agency which conducted the earlier investigation, a learned single Judge of this Court referred this matter for authoritative pronouncement by a Full Bench. According to the learned single Judge, the above view is opposed to the decision of the Apex Court and other Division Bencn decision of the Apex Court and other Division Bench decisions. Another incidental

question was whether further investigation can be ordered by the court after commencement of trial on the basis of charge sheet (final report) already accepted and charges framed by the Court. Power of the court to refer the matter to C.B.I. under the Delhi Special Police Establishment Act, 1946 is also in incidental question to be answered in the reference. As held by this Court in Babu Premarajan v. Superintendent of Police 2000(3) KLT 177 and Peter Vs. Sara, even though Chief Justice u/s 6 of the High Court Act has got power to place any matter to the Full Bench, u/s 3, single Bench can refer the matter only to a Division Bench. Section 3 of the High Court provides as follows:

3. Powers of Single Judge: The powers of the High Court in relation to the following matters may be exercised by a Single Judge provided that the Judge before whom the matter is posted for hearing may adjourn it for being heard and determined by a Bench of two Judges: xx xx

(underlining for emphasis)

2. u/s 4, a Bench of two judges can refer the case or question of law to Full Bench. Single Judge has to refer the case itself and Division Bench has to dispose of the case itself. See also: Kannappan v. RTO. Ernakulam 1988 (1) KLT 902. Hence, Hon''ble Chief Justice placed the matter to be decided by the Division Bench. Before answering the question of law, we shall refer to the facts of the case.

3. The petitioner in W.P.(C) No. 24258 of 2007 is the mother of one Udayakumar who is said to have been brutally manhandled and killed while in police custody on 27-9-2005 by three police attached to the Fort Police Station, Thiruvananthapuram. The said Udayakumar was allegedly tortured using iron rod, G.I. pipe etc. and 10.20 p.m. when he was removed to the Medical College Hospital from the Fort Police Station he was pronounced dead at 11.30 p.m. In this writ petition filed consequent on the important witnesses to the prosecution turning hostile during the trial of the case before the III Additional Sessions Court (Fast Track - III), Thiruvananthapuram in S.C. No. 1542 of 2006, the mother of the deceased Udayakumar seeks a direction for further investigation by the Central Bureau of Investigation besides a direction to remove from service those police constables who turned hostile to the prosecution during trial and also a direction to the trial court to take action and also a direction to the trial court to take action against them for perjury. Newly added fourth accused who was arrayed as accused by the trial court invoking powers u/s 319 filed Crl.R.P. No. 2902 of 2007 challenging the order made by the trial court invoking Section 319 Cr.P.C. The challenge is that the answers given by the revision petitioner as a prosecution witness cannot be used against him for any purpose except for prosecuting him for perjury in view of Section 132 of the Evidence Act as interpreted in Gangadharan v. SI of Police 1989 (2) KLT 448.

4. Chronological order of the facts leading to this writ petition and Crl. R.P. are as follows:

27-09-2005: Deceased Udayakumar along with C.W. 1 (Suresh Kumar @ Mani) was taken into custody at 1.30 p.m. by accused Nos. 1 and 2 namely Jithakumar and Sreekumar both of whom were police constables attached to the Fort Police Station, Thiruvananthapuram in the Crime Squad under C.W.23 (Circle Inspector, Fort Police Station).

From about 2 p.m. onwards C.W. 1 and Udayakumar are said to have been brutally tortured by Al to A3 all of whom were police constables attached to the Fort Police Station.

At 8 p.m. Crime No. 703 of 2005 was registered against Udayakumar and C.W. 1 (Suresh Kumar @ Mani) u/s 41(1)(d) Cr.P.C.

At 10.20 p.m. on the same day Udaykumar was removed to the Medical College Hospital, Thiruvananthapuram from the cell of Fort Police Station.

At. 11.30 p.m. Udayakumar was pronounced dead by the Doctor at the Medical College Hospital, Thiruvananthapuram.

Crime No. 704 of 2005 was registered by the Fort Police Station under the caption "unnatural death" u/s 174 Cr.P.C. with regard to the death of Udaykumar.

28-09-2005: Investigation Crime No. 704 of 2005 was entrusted with C.W. 49 (PPrabha), Assistant Commissioner, Narcotic Cell, Thiruvananthapuram City.

30-09-2005: A report was sent to J.F.C.M.- II, Thiruvananthapuram incorporating Section 302 read with Section 34 I.P.C. in the above crime.

02-10-2005: CW 49 prepared the scene mahazar.

03-10-2005: Accused Nos. 1 and 2 who are police constables were arrested.

04-10-2005: 3rd accused who is also a police constable in the Fort Police Station was arrested.

05-10-2005: Investigation of the case was transferred to C.B.C.I.D.

