State Vs. Mukesh

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SooperKanoon Citation : sooperkanoon.com/708636

Court : Delhi

Decided On : Aug-06-2009

Reported in : 162(2009)DLT733

Judge : Mool Chand Garg, J.

Acts : Delhi Police Act - Sections 3; Code of Criminal Procedure (CrPC) - Sections 5, 34, 54, 57, 154 to 156, 156(2), 156(3), 157, 158, 161, 162, 167, 167(1), 167(2), 167(5), 168, 169, 170, 173, 173(2) to 173(6), 173(8), 190, 193, 200, 379, 411, 437, 482, 491 and 561A; Delhi High Court Rules

Appeal No. : Crl.M.C. No. 2246/2002

Appellant : State

Respondent : Mukesh

Advocate for Def. : None

Advocate for Pet/Ap. : Mukta Gupta, Sr. Standing Counse

Disposition : Petition allowed

Judgement :

Mool Chand Garg, J.

1. By this petition the Government of NCT of Delhi has assailed the order passed by the Metropolitan Magistrate Delhi dated 29.6.2002, whereby following observations were made and directions were given to the Commissioner of Police, Delhi as well as the Director of Prosecution to review their procedure for checking and scrutiny of the charge-sheet before a report under Section 173 Cr.P.C is filed in the Court after completing the investigation:

A. In the scheme of law as provided under Cr.P.C. at no stage the prosecution is authorized or required to scrutinize the material before the same is put before the Court.

B. The formation of the final opinion is within the sphere of incharge of Police Station and the same has been abdicated to another agency, i.e., prosecution Department which is not within the scheme of code.

C. The present scheme is in violation of the law laid down in the case of Rishbud and R. Sarla.

D. It is not in the scheme of the code for supporting or sponsoring any joint operation between the Investigating Officer and the Public Prosecutor for filing the report in the Court.

E. That there is no dispute that the Investigating Officer can of his own initiative seek legal advice from any source including the prosecution department. However, the same should be before formation of opinion by the incharge of the police station and not thereafter.

F. Lastly the entire procedure of checking and scrutiny which has been so institutionalized by way of departmental arrangement between the Delhi Government, Delhi Police and the Director of Prosecution requires to be reviewed as the entire procedure of checking the police files through the prosecution agency at a stage where opinion has already been formed by the Incharge of the police station is only an attempt to evolve a method which is not in consonance with the scheme of law laid down by the Code of Crl. Procedure and by the Hon'ble Supreme Court.

Accordingly directions were given to the concerned authorities to review the procedure within one month.

2. It has been submitted that the aforessaid observations made by the Magistrate and directions contained in the order passed are not in accordance with the provisions contained in Code of Criminal Procedure or any other law dealing with the powers of the Magistrate in this regard and thus, the said order is illegal. It is also submitted that the order is also not in accordance with the legal prnouncements of the Apex Court and this Court from time to time holding that there is no such power vested in the Metropolitan Magistrate/ACMM or the CMM to pass any such order or to issue such directions as no such procedure is contemplated in the Code.

3. The occasion to pass the impugned order came during the pendency of investigation of FIR bearing No. 619/2000 registered at Police Station Lajpat Nagar under Section 379/482/411/34 against the respondent/Mukesh. He was arrested in that case and was remanded to judicial custody. He was not granted bail within the period of sixty days. Since the respondent could not have been detained in the Judicial Custody beyond that period without filing of Charge Sheet within the time prescribed under Section 167 of the Code of Criminal Procedure (hereinafter referred to as 'Code'), the respondent who had been approaching the Metropolitan Magistrate for his release on bail was released on Bail on the 60th day due to failure of the prosecution to file the Charge Sheet by that time. However on account of the stand of the Investigating officer that he could not file the report despite the completion of investigation within the prescribed period due the directions of the Superior Officer who wanted consultation with the legal advisor of the prosecution the magistrate passed the impugned order by taking suo motto cognizance of the delay in submitting the charge-sheet which occurred on account of directions given to the Investigating Officer by the senior officers to obtain the advice of the public prosecutor as if the Court was performing functions of a Writ Court. It has been held by the Court that such directions could not have been given and therefore, observed that the procedure adopted by the prosecution regarding obtaining advice from the Director of Prosecution was illegal and passed the impugned order dated 28.6.2002.

