

In Re: Sr. Abaya

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Court : Kerala

Decided On : May-26-2006

Reported in : 2006CriLJ3843; 2006(2)KLT1001

Judge : K. Padmanabhan Nair, J.

Acts : Code of Criminal Procedure (CrPC) - Sections 2, 133, 145, 154, 154(3), 155, 156, 156(1), 156(3), 157, 157(1), 158, 159, 161, 173, 173(2), 173(4), 173(8), 190, 207, 207A, 207A(4), 208, 209, 251A(2), 251A(3), 310, 319, 319(1), 482, 539, 556 and 559B; [Constitution of India](#) - Article 227; Companies Act - Sections 3; [Information Technology Act, 2000](#)

Appeal No. : Crl. R.P. No. 2248 of 2005

Appellant : In Re: Sr. Abaya

Advocate for Def. : S. Girish,; A.X. Varghese and; K.P. Satheesan, Advs.

Advocate for Pet/Ap. : Bechu Kurian Thomas, Adv.

Disposition : Petition allowed

Judgement :

ORDER

K. Padmanabhan Nair, J.

1. This suo motu Criminal Revision is taken against an order passed by the Chief Judicial Magistrate, Ernakulam on 26.9.2005 while considering the final report filed by the Central Bureau of Investigation in Crime No. RC 8(S) 93/SPE/KER/SIC-II, popularly known as Sr. Abhaya case. The short, but interesting, question arising for consideration in this Criminal Revision Petition is the power of the committal Magistrate to conduct local inspection of the place of occurrence while considering a final report filed under Section 173(4) Cr.P.C. in respect of a case exclusively triable by a Court of Sessions.

2. Sr. Abhaya, aged 21, daughter of Sri Thomas and Smt. Leelamma was a student of Pre-degree course of BCM College, Kottayam. She was staying in St. Pious Xth Convent at Kottayam. On 27.3.1992 she woke up at 4 AM and went to the kitchen of the hostel to drink cold water which was kept inside a fridge. She was found missing and nobody had seen her alive thereafter. A search was conducted. Her dead body was extricated from a well situated near the hostel. Crime No. 187/92 under the caption 'unnatural death' was registered by the Kottayam West Police. Due to public demand, the investigation was handed over to the Crime Branch. The case was reregistered as Crime No. 142/CR/92 of CBCID Kottayam. The Investigating Officer filed a report stating that it was a case of suicide by drowning. The Government of Kerala requested the Central Bureau of Investigation (CBI for short) to take over the investigation of Crime No. 142/CR/92 of CBCID Kottayam. The father of the deceased filed O.P. No. 9147/1997 before this Court to expedite the investigation of the case. The CBI took over the investigation of the case and re-registered the same as RCA(9)/93/SPE/KER. On 29.11.1996, the CBI submitted a final report in the case with a prayer to close the investigation of the case as untraced. The prayer of the CBI was opposed by the father of the deceased. The learned Chief Judicial Magistrate after hearing the counsel for the father of the deceased and Standing Counsel for CBI passed an order dt. 20.3.1997 rejecting the final report and directed the CBI to conduct further investigation. The learned Chief Judicial Magistrate made adverse remarks against Dr. Umadathan, the Medico Legal Expert and Shri K.J. Michael the S.P., Crime Branch. Shri K.J. Michael filed CrI. M.C 1566/97 for expunging the adverse remarks made against him. Dr. Umadathan, the Medico Legal Expert filed Criminal Miscellaneous Case No.

1320/97 to expunge the remarks made against him. This Court allowed both Crl. M. Cs. and expunged the remarks made by the Chief Judicial Magistrate against the Medico Legal Expert as well as the Investigating Officer. The CBI conducted further investigation on 12.7.1999 and a final report was filed stating that Sr. Abhaya was murdered but it was not possible to trace the culprit who committed the murder. The father of the deceased filed Crl.M.P. 16869/99 to reject the final report. Shri K. Divakaran, Advocate & Notary, Kottayam filed Crl.M.P. 110/2000 to order exhumation of the dead body of Sr. Abhaya and conduct a fresh postmortem examination by another Forensic Expert. Dr. Umadathan filed Crl.M.P. 2837/00 to reject the final report on the ground that the finding of the Investigating Officer that it was a homicide was not correct and it was a case of suicide. The learned Chief Judicial Magistrate rejected the final report filed by the CBI and directed the CBI to conduct fresh investigation and submit the report. The CBI filed Crl.R.P. 808/00 challenging the order passed by the learned Chief Judicial Magistrate. This Court by order dated 18.5.2001 allowed the Crl.R.P. in part. The order passed by the Chief Judicial Magistrate was modified and the CBI was directed to conduct further investigation under Section 173(8) of Cr.P.C.