13-02-2006: Final report u/s 173(8) Cr.P.C. was filed by C.W. 55 (K.B. Balachandran) Police Superintendent, C.B.C.I.D. (Special Investigation Group -1), Thiruvananthapuram. As per the final report, the prosecution has proposed to examine 55 charge witnesses (CWs), 55 documents including prosecution sanction pertaining to the accused and 33 material objects. The final report is to the following effects-

Accused Nos.l to 3 (Jithakumar, Sreekumar and Soman) were police constables working under C.W. 23 (E.K. Sabu) Circle Inspector of Fort Police Station who was heading the Crime Squad constituted for apprehending culprits involved in theft cases. Deceased

Udayakumar of Manakkad Village and his friend C.W. 1 (Suresh Kumar) were detected by accused Nos. 1 and 2 at Sreekandeswaram Park in Vanchiyoor Village within the limits of the Fort Police Station on 27-9-2005. Since Sureshkumar was a person involved in theft cases and also since deceased Udayakumar was found having in his possession a sum of Rs. 4020/-accused Nos. 1 and 2 suspecting that the money in the possession of deceased Udayakumar and Suresh into custody at 1.30 p.m. and brought them to the Fort Police Station in an autorickshaw driven by C.W.4 (Shibu Kumar). They were then taken to the room in the office of C.W.23 (E.K. Sabu) Circle Inspector of Police, Fort Police Station by about 2 p.m. C.W. 1 (Suresh Kumar) who beaten and fisted by accused Nos. 1 to 3 who thereby committed an offence punishable u/s 323 read with Section 34 I.P.C. Udayakumar was thereafter interrogated with regard to the possession of currency notes found on his person. He was subjected to brutal torture. In order to extort a confession from Udayakumar, accused Nos. 1 to 3, in furtherance of the common intention to voluntarily cause grievous hurt to Udayakumar, subjected him to corporal torture which was forbidden by law. He was made to lie on his back on a bench and repeatedly bastinadoed on the soles of his feet with a cane. Thereafter a G.I. pipe was forcefully rolled down his thighs resulting in the crushing and separation of his thigh muscles and flesh and the accused have thereby committed an offence punishable u/s 331 read with Section 34 I.P.C. Since the aforesaid acts of cruelty were committed by the accused with the intention and knowledge that the said acts were likely to cause the death of Udayakumar and as a result of the inhuman atrocities meted out to him, Udayakumar suffered massive hemorrhage inside his heart and succumbed to the same at 11.30 p.m. from the Medical College Hospital, Thiruvananthapuram, the accused have thereby committed the offence of murder punishable u/s 302 read with Section 34 I.P.C.

27-10-2006: Government; of Kerala appointed Sri. K.K. Vijayan as the Special Public Prosecutor to conduct the prosecution in the case which by then stood, committed to the Sessions Court, Thiruvananthapuram and made over to the Addl. Sessions Court (Fast Track - III), Thiruvananthapuram.

25-11 -2006: The Special Public Prosecutor filed his memo of appearance before the trial court and the case was scheduled for examination of witnesses from 1-3-2007 onwards.

01-03-2007: C.W. 1 (Suresh Kumar) was absent and the case adjourned to 2-3-2007.

02-03-2007: C.W. 1 was absent and his examination was adjourned to 12-3-2007.

12-03-2007: Case was re-scheduled for examination of the prosecution witnesses from 2-5-2007 onwards.

02-05-2007: The case was again re-scheduled to 2-7-2007 due to the illness of the counsel appearing for the 3rd accused.

15-06-2007: Crime No. 703/2006 registered against the deceased and C.W. 1 was referred by the Fort Police thereby indicating that a false case was registered against the

deceased and C.W. 1

02-07-2007: C.W. 1 was again absent and warrant was issued for securing his presence and the case was adjourned to 3-7-2007.

03-07-2007: C.W. 1 who was arrested and produced before Court, was examined as P.W. 1. He turned hostile to the prosecution. (The Special Public Prosecutor had filed a report before the trial Court to the effect that P.W. 1 was won over by the accused police officers and requesting for further investigation).

04-07-2007: CWs 8,9 and 12 examined as P.Ws 3 to 5.

05-07-2007: CWs Hand 10 examined as PWs 6 and 7.

06-07-2007: CWs 26,29,30,13 examined as PWs 8 to 11. CW13 who was examined as PW 11 (Raveendran Nair) was the Crime Bureau S.I. of Fort Police Station at the relevant time. Even though there were documents in Crime No. 703 of 2005 to indicate that P.W. 11 was the officer who recorded the arrest of the deceased and C.W. 1 and that he had questioned the deceased this witness turned hostile to the prosecution by deposing that he did not record arrest and that it was Al to A3 who arrested them and produced them before him.

07-07-2007: CWs. 37, 32 and 33 examined as PWs. 12 to 14.