4. Assailing the impugned order it has been submitted by the petitioner/State that the impugned order is contrary to law and is not in accordance with the provisions of the Code besides being contrary to the Judgments delievered by the Apex Court on the issue from time to time. Reference has been made to a judgment delivered by the Apex Court in the case of R. Sarala v. T.S. Vellu and Ors. reported in 2000(2) Crimes 187 (SC), wherein in Para 6, it was observed:

It is always open to any officer, including any investigating officer, to get the best legal opinion on any legal aspect concerning the preparation of any report. But the real question is, should the High court direct the investigating officer to take opinion of the Public Prosecutor for filing the charge sheet. The question here is not simply whether an investigating officer, on his own volition or on his own initative, can discuss with the Public Prosecutor or any legal talent, for the purpose of forming his opinion as to the report to be laid in the Court.

5. The learned standing Counsel for the petitioner submitted that in view of the aforesaid it was within the competence of any investigating officer to obtain legal advice from the Public Prosecutor during the course of investigation of the case and before filing the charge sheet. It is stated that it is not within the purview of the Metropolitan Magistrate to interfere into the process of investigation or to give directions of the nature which have been given to the petitioner by the Metropolitan Magistrate as the said order amounts to interference into the statutory rights of investigation by the Police. It has been submitted that while passing the impugned order the Metropolitan Magistrate has also misread the judgment of the Apex Court in the case of R. Sarla (supra). It is also submitted that no powers are available to the Magistrate under the Code which may entitle the Magistrate to give directions of the nature which has been given by the Magistrate till such time the challan is filed under Section 173 Cr.P.C. where also the powers are to be exercised in accordance with the provisions contained in the said Section and the law laid down in this regard by the higher courts while interpreting those provisions.

6. It is also contended that a bare perusal of the judgment of Apex Court in the case of R. Sarla (supra) shows that the issue before the Apex Court was as to

whether the High Court could have compelled the Police to seek the opinion from the Public Prosecutor as in the said case the High court had directed the Police to withdraw the charge sheet and submit the same only after getting it checked from the Public Prosecutor. In the facts of that case the Apex Court categorically held that it was permissible for the police officer to seek legal guidance from anybody, including the Public Prosecutor. The obiter of the judgment is that since it is not the legal requirement that the opinion of the Public Prosecutor should be taken, the Court could not have directed the Police to seek the opinion, however, taking such an opinion suo motto is not an illegality and thus it was held that the police can always seek the advice of the Prosecutor suo motto before filing the charge sheet in the court.

7. It is further submitted that Chapter 29 Clause 4(G) of the Delhi High Court Rules in relation to the duty of the Public Prosecutor provides that it is the duty of the Public Prosecutor to furnish opinion in all criminal cases when required by the District Magistrate and by the Sub Divisional officer through the District Magistrate. As per the Delhi Police Act, the Commissioner of Police is the District Magistrate of Delhi.

8. The petitioner also relied upon 14th Law Commission Report in this regard, where it has been suggested:

The Public Prosecutor in India is almost wholly occupied with the conduct of prosecutions in the sessions Court and in appearing for the State in criminal Appeals or Revisions and like matters. Apart from such advisory functions as he may discharge when requested to do so by the District Magistrate or the District Supdt. Of Police, he has no control over the cases before they come to the court. Even in the exercise of the power to withdraw from a prosecution, he is controlled to a large extent by the District Magistrate or the District Supdt. Of Police. On account of the practice that has prevailed for a long time, the Public Prosecutor has come to occupy a subordinate position. Even when he is aware of the defects in the prosecution evidence, he is not in a position to influence the future course of the prosecution. He is rarely consulted at the crucial states of the investigation and has no opportunity of guiding the investigating agency in the matter of gathering

relevant evidence. A large number of complaints never come to court for the reason that the police after investigation report them to be not worth proceeding upon grounds of insufficient evidence or legal difficulties. It is true that in such cases, the complainant can himself directly file a complaint. The propriety of dropping the prosecution in such cases is a matter that is at present examined only by the departmental officials. The public prosecutor is unable to interfere in any of these matters, being recorded more or less as subordinate officials under the control of the District Magistrate and the District Supdt. Of Police.