3. The CBI conducted further investigation and filed a final report on 30.8.2005. The counsel for the father of the deceased raised objection to the third report also. The learned Chief Judicial Magistrate heard the Standing Counsel for the CBI as well as the father of the deceased and perused the records. The learned Magistrate found that there were no materials enabling the committal Court to form any idea regarding the scene of occurrence. It was further held that aspects like measurement and location of the well, the room in which Sr. Abhaya was residing, the position of the kitchen where Sr. Abhaya went first from her room to take water after she woke up, the position of other rooms near the kitchen in which certain suspected persons were residing, the position of the house of Mr. Sanju P. Thomas, and the place where he was exactly standing to ascertain whether it was possible for him to see the body of Sr. Abhaya being taken out of well, whether the sound of falling of a vessel can be heard by those persons who were in the hostel, etc. were to be linked and analysed to decide whether the refer report was acceptable or anything further was possible and to find out whether any more aspects were to be done by the Investigating Officer. The learned Chief Judicial

Magistrate was of the opinion that it was only just and essential in the interest of justice to conduct a local inspection as contemplated under Section 310 of Cr.P.C. to enable him to get a clear idea and for passing a proper order appreciating and analysing various factual aspects involved in the case. The learned Magistrate directed to issue notice to the father of the deceased as well as to the Standing Counsel for CBI and fixed a time to conduct local inspection. When this fact was brought to the notice of this Court, this Court entertained a doubt regarding the jurisdiction of a committal Magistrate to conduct local inspection while considering the final report for committing the case to the Court of Sessions. Accordingly, this suo motu revision was registered. Notice was issued to the counsel for the CBI, the defacto complainant and the father of the deceased.

4. The notice issued to the defacto complainant was returned with an endorsement that she was in coma and she was unable to accept notice. So, notice to the defacto complainant was dispensed with. Shri Jomon Puthenpurackal filed Crl.M.A. 16782/05 to implead him as an additional respondent, Crl.M.A. 17146/05 for accepting certain documents and Crl.M.A. 16780/05 to stay all further proceedings before the Chief Judicial Magistrate. The main ground stated in the petition filed by Shri Jomon Puthenpurackal to implead him was that the Chief Judicial Magistrate, Ernakulam has got personal interest or bias in the matter. The petition became infructuous on account of the transfer of the Chief Judicial Magistrate. So, the prayer for impleading was not allowed.

5. Heard Advocate Shri A.X. Varghese, the counsel for the father of the deceased and the Standing counsel for the CBI. Considering the importance of the matter Advocate Shri Bechu Kurian Thomas was requested to assist the Court as *amicus curiae*. When the hearing of the case was going on. Advocate Shri S. Girish who was present in the Court also made submissions regarding certain legal aspects. He filed a hearing note also. Advocate Shri Bechu Kurian Thomas and Advocate Shri S. Girish were also heard.

6. Shri Bechu Kurian Thomas, the *Amicus Curiae* raised the following contentions:

It is contended that while considering the final report, the committal Magistrate may accept the final report and close the matter or direct further investigation. The

Magistrate may reject the conclusion arrived at by the Investigating Officer and take cognizance of the offence and proceed for trial of the case. It was argued that this is the third final report filed by the CBI and since the case is one exclusively triable by a Court of Sessions, the Magistrate can only order further investigation or accept the final report. It was argued that in view of the provision contained in Section 209 Cr.P.C., the Magistrate has no power to add a party and take cognizance and commit the case. There must be an accused and in this case the definite stand taken by the CBI is that it is not possible to trace the accused. It is contended that the Magistrate cannot add an accused even if he finds that the offence is committed by any particular individual while considering the final report under Section 209 Cr.P.C. It is argued that at that stage, the Magistrate is not conducting any enquiry. It is also contended that the learned Magistrate while considering a final report is not appreciating any 'evidence' and as such he is not entitled to conduct a local inspection. It was also argued that local inspection can be conducted only to appreciate evidence already adduced and hence the decision of the Magistrate to conduct a local inspection at this stage is without jurisdiction and liable to be set aside.