09-07-2007: CWs. 23 and 48 examined as PWs. 15 and 16.

10-07-2007: CWs. 15, 17, 16, 51 and 19 examined as P.Ws. 17 to 21.

11 -07-2007: CWs. 21 and 22 examined as PWs. 22 and 23.

12-07-2007: CWs. 31, 34, 35, 36, 24, 25, 27 and 28 examined as PWs. 24 to 31.

13-07-2007: CWs. 38, 42 and 7 examined as PWs. 32 to 34.

18-07-2007: i) Crl.MP. 1964/07 filed by the Special Public Prosecutor seeking permission to conduct further investigation in Crime Nos. 703/05 and 704 of 2005.

ii) P.W. 11 Raveendran Nair (CW13) was arrayed as A4 in the case by the trial Court which passed a separate order by invoking Section 319 Cr.P.C.

iii) Further examination of witnesses stopped.

24-07-2007: i) Newly added A4 applied for time through his counsel.

ii) Crl.M.P. 1969/07 filed by Special Public Prosecutor heard by the trial judge.

iii) Report of Investigating Officer seeking permission to conduct further investigation filed.

5. View of the State Government was recorded by the learned single Judge in the order of reference as follows:

The stand of the State Government as voiced through the Director General of Prosecution is that in the light of the perfunctory investigation conducted in the case and the material eye witnesses and police officers exhibiting testimonial infidelity by turning hostile to the prosecution and salvage the accused police personal, this is pre-eminently a fit case which is to be entrusted with the C.B.I. for further investigation.

Standing counsel for the C.B.I. who appeared on notice submitted that if the court order C.B.I. Will investigate the matter. Learned Single Judge, after an indepth consideration of the case, came to the conclusion that it is a fit case Where C.B.I. shall be directed to conduct further investigation in the matter. But, main apprehension of the learned single Judge was whether observation in Antony Scaria''s case will restrain the court than the agency which conducted earlier investigation.

6. Section 173(8) of the Code of Criminal Procedure reads as follows:

173. Report of police officer on completion of investigation: xx xx

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under Sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of Sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under Sub-section (2).

7. A plain reading of the section shows that police is free to conduct further investigation even after filing final report and even after court taking cognizance of the case on the basis of the final report. As held by the Apex Court in Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandadha Maharaj Vs. State of Andhra Pradesh and Others, , the section confers an express and special power to the police to carry out further investigation after taking cognizance of the case by the court. Section 156(3) Cr.P.C. gives power to the Magistrate to order investigation before registering of F.I.R. as decided in Central Bureau of Investigation Vs. State of Gujarat, .

8. In H.N. Rishbud and Inder Singh Vs. The State of Delhi, , the Supreme Court contemplated the possibility of further investigation even after the Court had taken cognizance of the offence. There, the Court held that if invalidity of the investigation comes to the knowledge of the Court in the earlier stages of trial, the Court can take necessary steps to get the illegality cured and rectified by ordering reinvestigation. The Court observed as follows:

10. It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for.... In our opinion, therefore, when such a breach is brought to the notice of the Court at an early stage of the trial the Court will have to consider the nature and extent of the violation and pass appropriate orders for such reinvestigation as may be called for, wholly or partly, and by such officer as it considers appropriate....

9. In Ram Lal Narang Vs. State (Delhi Administration), , the I Supreme court held that there is a statutory right on the police to investigate u/s 173(8) even if the Magistrate had taken cognizance. The police cannot abuse the power and, therefore, when the case is pending, police should ordinarily seek permission from the court for fresh investigation. The Court also held that power of the police to conduct investigation even after the Magistrate had taken cognizance of the offence was existing even before Section 173(8) was enacted. The Court also referred to the Law Commission report wherein Law Commission observed as follows in para 14.23 of its 41st report:

14.23. A report u/s 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting the report u/s 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and sent it to the Magistrate concerned. It appears, however, that Courts have sometimes taken the narrow view that once a final report u/s 173 has been sent, the police cannot touch the case again and cannot re-open the investigation. This view places a hindrance in the way of the investigating agency, which can be very unfair to the prosecution and, for that, matter, even to the accused. It should be made clear in Section 173 that the competent police officer can examine such evidence and send a report to the Magistrate. Copies concerning the fresh'' material must of course be furnished to the accused.

10. Based upon the opinion, Section 173(8) was statutorily incorporated in the Code. The Supreme Court held that even before Section 173(8) was incorporated, police had the same powers and observed as follows:

17. ...This decision is a clear authority for the view that further investigation is not altogether ruled out merely because cognizance of the case has been taken by the Court; defective investigation coming to light during the course of a trial may be cured by a further investigation, if circumstances permit it.