14. It has been suggested, and we see great usefulness in the suggestion, that the prosecution agency should be separated from and made independent of its administrative counter-part, that is the police department, and that it should not only be responsible for the conduct of the prosecution in the court but it should also have the liberty of scrutinizing the evidence particularly in serious and important cases before the case is actually filed in court. Such a measure would ensure that the evidence in support of a case is carefully examined by a properly qualified authority before a case is instituted so as to justify the expenditure of public time and money on it. It would also ensure that the investigation is conducted on proper lines, that all the evidence needed for the establishment of the quilt of the accused has been obtained. The actual conduct of the prosecution by such an independent agency will result in a fairer and more impartial approach by the prosecutor to the case.

15. 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 part of the police department, he should be an independent official, directly responsible to the State Govt. The departments of the machinery of the criminal justice, namely, the investigation department and the prosecuting department should thus be completely separated from each other.

16. The principal functions of the Director of Public prosecutions should be as follows:

4. Every police charge sheet before it is laid in the court, should be scrutinized in his department so that, in case any difficulty or lacuna exists in the prosecution case, it should be possible to remedy it by further investigation of the lines indicated by his department.

5. He should advise the Police Department, or other government Departments at the District level, on the legal aspects of a case, at any stage of criminal proceedings, including the stage of investigation. His advice will be particularly helpful in difficult and important cases, like cases involving charges of conspiracy, fraud and forgery, cases based on circumstantial evidence and evidence gathered from account books, especially of firms or corporations.

7. Cases in which the police department decides not to initiate prosecutions should similarly be scrutinized by his department.

23. A recommendation regarding the prosecuting agency may be summarized as follows-

4. His duties and functions should be as set out in paragraph 16 (which is reproduced above).

That vide 41st report of Law Commission of India it concluded that With the abolition of committal proceedings, it will be the responsibility of the Public Prosecutor to scrutinize the police report (or charge sheet as they are commonly called) before it is submitted to the Magistrate and to see that a case which, according to the police is exclusively triable by a court of Session is really so and that there is sufficient evidence to support it. This is said to be the practice even now, at least in important sessions case, and there should accordingly be no difficulty in enforcing it in all sessions case. At this stage the Public Prosecutor should have the authority to send the case back for further investigation and to modify the proposed charge whenever he finds it necessary to do so.

9. It has been contended that taking into consideration the aforesaid suggestions Standing Order No. 259 dt. 6.10.78 was issued by the Commissioner of Police which is annexed to the reply at page 72 of the paper book. The same is neither violative of Code of Criminal Procedure nor the decisions of the Apex Court (supra) and is within the competence of the Investigating Agency.

10. The petitioners have also submitted:

(i) That the Apex Court in the case of Vineet Narain and Ors. v. U.O.I. reported as : AIR 1998 SC 889 directed strengthening of the in-house legal advice mechanism. By issuing directions it was held that a panel of competent lawyer of experience and impeccable reputation be instituted and their services should be utilized as prosecutors and Counsel in cases of significance and even during the course of investigation of an offence.

(ii) That the Metropolitan Magistrate in its judgment has not disputed the competency of the police to seek legal opinion, however, the Metropolitan Magistrate has stated that the same can be before the formation of opinion and not thereafter. The said distinction sought to be drawn by the Ld. Metropolitan Magistrate is nowhere available under the scheme of Code of Criminal Procedure and is in any case violative of the said Code.