7. Advocate Shri S. Girish in his argument note had raised the following contentions.

When a person appears before the Station House Officer of a Police Station and gave information regarding the commission of a cognizable offence, the Police Officer is bound to record the same and register a case under Section 154(3) of Cr.P.C. Section 156(3) Cr.P.C. confers powers on the Magistrate to direct investigation under Section 190 Cr.P.C. Section 157 Cr.P.C. deals with the procedure of investigation. After investigation, the final report is to be filed under Section 158 Cr.P.C, When a final report is filed, the procedure to be followed by the Magistrate is stated in Section 159 Cr.P.C. It is contended that a reading of Section 159 Cr.P.C. makes it clear that the Magistrate has got the following options.

(i) He can direct an investigation.

(ii) He can proceed to the spot and conduct a preliminary enquiry,

(iii) He can depute a Magistrate subordinate to him to proceed to the spot and hold a preliminary enquiry.

It was contended that when the Magistrate himself conducts an enquiry the term 'preliminary inquiry' is used and the Magistrate himself can go to the spot and conduct enquiry. It is contended that in view of the provisions contained in Section 159 Cr.P.C. the Magistrate has got jurisdiction to go to the place of occurrence if he is not satisfied with the report of the Police. It is further contended that before invoking the powers under Section 310 of Cr.P.C., the Magistrate shall give notice to the complainant as well as to the accused. But in this case, the CJM will not be able to give notice to the accused. The Investigating Agency has not yet succeeded in locating the culprit. In the interest of justice, a Magistrate can hold a preliminary enquiry to find out the culprit, but he shall keep away from the trial. It was also contended that Investigating Agency who is submitting the final report under Section 173 Cr.P.C. have not complied with the provisions of Section 173(2) Cr.P.C. which enjoins that the final report shall contain the name of the accused. It is contended that CBI is bound to continue investigation unless and until it finds out the real culprit.

8. Shri A.X. Varghese, counsel appearing for the father of the deceased had raised a preliminary objection regarding the maintainability of the Criminal Revision Petition. It is argued that the order passed by the Magistrate is purely an interlocutory order and the Court has no jurisdiction to interfere with the supervisory power of the Magistrate to issue proper direction to the Investigating Agency. It is also argued that the Magistrate can ignore the conclusion arrived at by the Investigating Officer and take cognizance. There cannot be any quarrel with the legal proposition stated by the counsel for the father of the deceased. It is well settled position of law that the High Court has got power to set aside an illegal order either by invoking the revisional powers or in exercise of the internal powers conferred on it under Section 482 of Cr.P.C. In appropriate cases the High Court can invoke the supervisory jurisdiction conferred on it under Article 227 of the [Constitution of India](#). So, it is not possible to accept the contention of Advocate Shri A.X. Varghese that this Court has no jurisdiction to interfere with the order passed by the learned Magistrate.

9. Now, I shall consider the arguments raised by Advocate Shri S. Girish that in view of the provisions contained in Section 159 Cr.P.C., the Magistrate can conduct local inspection. Chapter XII which contains Sections 154 to 176 Cr.P.C. deals with the procedure to be followed by the Police on receipt of information of commission of a crime and their power to investigate. Section 154 Cr.P.C. deals with information in cognizable offence. It enjoins that when any person appears before the Station House Officer and gives information regarding the commission of a cognizable offence, the Station House Officer in charge of the Police Station has got no option but to record the same and register an FIR. Section 155 Cr.P.C. deals with information as to non-cognizable cases and the investigation of such cases. Section 156 Cr.P.C. deals with power of the Police Officer to investigate cognizable cases. Section 156(1) Cr.P.C. provides that on receipt of the information regarding a cognizable offence, the Police Officer shall register the FIR and then can investigate the case. Section 157 Cr.P.C. deals with procedure for investigation. Section 158 deals with submission of reports prepared under Section 157. Section 159 Cr.P.C. deals with power of the Magistrate to hold investigation or preliminary inquiry. It reads as follows:

159. Power to hold investigation or preliminary inquiry.- Such Magistrate, on receiving such report, may direct an investigation, or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in the manner provided in this Code.