(underlining for emphasis)

11. After considering various decisions of the Apex Court, a Division Bench of this Court in Shaji Vs. State of Kerala, - one of us, Koshy, J. delivered the judgment for Division

Bench) summarised the power of the police in conducting the investigation as follows:

(1) When a final report is filed before the Magistrate u/s 173(8), the Court may accept the report and either drop the proceedings or take cognizance of the proceeding on the basis of the report;

(2) The Court may disagree with the report. Even if the final report states that no offence has been committed, if the Magistrate feels that there are sufficient grounds for proceeding further, he can issue process and take cognizance of the offence;

(3) The Court may without accepting the report order further investigation. Magistrate has no power to direct the police to file a final report in a particular form or receipt making some persons guilty. On the basis of the further investigation, police is free to make the final report;

(4) By taking cognizance of the offence, adjudicatory process of the Court starts and normally investigation stage ends except u/s 173(8). Therefore, ordinarily, after taking cognizance of the offence, court shall not suo motu order further investigation unless circumstances warrant;

(5) If the complainant filed a petition saying that real culprits were not included in the final report or there is lacuna in the investigation which will cause failure of justice and if the Magistrate after considering the matter comes to the prima facie conclusion that proper investigation was not conducted, he is not helpless, the Magistrate will be free to order further investigation to avoid failure of justice;.

(6) Section 173(8) gives power to the police to conduct further investigation with permission from the Magistrate even in a case where cognizance of the offence has already been taken by the Magistrate. The above provision gives express power to the police for further investigation even after taking cognizance of the offence.

(7) Section 173(8) puts no bar on the Magistrate to order further investigation. If the Magistrate comes to the conclusion that in the interest of justice a further investigation is necessary, he can trigger the police to exercise the power u/s 173(8) as police has power to conduct further investigation u/s 173(8) even after taking cognizance of the offence. The Magistrate has-got power to point out to the police to exercise their duties u/s 173(8) if on the facts of the case, it is revealed that further investigation is necessary. But, such powers can be exercised sparingly only if the circumstances warrant in the interest of justice.

(8) There is no provision in the Code prohibiting or fettering the power of the Magistrate from ordering further investigation if the circumstances warrant to prevent miscarriage of justice. It is the duty of the Court to see that ultimate truth is revealed and no innocent shall be punished and at the same time real culprits shall not escape;

(9) When a Magistrate order further investigation, High Court in its revisional power shall not interfere in the same unless there is miscarriage of justice.

12. Here, Section 173(8) deals mainly regarding power of the police to conduct further investigation even after taking cognizance of the case by the court, but, it also enables the court in ordering the same agency or superior officer of the same agency to exercise powers u/s 173(8) and to hold further investigation in the interest of justice, if circumstances warrant.

13. In Vijayakumar v. Kamarudhin 1999 (1) KLT 184, a financier under a hire purchase scheme seized the vehicle for default in payment of instalments. A crime was registered by the S.I. of Police, Kattakkada. Finally, a refer report was filed before the Magistrate"s court. It was accepted by the court. Later, on the basis of a complaint before the Chief Minister, C.B.C.I.D. started further investigation. Considering the nature of allegations, the court came to the conclusion that there is no prima facie case and observed as follows:

10. In the decision in Ashok Kumar v. Balaraman 1998 (1) KLT 155 a single Judge of this Court relying upon the decisions of the Supreme Court in Sardar Trilok Singh and Others Vs. Satya Deo Tripathi, and this Court in Bharudan Dugar v. S.I. of Police 1986 KLT 430 held that when a financier, under a hire purchase scheme seizes the vehicle on default in payment of instalments, no criminal prosecution can be launched by the lawyer and launching of criminal prosecution against the financier tentamounts to abuse of the process of the court since the dispute is of civil nature and therefore the criminal proceedings are to be quashed.

On these facts, second investigation was quashed as there is no point in proceeding with the case as it is an abuse of the process of the court. The court also observed that, on the facts of the case, if further investigation is made, at least, a formal permission ought to have been obtained from the court which accepted the earlier refer report. On the principle laid down by the Apex Court in Ram Lal Narang Vs. State (Delhi Administration), , it was held as follows:

...Though there is no statutory requirement for the police to obtain permission from the concerned court to conduct further investigation in the case, the Apex Court has held in the decision in Ram Lal Narang Vs. State (Delhi Administration), that "In the interest of independence of magistracy and Judiciary, in the interest of purity of administration of criminal justice, and in the interest of comity of various agencies and institutions entrusted with different stages of such administration, it would ordinarily be desirable that the police should inform the Court and seek formal permission to make further investigation when fresh facts come to light." In view of the authoritative pronouncement by the Supreme Court declaring the law on the point, it is necessary that the police should obtain formal permission from the court for the purpose of further investigation as envisaged u/s 173(8) of the Cr.P.C.