(iii) That directing the State to take a particular kind of policy decision is not permissible to any Court much less to the Ld. Magistrate which is bound by the statutory provisions. Even while exercising plenary powers the Apex Court has held that laying down a particular policy is not in the domain of the Courts. Thus, it was prayed that the impugned order dated 29.6.2002 passed by the Ld. Metropolitan Magistrate be set aside and the present petition be allowed.

11. Nobody come forward to oppose the petition. Though, at one stage, Sh. Aman Hingorani and Sh. Santosh Kumar, Advocates, filed a reply affidavit to the petition on behalf of the accused in this case. In the said affidavit the order passed by the Magistrate was justified by relying upon the Standing Order No. 259 issued by the Commissioner of Police which mandates challans to be forwarded to Prosecutors for scrutiny before the same are filed in the Court, reference was also made to the

minutes of the meeting held on 17.05.2000 in the chamber of Principal Secretary (Home) where the Principal Secretary (Home) himself opined that in view of the decision of the Apex Court in R. Sarla's case the 'practice of challan scrutiny appears to be done only as a practice without backing of any law and rules.'. It was also submitted that in the present case the role played by the prosecutor was in fact overruling the Additional Public Prosecutor and in that way interfering into the work of the prosecution. It was also submitted that on a random survey of 28 court cases conducted in November-December 2001 by the Faculty Legal Service Programme of the Faculty of Law, University of Delhi under the supervision of its Director, Professor B.B. Pandey assisted by Santosh Kumar, Advocate, it was found that in the guise of scrutiny, the prosecutors had, in fact, issued memos in each of the 28 cases containing directions to the Investigating Officer which varied from

a) Collecting further specified documentary evidence;

b) Citing new witnesses for specific purpose;

c) Conducting TIP;

d) Recording specific statements from witnesses in form of supplementary statements;

e) Requiring witnesses to sign or put thumb impression on documents;

f) Addition/alteration of statutory provisions in the challan;

g) Addition of accused;

h) Addition of suspects in Col 2 of Challan (who are not charge-sheeted due to insufficiency of evidence);

i) Arrest of accused persons or suspects;

j) Collection and placing of reports of experts;

k) Obtaining sanction.

The challans were forwarded to the Court only after compliance by the investigating officer of the directions issued by the prosecutors. And even more shocking practice is illustrated by the last case (listed as Item No. 28), where the Memo issued by the Chief Prosecutor ran in 7 pages and contained 24 directions for compliance by the IO including the production of fresh documents, the citation of more witnesses, further investigation into the role of certain persons, the arrest of certain persons and a direction to make certain persons accused and to designate others as suspects under Col.2 of the challan. In this case, the Chief Prosecutor had issued the Memo to the IO on 20.10.01 but as the 90 day period was to expire, he permitted the modified charge sheet submitted on 22.10.01 to be forwarded to the Court but only after undertaking from the IO that he will arrest the persons and file the supplementary challan against them as directed by the Chief Prosecutor.

12. On that basis it was submitted that the procedure which was followed on the part of the prosecution in delaying filing of the challan at the behest of the public prosecutor in the garb of obtaining their advice was uncalled for and totally illegal and therefore, the order passed by the Magistrate was fully justified.

13. Since this case raises a very important issue, I have scrutinized the written submissions made by the petitioner and have carefully gone through the reply filed by the respondent. I have also gone through the Code so as to examine the powers of the Magistrate during the period of investigation carried out by the Police of any offence, whether cognizable or non-cognizable offence.

14. At this stage, it would be relevant to take note of some of the provisions contained under the Code of Criminal Procedure relevant to the controversy raised in this case.

15. Section 5 of the Code shows that all offences 'shall be investigated, inquired into, tried and otherwise dealt with in accordance with the Code' (except insofar as any special enactment may provide otherwise). For the purposes of investigation offences are divided into two categories 'cognizable' and 'non-cognizable'. Once information of the commission of a cognizable offence is received or such commission is suspected, the appropriate police officer has the authority to enter

on the investigation of the same (unless it appears to him that there is no sufficient ground). But where the information relates to a non-cognizable offence, he is not authorised to investigate it without the order of a competent Magistrate.