Section 159 confers power on a Magistrate to conduct an enquiry. It provides that on receipt of such a report, the Magistrate may proceed to hold a preliminary enquiry into or otherwise dispose of the case in any manner provided in the Code. It does not confer any power on the Magistrate to conduct any local inspection. In *Emperor v. Abdul Rahman and Ors.* ILR XXXII A11.30 the District Magistrate on receipt of a final report made an investigation and directed the Superintendent of Police to conduct the investigation. The Superintendent of Police conducted the investigation and filed a report to the effect that the case was not true. He made a suggestion that the Magistrate may enquire into it. The District Magistrate deputed a Magistrate of First Class to conduct an enquiry. He conducted an enquiry which

resulted in an order for the prosecution of certain witnesses who had given evidence before him. A Division Bench of the Allahabad High Court held that there was no legal authority for the enquiry held by the Magistrate and his order for the prosecution of the witnesses was therefore invalid. In *Tangedupalle Pedda Obigadu v. Pullasi Pedda and Ors.* AIR 1922 Mad. 40 it was held that the expression 'preliminary enquiry' in Section 159 appears to be used in a different sense from its use in Section 288, where it refers to inquiries under Chapter XVIII prior to commitment to the Sessions, which are held after police investigation is complete. In *Pancham Singh v. State* : AIR1967 Pat416 it was held that the Magistrate has no power to suspend police investigation already taken up under Section 157(1) and direct Magisterial enquiry. In *Bipin Kumar Tewari v. S.N. Sharma* 1969 ALJ 406 a Division Bench of the Allahabad High Court held that once Police starts investigation of the case, the Sub Divisional Magistrate cannot take recourse to the alternate procedure contained in the second part. The opposite parties in that case challenged the decision of the Allahabad High Court before the Supreme Court. In *S.N. Sharma v. Bipin Kumar Tewari and Ors.* : 1970 CriLJ764 it was held as follows:

The use of the expression 'as he thinks fit' in Section 159 makes it clear that Section 159 is primarily meant to give to the Magistrate the power of directing an investigation in cases where the police decide not to investigate the case under the proviso to Section 157(1), and it is in those cases that, if he thinks fit, he can choose the second alternative of proceeding himself or deputing any Magistrate subordinate to him to proceed to hold a preliminary enquiry as the circumstances of the case may require.

It is very pertinent to note that Section 159 confers power on the Magistrate only to conduct an enquiry and not any power to proceed to the place and conduct a local inspection. The words 'at once proceed' occurring in Section 159 of the Code qualifies the word 'enquiry'. So, the contention that in view of the provision contained in Section 159, the Magistrate has got power to proceed to the spot and hold an enquiry is not correct.

10. Advocate Shri Bechu Kurian Thomas has argued that while considering the final report, the Magistrate has got three options. He relied on a decision reported in *India Carat Pvt. Ltd. v. State of Karnataka and Anr.* : [1989]1SCR718 in which it was held that the Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts emerging from the investigation taking into account the statements of the witnesses examined by the police during the investigation and take cognizance of the case. But the case on hand is exclusively triable by the Court of Sessions. In such a case, the duty of the Magistrate is to verify whether the Investigating Officer had complied with the legal requirement and then commit the case to the Court of Sessions. The Magistrate cannot add a party at this stage. In *India Carat's case (supra)* it was also held by the Supreme Court that while considering a final report filed by the Investigating Agency the committal Magistrate has got three options.

(i) To accept the final report and close the matter.

(ii) Direct further investigation.

(iii) Take cognizance of the offence and proceed for trial of the case.

The instant case is exclusively triable by the Magistrate. Sections 207 to 209 of Cr.P.C. deals with the procedure to be followed by the Magistrate in such cases. Section 208 Cr.P.C. provides that the Magistrate shall supply copies of statements and documents to the accused in cases triable by Court of Sessions. Section 209 provides that the Magistrate shall commit the case to the Court of Sessions if the offence is exclusively triable by it. But in such cases, the Magistrate can commit the case only when the accused appears or brought before him. It is also well settled position of law that it is not possible for the Magistrate to add an accused invoking the powers conferred on him under Section 319 at the stage of 209 of the Code. The definite stand taken by the Investigating Officer is that it is not possible to identify the culprit. So, the Magistrate cannot take cognizance of the offence. The two options available to the Chief Judicial Magistrate is either to accept the final report and close the matter or order further investigation under Section 173(8) of Cr.P.C.