The court also observed that Section 173(8) when police opined that if further investigation should be conducted, it shall be done by the same investigating agency as it is not a fresh investigation, but, a further investigation. The learned Single Judge was of the opinion that C.B.C.I.D. was not the same investigating agency as only local police conducted the earlier investigation. -

14. In Antony Scaria v. State of Kerala 2001 (2) KLT 93, though it accepted the decision that u/s 173(8) when further investigation has to be conducted by the same agency, it was held that since C.B.C.I.D. is also working under the State police, it is not a different agency. In that case, Crime No. 92 of 1997 was registered in Kumali Police Station on the basis of the information in Kumali Police Station on the basis of the information given by the 7th respondent on 10-6-1997 at about 11.45 pm that her husband the 6th respondent was missing upon 9-6-1997. The crime was registered alleging "man massing". The Sub Inspector of Police submitted a report in court on 11-6-1997 stating that offence punishable u/s 365 read with Section 34 IPC was disclosed to have been committed during the course of investigation. Appellants got anticipatory bail during the course of investigation. On 6-8-1997, the District Superintendent of Police, Idukki passed an order directing handing over of investigation to Sri. Gopinathan Nair, Dy. S.P., Crime Detachment, Idukki who after investigation filed a final report in court dated 24-9-1997 stating that no offence is revealed to have been committed by the accused in the crime. Thereafter, the Director General of Police made an order on 4-11-1997 transferring the crime registered in the Kumali Police Station to Crime Branch C.I.D. for investigation. The court held that investigation of the crime by C.B.C.I.D. was perfectly in order as local police and C.B.C.I.D. are working under the State and can be considered as same agency, but, agreed with the view taken in Vijayakumar"s case and held that u/s 173(8), further investigation shall be done by the same agency. The Division Bench relied on certain observations of the Supreme Court in K. Chandrasekhar Vs. The State of Kerala and Others, and observed as follows:

11. In K. Chandrasekhar v. State of Kerala 1998 (1) KLT 835, the Supreme Court observed that further investigation is the continuation of the earlier investigation and not a fresh investigation or re-investigation to be started ab-initio wiping out the earlier investigation altogether. It is also stated in the above decision that Sub-section (8) of Section 173 Cr.P.C. envisages that on completion of further investigation, the investigating agency has to be forward to the Magistrate a further report or reports and not fresh report or reports regarding the further evidence obtained during such investigation. The Supreme Court also held that further investigation has to be conducted by the same agency which conducted the original investigation and that further investigation by a different agency is impermissible. In the above case, originally, investigation of the crime was conducted by the Kerala Police and investigation was subsequently handed over to the Central Bureau of Investigation. After completing investigation, the Central Bureau of Investigation gave a refer report which was accepted by the Court. After that the State Government took the decision to get the crime

investigated again by the Kerala Police. The state Government withdrew the consent given for investigation to be conducted by the Central Bureau of Investigation and sought further investigation of the case by the State Police. The Supreme Court found that if any further investigation had to be made in the crime, it was the Central Bureau of Investigation alone which could do further investigation was conducted by that agency. Notification issued withdrawing consent to enable the State Police to further investigate into the case was found to be patently invalid and unsustainable in law.

15. In Antony Scaria''s case (supra), the Division Bench was considering the power of the police in conducting further investigation u/s 173(8) and not on the powers of this Court to order further investigation in the interest of justice.

16. Ratio in K. Chandrasekhar''s case is that once the State Government has given consent and issued notification entrusting the matter to CBI, State Government cannot withdraw it and withdrawal of consent will not entitled the State Police to further investigating the case considering the scope of Section 6 of the Delhi Special Police Establishment Act, 1946. Apex Court, following the earlier decision in Kazi Lhendup Dorji Vs. Central Bureau of Investigation and Others, wherein it was held as follows:

Therefore, even if we proceed on the basis that Section 21 of the General Clauses Act is applicable to an order passed u/s 6 of the Act, an order revoking an order giving consent u/s 6 of the Act can have only prospective operation and would not affect matters in which action has been initiated prior to the issuance of the order of revocation. The impugned notification dated 7-1-1987, has to be construed in this light. If thus construed it would mean that investigation which was commenced by C.B.I. prior to withdrawal of consent under the impugned notification dated 7-1-1987, had to be completed and it was not affected by the said withdrawal of consent. In other words, the C.B.I. was competent to complete the investigation in the case registered by it against respondent 4 and other persons and submit the report u/s 173 Cr.P.C. in the competent court.

and court held as follows:

In view of the law so laid down by a three Judge Bench of this Court, it must be held that an investigation started by C.B.I. with the consent of the State Government concerned cannot be stopped midway by withdrawing the consent.