16. Thus it may be seen that according to the scheme of the Code, investigation is a preliminary requirement for putting an accused for trial except when the Magistrate takes cognizance otherwise than on a police report in which case he also has the power under Section 156(3) of the Code to order investigation by the Police, if he thinks fit.

17. In order to ascertain the scope of and the reason for requiring such investigation to be conducted by an officer of high rank (except when otherwise permitted by a Magistrate), it is useful to consider what 'investigation' under the Code comprises of. Investigation usually starts on information relating to the commission of an offence given to an officer in charge of a police station and recorded under Section 154 of the Code. If from information so received or otherwise, the officer in charge of the police station has reason to suspect the commission of an offence, he or some other subordinate officer deputed by him, has to proceed to the spot to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender. Thus investigation primarily consists of the ascertainment of the facts and circumstances of the case. By definition, it includes 'all the proceedings under the Code for the collection of evidence conducted by a police officer'. For the above purposes, the investigating officer is given the power to require before himself the attendance of any person appearing to be acquainted with the circumstances of the case. He has also the authority to examine such person orally either by himself or by a duly authorised deputy. The officer examining any person in the course of investigation may reduce his statement into writing and such writing is available, in the trial that may follow, for use in the manner provided in this behalf in Section 162.

18. Under Section 155 the officer in charge of a police station has the power of making a search in any place for the seizure of anything believed to be necessary for the purpose of the investigation. The search has to be conducted by such

officer in person. A subordinate officer may be deputed by him for the purpose only for reasons to be recorded in writing if he is unable to conduct the search in person and there is no other competent officer available. The investigating officer has also the power to arrest the person or persons suspected of the commission of the offence under Section 54 of the Code. A police officer making an investigation is also entitled to enter his proceedings in a diary from day-to-day. Where such investigation cannot be completed within the period of 24 hours and the accused is in custody he is enjoined also to send a copy of the entries in the diary to the Magistrate concerned. It is important to notice that where the investigation is conducted not by the officer in charge of the police station but by a subordinate officer (by virtue of one or other of the provisions enabling him to depute such subordinate officer for any of the steps in the investigation) such subordinate officer is to report the result of the investigation to the officer in charge of the police station. If, upon the completion of the investigation it appears to the officer in charge of the police station that there is no sufficient evidence or reasonable ground, he may decide to release the suspected accused, if in custody, on his executing a bond. If, however, it appears to him that there is sufficient evidence or reasonable ground to place the accused on trial, he is to take the necessary steps therefor under Section 170 of the Code.

19. In either case, on the completion of the investigation he has to submit a report to the Magistrate under Section 173 of the Code of Criminal Procedure in the prescribed form furnishing various details. Thus, under the Code of Criminal Procedure the investigation consists generally of the following steps: (1) Proceeding to the spot; (2) Ascertainment of the facts and circumstances of the case; (3) Discovery and arrest of the suspected offender; (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial; and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so, taking the necessary steps for the same by the filing of charge-sheet under Section 173.

20. The scheme of the Code shows that while it is permissible for an officer in charge of a police station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for every one of these steps is that of the person in the situation of the officer in charge of the police station, it having been clearly provided in Section 168 that when a subordinate officer makes an investigation he should report the result to the officer in charge of the police station. It is also clear that the final step in the investigation, viz., the formation of the opinion as to whether or not to send the accused for trial is to be that of the officer in charge of the police station. There is no provision permitting delegation thereof but only a provision entitling superior officers to supervise or participate under Section 155.