11. The next question to be considered is whether the Magistrate can conduct a local inspection while considering a final report under Sections 208 and 209 CR.P.C. Section 310 reads as follows:

310.(1) Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.

(2) Such memorandum shall form part of the record of the case and if the prosecutor, complainant or accused or any other party to the case, so desires, a copy of the memorandum shall be furnished to him free of cost.

The section provides that a Magistrate may conduct a local inspection of place of occurrence or any other place. A reading of the section makes it clear that such powers can be invoked during the course of enquiry, trial or other proceedings and the purpose of the local inspection is to properly appreciate the evidence given in the case. Shri A.X. Varghese, counsel appearing for the father of the deceased has argued that the materials submitted along with the final report is evidence for the purpose of Section 310. He has relied on the decisions reported in *Tulsidas Mundhra v. State of West Bengal* 66 CWN 680, *Ramnarayan v. State of Maharashtra* : 1964 CriLJ44 , *Jiwa Ram v. State* and *Sirajuddin v. State* : AIR1968 Mad117 in support of his arguments.

12. Advocate Shri Bechu Kurian Thomas has argued that meaning of the words 'judicial proceedings' and 'evidence' shall be considered before taking any decision in the matter. Section 2(g) of Cr.PC. defines the word inquiry. It reads as follows:

2(g). 'inquiry' means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court;

Section 2(i) deals with judicial proceedings. It reads as follows: 'judicial proceeding' includes any proceeding in the course of which evidence is or may be legally taken on oath.

The word 'evidence' is not defined in the Criminal Procedure Code. But the Evidence Act defines the word evidence. Section 3 of the Indian Evidence Act reads as follows:

Section 3 Interpretation Clause- In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context...

Evidence.- Evidence means and includes -

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters to fact under inquiry, such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.

The word document is also defined in the Indian Evidence Act. Section further clarifies that the expression 'electronic records' shall have the meaning assigned to it in the [Information Technology Act, 2000](#). A strictly scientific and logical definition of the term 'evidence' is hardly possible by exclusion of facts. Judicial evidence may be defined as evidence received by Courts of Justice in proof or disproof of facts, the existence of which comes in question before them. In the Evidence Act, the meaning of the word evidence is restricted to (1) statement made by witnesses in relation to the matter of fact under enquiry, i.e. oral evidence and (2) documents produced for the inspection of the Court, i.e. documentary evidence. The meaning of the word given in the Evidence Act is not complete. It is also settled position of law that the result of the local enquiry by the Presiding Officer is not evidence. The statements recorded under Section 161 of the Cr.P.C. and the statements of persons recorded at inquiry are not evidence. It reads as follows:

Document - 'Document' means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording

that matter.

13. Advocate Shri Bechu Kurian Thomas has argued that in Tulsidas Mundhra's case a Division Bench of the Calcutta High Court has considered the meaning of the word 'evidence' in Section 207A of Cr.P.C. 1898 (Amended by Act XXVI of 1955). It was held that all documents which are produced for inspection of the Court fall within the definition of evidence and therefore the, documents which have been produced for inspection of the Court under Section 207A are evidence within the meaning of Evidence Act. In Ramnarayan's case (supra) a Constitution Bench of the Supreme Court considered the meaning of the word 'evidence' used in Section 207A held as follows.

The Evidence Act which applies to the trial of all criminal cases, the expression 'evidence' is defined in Section 3 as meaning and including all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry and documents produced for the inspection of the Court. There is no restriction in this definition to documents which are duly proved by evidence. Normally in a criminal trial, the Court can proceed on documents which are duly proved, or by the rules of evidence made admissible without formal proof, but under the amended Code the Legislature has in Section 207 A prescribed a special procedure in proceedings for commitment of the accused. The record consists of the oral evidence recorded under Sub-section (4) of Section 207 A and the documents referred to in Section 173(4), and it would be difficult to regard only those documents which are duly proved, or which are admissible without proof as 'evidence' within the meaning of Clause (6) of Section 207A and not the rest.