It was further held by the Hon''ble Apex Court considering Section 173(8) as follows:

From a plain reading of the above section it is evident that even after submission of police report under Sub-section (2) on completion of investigation, the police has a right of ''further'' investigation under Sub-section (8) but not ''fresh investigation'' or ''re-investigation''. That the Government of Kerala was also conscious of this position is evident from the fact that though initially it stated in the Explanatory Note of their notification dated June 27, 1996 (quoted earlier) that the consent was being withdrawn in public interest to order a ''re-investigation'' of the case by a special team of State police

officers, in the amendatory notification (quoted earlier), it made it clear that they wanted a "further investigation of the case". The dictionary meaning of "further" (when used as an adjective) is "additional"; "more"; "supplemental". "Further" investigation there is the continuation of the earlier investigation altogether. In drawing this conclusion we have also drawn inspiration from the fact that Sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to forward to the Magistrate a "further" report or reports - and not fresh report or reports - regarding the "further" evidence obtained during such investigation. Once it is accepted - and it has got to be accepted in view of the judgment m Kazi Lhendup Dorji (supra) - that an investigation undertaken by C.B.I. pursuant to a consent granted u/s 6 of the Act is to be completed, notwithstanding withdrawal of the consent, and that "further investigation" is a continuation of such investigation which culminates in a further police report under Sub-section (8) of Section 173, it necessarily means that withdrawal of consent in the instant case would not entitle the State Police, to further investigate in the case. To put it differently, if any further investigation is to be made it is the C.B.I. alone which can do for it was entrusted to investigate into the case by the State Government. Resultantly, the notification issued withdrawing the consent to enable the State Police to further investigate into the case is patently invalid and unsustainable in law.

Therefore, it can be seen that Section 173(8) deals with power of the police which conducted earlier investigation and submitted a final report (whether charge sheet or refer report), to conduct further investigation notwithstanding the fact that earlier report was accepted and acted on by the court.

17. Power of the police to conduct further investigation u/s 173(8) will, in no way, fetter the power of the High Courts and Apex Courts in ordering investigation by the Special Investigating Agency if circumstances warrant. Inherent powers of the Court to secure the ends of justice are saved by Section 482 of Cr.P.C. Power of the Court under Article 226 of the Constitution of India is also enabling the court in ordering further investigation by special investigating agency in the circumstances of the case to avoid failure of justice. We are of the view that power of the State to refer the matter to CBI for further investigation u/s 5 and 6 of the Delhi Special Police Act or power of the court to refer the matter to CBI for further investigation is, in no way, restricted by Section 173(8). The Division Bench in Antony Scaria"s case (supra) only considered the power of the police u/s 173(8) and held that even if earlier investigation was conducted by local police, further investigation was conducted by local police, further investigation can be conducted by C.B.C.I.D. which is also working under the State. The above decision needs no interference as the above decision is not a bar to refer the matter for investigation by the C.B.I. in an appropriate case by the High Court. The Supreme Court in Ramesh Kumari v. State (N.C.T. of Delhi) AIR 2006 SCW 1021 referred the matter to CBI even though complaint was filed before the local police as allegation are mainly against police personnel and local police even refused to register a case. In Gudalure M.J. Cherian and Others Vs. Union of India (UOI) and Others, the Apex Court directed the C.B.I. to take up

the investigation of the case in Gajraula Nun"s rape case. There the investigation was conducted by the State Police which had filed a charge-sheet also. In order to do justice between parties and to instill confidence in the public mind the Apex Court directed the C.B.I. to conduct the investigation. In Kashmeri Devi Vs. Delhi Administration and Another, on being convinced that the investigation by the Delhi Police against the accused police officers on a charge of murder by torture in police custody was partisan and was to shield the guilty policemen the Apex Court directed the trial court before which the charge-sheet had already been submitted, to exercise his powers u/s 173(8) Cr.P.C. to direct the C.B.I. to conduct a proper investigation in the matter. In Central Bureau of Investigation and another Vs. Rajesh Gandhi and another, even though a final report was filed before the Chief Judicial Magistrate, Dhanbad, the Central Government issued a notification u/s 5(1) read with Section 6 of the D.S.P.E, Act enabling the C.B.I. to conduct the investigation in the case. Though the action of the Central Government was successfully challenged before the Patna High Court, the Supreme Court taking note of the fact that the investigation by the local police was not satisfactory directed the C.B.I. to further investigate the offences in accordance with law. The power u/s 173(8) of Cr.P.C. was also taken note of by the Apex Court in that decision. But, unlike the Supreme Court or High courts, trial court or magistrate"s court cannot direct the C.B.I. to conduct further investigation in a case where investigation is being conducted by the State Police, as held by the Apex Court in Central Bureau of Investigation Vs. State of Rajasthan and Another, . In that case, it was held that magisterial power cannot be stretched beyond directing the officer in charge of a police station to conduct the investigation and no direction can be given to the C.B.I. to conduct the investigation. It is also held that in routine matters like theft etc., court shall not entrust investigation to C.B.I. The High Court also, only in special circumstances, to avoid failure of justice, can refer the matter to C.B.I. In Gudalure M.J. Cherian v. Union of India (supra), investigation was conducted by local police and charge sheet was submitted. It was held by the Apex Court that, ordinarily, courts will not re-open the investigation by entrusting the same to a special agency like C.B.I. Apex Court held that in a given situation, to do justice and to install confidence in the public mind, in appropriate cases, High Court can allow the C.B.I. to further investigate the crime.