21. Thus, the aforesaid scheme goes to show that the Magistrate has no role to play or to interfere into the investigation till a charge sheet is filed and in this regard he also has no jurisdiction to interfere into the process of taking advice, if any, by the Investigating Officer of the Public Prosecutor. Thereafter, he can proceed under Section 173 Cr.P.C. by accepting the report or rejecting the same. The said provision for the sake of reference is reproduced hereunder:

173. Report of police officer on completion of investigation.

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-

(a) The names of the parties;

(b) The nature of the information;

(c) The names of the persons who appear to be acquainted with the circumstances of the case;

(d) Whether any offence appears to have been committed and, if so, by whom;

(e) Whether the accused has been arrested;

(f) Whether he has been released on his bond and, if so, whether with or without sureties;

(g) Whether he has been forwarded in custody under Section 170.

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under Section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this Section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which Section 170 applies, the police officer shall forward to the Magistrate along with the report-

(a) All documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) The statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witness.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the sub-matter of the proceeding or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in Sub-section (5).

(8) Notwithstanding 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-section (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).

22. The other relevant provision is Section 167 of Cr.P.C., which reads as under:

167. Procedure when investigation cannot be completed in twenty-four hours.

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom all accused person is forwarded under this Section may, whether he has or not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

[(a) The Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding-

(i) Ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) Sixty days, where the investigation relates to any other offence,

And, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this Sub-section shall be deemed to be to released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

(b) No Magistrate shall authorize detention in any custody under this Section unless the accused is produced before him;

(c) No Magistrate of the second class, not specially empowered in this behalf by the high Court, shall authorize detention in the custody of the police.

[Explanation I. For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in Custody so long as he does not furnish bail.]

[Explanation II].If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorizing detention.

[(2A) Notwithstanding, anything contained in Sub-section (1) or Sub-section (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom

the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred, a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, lot reasons to be recorded in writing, authoress the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and on the expiry of the period of detention so authorized, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to Sub-section (2):

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together was a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.]

(3) A Magistrate authorizing under this Section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under Sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under Sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.

23. A reading of the aforesaid two provisions together goes to show that the power of the Magistrate till the charge sheet is filed is very specific including the right to consider grant/refusal of bail to an accused depending upon the nature of the case and limitation for filing the charge sheet. As per Section 167 of the Code if the charge sheet is required to be filed within 60 days, then he can release the accused on bail even before that period, if a case is made out. Similarly, if the time prescribed is 90 days, then also he can do so in an appropriate case. However if no charge sheet is filed within the prescribed period than he has to release the accused on bail irrespective of the merits of the case on the expiry of the aforesaid period. However, at no stage he can advise the prosecution to investigate the matter in a particular manner or to stop the investigation or to advice them that they should contact public prosecutor for his advice. It is for the police to consult the public prosecutor in case they require any such advice and therefore anything said or done by the Magistrate beyond the powers conferred upon him under the Code is totally unwarranted and uncalled for. Passing of any order beyond the scope of the Code would be illegality.

24. At this stage, it would be of assistance to take note of a very old judgment delivered by the Privy Council on 17.10.1944 in the case of King Emperor v. Khwaja Nazir Ahmad : AIR 1945 PC 18 ratio whereof still holds good. In that case directions given by the Magistrate to stop investigation in a cognizable offence was not found justified and was rather found illegal. The Privy Council after taking note of the provisions contained in the Code including Sections 154 to 156 has observed:

12. In their Lordships' opinion however, the more serious aspect of the case is to be found in the resultant interference by the Court with relates to the duties of the

police. Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly, acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged congnizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case when moved under Section 491, Criminal P.C. to give directions in the nature of habeas corpus. In such a case as the present, however, the Court's functions begin when a charge is preferred before it and not until then. It has sometimes been thought that Section 561A has given increased powers to the Court which it did not possess before that Section was enacted. But this is not so. The Section gives no new powers, it only provides that those which the Court already inherently possess shall be preserved and is inserted, as their Lordships think, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code, and that no inherent power had survived the passing of that Act. No doubt, if no cognizable offence is disclosed, and still more if no offence of any kind is disclosed, the police would have no authority to undertake an investigation and for this reason Newsam J. may well have decided rightly in M.M.S.T. Chidambaram v. Shanmugam Pallai ('38) 25 A.I.R. 1938 Mad. 129 But that is not this case.