In Sirajuddin 's case (supra) it was held as follows: Documents referred to in Section 173 are in a sense evidence, though only at the stage of enquiry before framing charge and for framing charge. The Evidence Act, defines evidences to mean and include also all documents produced for inspection of Courts. As these documents are the matter which a magistrate has to consider under Section 251 A(2) and (3), it would be open to the prosecution and the accused to rely upon or refer to them in support of their respective contentions, when they exercise the

right of being heard under Section 251 A(2) and (3).

In *Raj Kishor Prasad v. State of Bihar and Anr.* : 1996 CriLJ2523 it was held that while exercising the power under Section 209, the Magistrate is not conducting the enquiry. It was held as follows: Proceedings before a Magistrate under S. 209 Cr.P.C. are patently not trial proceedings and were never considered so at any point of time historically. Before the amendment of the Code of Criminal Procedure in the present form, commitment proceedings had the essential attributes of an inquiry and were termed as such. If proceedings under Section 209 Cr.P.C. continue to be an inquiry, Section 319 Cr.P.C. would be obviously attracted.

In *Narayanan Nambiar v. State of Kerala* (1987 (1) KLT 871) a learned Single Judge of this Court considered the meaning of the word 'evidence' appearing in Section 319 Cr.P.C. It was held that the word evidence mentioned in Section 319(1) Cr.P.C. does not include materials collected during investigation. It was held as follows:

The evidence referred to in Section 319(1) is evidence produced as the inquiry or trial and not the evidence collected during investigation. Evidence produced at the stage of inquiry or trial may include in given cases such of the materials collected during investigation and proved as evidence during inquiry or trial.... What Section 319(1) mentions is not satisfaction at the time of taking cognizance under Section 190 or proceeding under Section 204 but at a later stage during inquiry or trial on the basis of evidence brought to Court at those stages.

In *Ranjith Singh v. State of Punjab* : 1998 CriLJ4618 a three Judge Bench of the Supreme Court approved the principles laid down in *Raj Kishor Prasad's* case (supra) and held as follows:

It is settled that 'evidence' envisaged in Section 319 of the Code is the evidence tendered during trial of the case if the offence is triable by a Court of Sessions. The material placed before the committal Court cannot be treated as evidence collected during enquiry or trial.

14. Advocate Shri A.X. Varghese, learned Counsel appearing for the father of the deceased has argued that the principle laid down in Narayanan Nambiar's case (supra) has no application in this case. It was argued that the power of the Magistrate to conduct local inspection under Section 310 can be exercised during enquiry, trial or other proceedings, whereas the power to add an additional accused arises only during enquiry or trial of a case. Advocate Shri A.X. Varghese relied on the decisions reported in Ram Saran and Ors. v. Ramdas AIR 1965 Jammu and Kashmir 49, Chheda v. Padmakar 1984 A11.L.J. 684, Sqnappa Kamayva and Ors. v. Bamidi Rajanna and Ors. 1989 (3) Crimes 668, Deo Prasad Saha and Ors. v. Ravi Ravidas 1990 CrL. Law Journal 823 in support of his arguments. Section 319(1) 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 not 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) xxx xxx xxx(3) xxx xxx xxx(4) xxx xxx xxxIt is true that provisions of Section 319 is made applicable to enquiry or trial whereas Section 310 deals with enquiry, trial and other proceedings. The expression 'other proceedings' used in Section 310 is to be given the same meaning enquiry or trial. The principles of ejusdem generis would apply and would restrict the meaning of the words 'other proceedings' to proceeding in which evidence is required to be adduced. So. the expression 'other proceedings' means proceedings initiated by the Executive Magistrate under Section 133 or 145 of the Cr.P.C. The Magistrate while considering a final report under Section 209 is not recording any evidence, but considering only the materials produced before him along with the final report. The major portion of the materials produced in the final report are the statements given by the witnesses which cannot be considered as evidence. So, I respectfully follow the principles laid down in Narayanan Nambiar's case and hold that a Committal Magistrate while considering a final report in a case exclusively triable by a Court of Sessions is not recording any evidence and the statements and documents

produced along with the final report cannot be treated as evidence collected during enquiry or trial. So, I accept the contention raised by Advocate Shri Bechu Kurian Thomas that a committing Magistrate who is considering a final report of a case exclusively triable by the Court of Sessions under Section 209 of Cr.P.C. has no jurisdiction to conduct local inspection in exercise of the powers conferred on him under Section 310 of the Code at that stage.