18. We have seen that High Court has got power to refer the matter to the C.B.I. for further investigation in appropriate cases in the interest of justice. Next question is whether, in this case, a further investigation is required. Learned single Judge in the reference order held as follows:

Custodial torture of helpless and defenseless captives, detenues/arrestees by the custodians of law who turn out to be perpetrators of crime, is the most barbarous and savage degeneration of a civilized society. It is shocking to realise that police lock-ups in the country turn out to be death chambers. Custodial crimes is a species of man - made malady which is growing in alarming proportions. By resorting to such excesses, the law enforcers are only creating a cogenial atmosphere for fostering terrorism, no civilized society can afford to support this transformation of man into a beastly animal. Apart from

the fact that the investigation has turned out to be a mockery with only perfunctory attempts to weave a seemingly plausible story of torture while in police custody, the trial in the case has revealed the calculated conspiracy by the police witnesses exhibition no qualms in mortgaging their own conscience with a view to exculpate the members of their own breed and thereby jettison justice. Notwithstanding the emphatic direction by the apex Court in Sube Singh v. State of Haryana 2006 (2) SCC Crl. 54 that an independent investigating agency (preferably, the respective Human Rights Commission or C.B.I.) should be entrusted with the investigation of cases of custodial violence against police personnel, the facts of this case will reveal that the investigation was initially conducted by the local police and was subsequently entrusted with the Crime Branch Police (CBCID) which, going by the decision reported in Antony Scaria v. State of Kerala 2001 (2) KIT 93, is nothing but the same agency under the State Government. In the facts and circumstances of the case, I have no hesitation to hold that this is pre-eminently a fit case in which the investigation should have been entrusted with the C.B.I. and it is not too late to handover the investigation to C.B.I. for the purpose of further investigation so that justice will not be casuality.

19. We fully agree with the above view and we are of the opinion that it is a fit case where C.B.I. should investigate into the matter.

20. The next question is whether further investigation can be ordered during trial. It was argued that it will cause undue delay. In Ram Lal Narang Vs. State (Delhi Administration), it was observed by this Court that further investigation is not altogether ruled out merely because cognizance has been taken by the Court. When defective investigation comes to light during course of trial, it may be cured by further investigation if circumstances so permits. It would ordinarily be desirable and all the more so in this case, that police should inform the court and seek formal permission to make further investigation when fresh facts come to light instead of being silent over the matter keeping in view only the need for an early trial since an effective trial for real or actual offences found during course of proper investigation is as much relevant, desirable and necessary as an expeditious disposal of the matter by the Courts. In view of the aforesaid position in law if there is necessity for further investigation the same can certainly be one as prescribed by law notwithstanding the fact that trial was started. The mere fact that there may be further delay in concluding the trial should not stand on the say of further investigation if that would help the Court in arriving at the truth and do real and substantial as well as effective justice. The above decision is being followed for the last quarter of century by the courts in India. The above decision was followed recently by the Apex Court in Hasanbhai Valibhai Qureshi v. State of Gujarat and Ors. AIR 2004 SCW 2063.

21. The next question to be considered is the power of the court to add further persons as accused u/s 319 of Cr.P.C. We have already seen that even after court takes cognizance and trial started, police can conduct further investigation u/s 173(8) and even court can order the same again to conduct further investigation by directing the police to use power u/s 173(8). As a result of further investigation, if necessary, further accused can be

arrayed as parties or additional charges can be framed. But, the newly arrayed accused should be given full opportunity to meet the charges against them and if necessary witnesses already examined can be recalled by exercising power of Section 217 of Cr.P.C. Apart from the above, court has got power to add any person as accused after trial started on contingencies made u/s 319 of the Code of Criminal Procedure. Section 319 Cr.P.C. reads as follows:

319. Power to proceed against other persons appearing to be guilty of offence:

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person nor being the accused has committed any offence for which such person could be tried together with the accused, the court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the court he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under Sub-section (1) then-

(a) the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard;

(b) subject to the provisions of Clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