25. Even though in the aforesaid case some reference has been made to the powers of the High Court under Section 561A (Now Section 482 Cr.P.C.) which of course is not the issue involved in this matter but what has been specifically observed is that when only investigation is going on, the Courts should not interfere into the process of investigation. In that view of the matter, the MM concerned certainly exceeded her jurisdiction in having passed the directions as

referred to above and to that extent, the grievance of the petitioner is justified.

26. The judgment delivered in the case of King Emperor v. Khwaja Nazir Ahmed (supra) was also followed by the Apex Court in the case of H.N. Rishbud v. State of Delhi : AIR 1955 SC 196.

27. The issue again came up for consideration before the Apex Court in the case of Abhinandan Jha and Ors. v. Dinesh Mishra reported in : AIR 1968 SC 117, where directions given to the police to submit a chargesheet after investigation was complete and a final report was filed disclosing that no case was made out. Setting aside such directions it was held:

Just as it is essential that every one accused of a crime should have free access to a court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as Their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the court to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus. In such a case as the present, however, the court's functions begin when a charge is preferred before it, and not until then.

28. Dealing with the role of the Metropolitan Magistrate after a report is submitted by the police after completion of investigation under Section 173 Cr.P.C., it was further observed:

12. Though it may be that a report submitted by the police may have to be dealt with judicially, by a Magistrate, and although the Magistrate may have certain supervisory powers, nevertheless, we are not inclined to agree with the further view that from these considerations alone it can be said that when the police submit a report that no case has been made out for sending up an accused for trial, it is open to the Magistrate to direct the police to file a charge-sheet. But, we may make it clear, that this is not to say that the Magistrate is absolutely powerless, because, as will be indicated later, it is open to him to take cognizance of an offence and proceed, according to law. We do not also find any such power, under Section 173(3), as is sought to be inferred, in some of the decisions cited above. As we have indicated broadly the approach made by the various High Courts in coming to different conclusions, we do not think it necessary to refer to those decisions in detail.

29. However, the Court further observed:

17. ...The Magistrate cannot compel the police to form a particular opinion, on the investigation, and to submit a report, according to such opinion. That will be really encroaching on the sphere of the police and compelling the police to form an opinion so as to accord with the decision of the Magistrate and send a report either under Section 169, or under Section 170, depending upon the nature of the decision. Such a function has been left to the police under the Code.

30. It was also observed that:

19. The question can also be considered from another point of view. Supposing the police send a report viz. a charge-sheet, under Section 170 of the Code. As we have already pointed out, the Magistrate is not bound to accept that report, when he considers the matter judicially. But can he differ from the police and call upon them to submit a final report, under Section 169? In our opinion, the Magistrate has no such power. If he has no such power, in law, it also follows that the Magistrate has no power to direct the police to submit a charge-sheet, when the police have submitted a final report that no case is made out for sending the accused for trial. The functions of the Magistracy and the police, are entirely different, and though, in the circumstances mentioned earlier, the Magistrate may

or may not accept the report, and take suitable action, according to law, he cannot certainly infringe upon the jurisdiction of the police, by compelling them to change their opinion, so as to accord with his view.

20. Therefore to conclude, there is no power, expressly or impliedly conferred, under the Code, on a Magistrate to call upon the police to submit a charge-sheet, when they have sent a report under Section 169 of the Code, that there is no case made out for sending up an accused for trial.

31. In another case titled as State of Bihar and Anr. v. J.A.C. Saldanha and Ors. reported as (1980) SCC 554, where provisions under Section 173(8) Cr.P.C. has been discussed, it was observed.