15. Now, I shall consider the argument of Advocate Shri Bechu Kurian Thomas that the facts and circumstances of this case do not justify the decision of the learned Chief Judicial Magistrate to conduct a local inspection. Section 310 of Cr.P.C. 1973 deals with power of the Magistrate/Judge to conduct local inspection. There was no provision in the Criminal Procedure Code (1882) which enabled a Magistrate to conduct a local inspection. Subsequently, an explanation was added to Section 556 of Cr.P.C. 1898. The explanation provided that a Magistrate shall not be disqualified from trying a case by reason only that he has viewed the place in which an occurrence is alleged to have been committed or any other place in which any other transaction material to the case is alleged to have occurred and made an enquiry in the case. See *Queen Empress v. Manikam* ILR XIX Madras 263, *Ahmad Yar Khan v. Emperor* XI CrLJ 171 and *Babbon Shaik v. Emperor* ILR XXXVII 340. In the year 1923, Section 539(b) was inserted in the 1898 Code by which power of local inspection was conferred on the Magistrate/Judge. Section 539(b) declare and recognise the power of the Magistrate to conduct local inspection.

16. It is argued by the Amicus Curiae that in *Tirkah v. Nanak* AIR 1927 All. 350 it was held that if a Magistrate makes use of knowledge derived from a local inspection without affording the accused an opportunity to cross-examine or to explain the points against him, he acts with material irregularity sufficient to vitiate the trial. It was also held that a local inspection of the Magistrate is permitted for the purpose of properly appreciating the evidence in this case and cannot take the place of evidence itself. In *Sheik Badasah v. Emperor* 40 CrLJ (1939) 624 the Magistrate visited the spot on the evening and came to the conclusion that there was sufficient light to enable anybody to mark closely the features of a stranger. The High Court held that the learned Magistrate assumed that the

condition of the light and atmosphere were the same on the night that he went to the spot as they were at the time of the occurrence. It was held that the Magistrate had gone beyond the scope of Section 539(b) and result of such inspection could not be made the basis of conviction. In *Dwaraka Prasad v. Ram Nath Modi and Ors.* AIR 1951 Vindhya Pradesh 1 it was held that the only purpose of local inspection is to properly appreciate the evidence given at the trial. It was held as follows:

The only purpose of local inspection being to properly appreciate the evidence given at the trial and it is only reasonable that the local inspection should, as a rule, come after all the evidence is recorded.... Even that should be resorted to very sparingly, the Court taking special precautions to prevent itself becoming a witness unconsciously. On some occasions, it is practically impossible for the Court to make a local inspection, and not import new materials collected by it. The moment the Court collects new materials it becomes a witness, and as it cannot cross-examine itself, it cannot try the case.

17. In *Pritam Singh v. State of Punjab* : 1956 CriLJ805 a three Judge Bench of the Supreme Court held that a Magistrate is not entitled to allow his views or observations to take the place of evidence because such view or observation cannot be tested by cross-examination.

18. In *Deva Setty v. State of Mysore* : AIR1959 Kant170 it was held as follows:

A local inspection may be made for the purpose of properly appreciating the evidence given during the trial. The magistrate should not, in making the local inspection, do any thing which would reduce him to the position of a witness.

A Division Bench of this Court had occasion to consider the scope of Section 539 in *State of Kerala v. Chandran* 1973 KLT 625 : 1974 Cri. Law Journal 52. It was held as follows:..But the Code provides for the Judge making a local inspection himself. That inspection can be used by him for properly appreciating the evidence in the case and for no other purpose. It cannot be used for preparation of the background for appreciating the evidence of the witnesses because preparation of the background has to be made by the parties themselves by letting in evidence

for that purpose and the Judge is not expected to supply that lacuna in evidence. Preparation of the background to appreciate the evidence of witnesses is not the same as 'properly appreciating the evidence' contemplated by the Section.

It was further held as follows:.If the impressions gained by the Judge on controversial matters are allowed to get in without being tested by cross-examination there is the likelihood of miscarriage of justice resulting from it.