The basic requirement as held by the Apex Court Michael Machado and Another Vs. Central Bureau of Investigation and Another, for invoking Section 319 Cr.P.C. is that it should appear to the court from the evidence collected during trial or in the inquiry that some other person, who is not arrayed as an accused in that case, has committed the offence for which that person also should be tried together with the accused already arraigned. The power u/s 319 shall be sparingly used as held by the Apex Court in Rakesh and Another Vs. State of Haryana, . In that case, Apex Court upheld addition of three accused on the statement of prosecution by the court u/s 319. In Kishore Singh v. State of Bihar 2001 Cri.L.J. 123, Apex Court held that persons against whom charge sheet has not been filed can be arrayed as accused persons in the exercise of power u/s 319. In Kishore Singh"s case (supra), it was also held that Section 319 can be invoked both by the court having original jurisdiction as well as the court to which the case has been committed or transferred for trial. In A.R. Antulay Vs. Ramdas Sriniwas Nayak and Another, , it was held that court is compelled to summon additional accused not willingly come up for trial on the basis of material collected in the investigation also. In Ranjit

Singh Vs. State of Punjab, , Apex Court held that evidence envisaged in Section 319 is the evidence adduced during trial of the case, if the offence is triable by the court of Sessions. In other words, material placed before the committal court cannot be treated as evidence collected during enquiry or trial even though the word "evidence" occurring in the section has a wider connotation and court need not wait till entire evidence is over. In Hareram Satpathy Vs. Tikaram Agarwala and Others, , it was observed that it includes evidence collected in the investigation also. Similar view is taken in Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, . In Rakesh and Another Vs. State of Haryana, , Apex Court held that the examination-in-chief of witnesses in evidence can be taken the basis of power to invoke Section 319 though that witness was not cross-examined when the order was issued. In this case, more than 34 witnesses were examined when order u/s 319 was passed adding PW11 as an accused considering the evidence adduced in the trial. Sessions Court felt that revision petitioner shall be added as accused on the basis of evidence already adduced. At this stage, prima facie case alone need be considered and conclusive evidence which is sufficient for convicting is not required for impleading a person as an accused u/s 319. In this case, court heard the persons with notice before adding them as accused and before passing order u/s 319. The impugned order is a speaking order. (See; Murali alias Muraleedharan Vs. State of Kerala, The trial court objectively considered the matter and was satisfied that the revision petitioner shall be added as an accused and we no ground to interfere in the order.

22. The expression "any person not being the accused" means a person whom no process was issued as an accused by the police or any person who was not being tried by the court as an accused. Apex Court in Joginder Singh and Another Vs. State of Punjab and Another, held that even a person who has been dropped by the police during investigation can be made as an accused by the court u/s 319 if other conditions in the section are satisfied. Apex Court in Dr. S.S. Khanna v. Chief Secretary Patna 1983 Cri.LJ. 1044 SC held that a person who was examined as a witness also can be arrayed as an additional accused if other conditions u/s 319 are satisfied. When police has not filed charge sheet against a person, but, if evidence recorded before the Court, prima facie, shows his involvement in the case, he can be summoned u/s 319. It has been repeatedly held by the court that the Sessions Court can summon a person as an accused u/s 319 Cr.P.C. when he has not been committed to the court of sessions as the power is exercised in the interest of justice and materials available in the main case committed properly by the Magistrate''s Court Margoobul Hasan v. State of UP 1988 Crl.L.J. 1467 and Kishun Singh and Others Vs. State of Bihar, . Decision of this Court in Gangadharan v. SI of Police 1989 (2) KLT 448 was on the facts of that case considering the prima facie nature of the case and not for the proposition that a witness examined in a case cannot be impleaded as an accused at all u/s 319 of Cr.P.C.

23. It was pointed out by the Director General of Public Prosecutions that when layman is declared hostile or denying statement given u/s 161 defence is that police did not record

the statement correctly. But, petitioner in the Crl.R.P. is a police officer and he cannot ordinarily take such defence. We are not considering the question whether he can be convicted for perjury or whether departmental action can be taken against the petitioner or other police constables who were declared as hostile etc. in this writ petition. We leave the matter to the concerned department and authority to consider the question of taking disciplinary action and to the appropriate court whether action can be taken for perjury. After going through the evidence already on record, we have already held that court was justified on evidence adduced before it in impleading the review petitioner as an accused. We see no infirmity in the order passed u/s 319. It cannot be stated that there is no prima facie case against him. Hence, Crl.R.P. is dismissed. But, we are not expressing any opinion on the merits of the matter as it is for the trial court to decide the matter after considering the evidence. We have already found that this case is a fit case which C.B.I. should conduct further investigation as police officers are accused in the case and from the available materials, we are of the prima facie opinion that in this case colleagues in the police force are more interested in protecting the accused instead of doing justice or conducting proper investigation according to law. It is true that in all cases where CBI enquiry is ordered it is not necessary to stay the trial which is in progress. But, in the nature of the case, it is necessary that further proceedings of the trial court need be started only after CBI files further report and it is a fit case to allow the writ petition filed by the mother of the deceased by referring the matter to C.B.I. Hence, we direct the C.B.I. to conduct further investigation as expeditiously as possible.

Both writ petition and Crl.R.P. are disposed of with the above directions.