19. The power of the Magistrate under Section 156(3) to direct further investigation is clearly an independent power and does not stand in conflict with the power of the State Government as spelt out hereinbefore. The power conferred upon the Magistrate under Section 156(3) can be exercised by the Magistrate even after submission of a report by the investigating officer which would mean that it would be open to the Magistrate not to accept the conclusion of the investigating officer and direct further investigation. This provision does not in any way affect the power of the investigating officer to further investigate the case even after submission of the report as provided in Section 173(8). Therefore, the High Court was in error in holding that the State Government in exercise of the power of superintendence under Section 3 of the Act lacked the power to direct further investigation into the case. In reaching this conclusion we have kept out of consideration the provision contained in Section 156(2) that an investigation by an officer in charge of a police station, which expression includes police officer superior in rank to such officer, cannot be questioned on the ground that such investigating officer had no jurisdiction to carry on the investigation; otherwise that provision would have been a short answer to the contention raised on behalf of Respondent 1.

32. In the case of Union of India v. Prakash P. Hinduja and Anr. : (2003) 6 SCC 195 while discussing the provisions contained under Section 193, 190, 156 and 157 Cr.P.C., it has been observed, 'that legal position is well settled and is

absolutely clear that the Court would not interfere with the investigation during the course of investigation i.e. from the time of the lodging of the FIR till the submission of the report under Section 173 Cr.P.C. by the Officer-in-Charge of the Police Station as this field is exclusively reserved for the investigating agency.'

33. In another judgment delivered by the Apex Court in State of Karnataka and Anr. v. Pastor P. Raju : (2006) 6 SCC 728 again in relation to the powers of the Magistrate before filing of the charge sheet, it was again reiterated that:

20. Thus the legal position is absolutely clear and also settled by judicial authorities that the court would not interfere with the investigation or during the course of investigation which would mean from the time of the lodging of the first information report till the submission of the report by the officer in charge of the police station in court under Section 173(2) Cr.P.C., this field being exclusively reserved for the investigating agency.

34. In view of the aforesaid, it is apparently clear that under the Code the powers vested in the Magistrate from the date of registration of an FIR in relation to any offence, whether cognizable or non-cognizable, the role of the Magistrate starts only after a report is filed under Section 173 of the Code. At that stage the Court may take cognizance of the offence by accepting the report submitted by the Police or to reject the same or to give further directions. The only exception is the directions to investigate the crime pursuant to a complaint under Section 200 Cr.P.C. by exercising power under Section 156(3) Cr.P.C. The other ancillary powers of the Magistrate under the Code pertains to grant of custody of the accused whether it is judicial or Police during the course of investigation and to release the accused on bail in accordance with the provisions contained under Section 437 Cr.P.C., if a case is made out. However, nothing in the Code permits the Magistrate to interfere in the process of investigation or to affect investigation followed by the investigating agency before submission of the report under Section 173 Cr.P.C., even if it if filed after obtaining advice from the public prosecutor.

35. At the cost of repetition it is reiterated that the MM/ACMM/CMM have to follow the procedure prescribed under Cr.P.C. before passing any order against the investigating agency in relation to any offence for which either FIR has been

registered or a complaint is filed. They are bound by the procedure prescribed under the law and cannot transgress the limits of the law. Cr.P.C. does not give inherent powers to courts below High Court. The court of MM cannot devise a procedure other than the one provided under the Code.

36. Thus it is concluded that the Magistrate and investigating agency acts in two different spheres. While after the registration of the case it is for the investigating agency, i.e., Police to investigate the case in accordance with the provisions contained in Code of Criminal Procedure which may include taking advice of the public prosecutor or not, the role of the Magistrate starts only after filing of a report under Section 173 Cr.P.C. Till then the Magistrate is neither empowered nor justified in giving directions to the investigating agency to conduct investigation in any particular manner, of course, he has other ancillary powers such as grant of custody, etc. of the accused brought before him either judicial or to the police or to release him on bail and supply copies, etc., whether the case is triable by him/her or by the Court of Sessions.

37. In view of the aforesaid, the impugned order dated 29.6.2002 cannot be sustained and the same is accordingly set aside. Petition is accordingly allowed. Needless to say that nothing stated herein would authorize the petitioners to adopt a procedure even during the course of Investigation of any offence except in accordance with law.

38. The Registrar General to circulate a copy of this judgment to all the subordinate judicial officers for their information and compliance.