In State of Uttar Pradesh v. Het Ram and Ors. AIR 1976 SC 2124 it was held as follows:

What Section 539-B contemplates is the local inspection of the topography of the place in which the offence was alleged to have been committed or its local peculiarities for the purpose of properly appreciating the evidence which was already on record.

In Keisam Kumar Singh and Anr. v. State of Manipur : 1986 CriLJ17 it was held as follows:

Normally a Court is not entitled to make a local inspection and even if such an inspection is made, it can never take the place of evidence or proof but is really meant for appreciating the position at the spot. In the present case the Sessions Judge by making a local inspection converted himself into a witness in order to draw full support to the defence case by what he may have seen. By doing so the Sessions Judge exceeded his jurisdiction.

In State of H.P. v. Mast Ram : AIR 2004 SC5056 the Apex Court held as follows:.the local inspection envisaged under Section 310 Cr.P.C. is for the purpose of properly appreciating the evidence already recorded during the trial. Memorandum of spot inspection recorded by the trial Judge has to be appreciated in conjunction with the evidence already recorded. Any omission and/or commission in the memorandum recorded by the trial Judge by itself would not constitute material irregularity, which would vitiate the prosecution case.

So, it is settled position of law that though the Magistrate has power to conduct a local inspection that can only be for the purpose of appreciating the evidence on

record and that shall not be done in a manner so as to reduce the Magistrate as a witness.

19. The learned Magistrate has stated the reasons for conducting the local inspection in the order. It was stated that the measurement and location of the well, the room in which Sr. Abhaya was residing, the position of kitchen where Sr. Abhaya went from her room for taking water after she woke up, the position of other rooms near the kitchen which certain suspected persons were residing, the position of the house of Mr. Sanju P. Thomas wherein he is alleged to have stood when the body was taken out of the well are to be linked and analysed to decide whether the refer report is acceptable or not. It is stated that no scene mahazar or site plan is available. It is also stated that whether it has to be ascertained whether falling the vessels can be heard by a person who has stated about the same by remaining in the respective portions of the hostel building are to be examined. If the learned Magistrate prepares a site plan, or scene mahazar necessarily he will have to be examined as a witness. The Sessions Judge who conduct the trial of the case may also require such evidence in the case. The learned Chief Judicial Magistrate could have directed the Investigating Officer to prepare a scene mahazar or a site plan and mark the location of the well, the room in which Sr. Abhaya was sleeping, the kitchen, the room in which certain suspected persons were residing and also the position of the house of Mr. Sanju P. Thomas. Even assuming that the learned Magistrate is able to see the place of occurrence from the spot when Mr. Sanju P. Thomas was standing, that does not mean that Mr. Sanju P. Thomas had interested the incident. That depends upon the height of the place, level difference of these two places, etc. Even if the Magistrate is able to hear the sound of a falling vessel that does not mean that witnesses who stood in those place should have been heard it. The sound of a falling vessel depends upon the nature of the material used for the manufacture of the vessel, the place where it fell down, the height from which it fell down, etc. The volume of sound an object produces can very well be measured by using scientific equipments and whether that can be heard by an ordinary man can also be ascertained using scientific methods. So, all the matters which are enumerated in the order by the learned Magistrate which are lacking in the final report can be obtained by giving necessary direction to the Investigating Officer. If the learned Magistrate

ascertains any of the points, he will have to be examined as a witness. Such an action cannot be permitted. Further, even if the learned Chief Judicial Magistrate collect all those matters stated in his order, he will not be able to commit the case to the Court of Sessions, since the identity of the culprits could not be established. So, the learned Magistrate had exceeded the exercise of the jurisdiction vested in him in taking a decision to conduct a local inspection at this stage. The order impugned is illegal and is liable to be set aside.

In the result Crl.R.P. is allowed. The order passed by the learned Chief Judicial Magistrate, Ernakulam on 26.9.2005 in RC 8(S) 93/SPE/KER/SIC-II to conduct a local inspection is set aside. The learned Magistrate is directed to reconsider the final report and pass appropriate orders. I make it clear that I have not considered whether the points the learned Chief Judicial Magistrate has noted in the order are necessary or not for the disposal of the case. I place on record my appreciation for the valuable assistance rendered by Advocate Sri. Bechu Kurian Thomas and Advocate Sri S. Girish in decidmg the case.

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