

1.Katturaja Vs. State Represented by

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Court : Chennai

Decided On : Jan-31-2013

Judge : M.Jaichandren

Appellant : 1.Katturaja

Respondent : State Represented by

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

31. 01/2013 CORAM THE HONOURABLE MR.JUSTICE M.JAICHANDREN and THE HONOURABLE MR.JUSTICE S.NAGAMUTHU REFERRED TRIAL (MD)No.1 of 2013 and Criminal Appeal (MD) No.19 of 2013 REFERRED TRIAL (MD)No.1 o

1. Katturaja 2.Vettum Perumal @ Krishnan @ Kitchi .. Accused vs. State represented by the Deputy Superintendent of Police, Valliyoor Sub Division, Nanguneri Sub Division (i/c) Kalakkadu Police Station, Tirunelveli District. .. Complainant (Cr.No.111/2007) CRIMINAL APPEAL (MD)No.19 o

1. Katturaja 2.Vettum Perumal @ Krishnan @ Kitchi .. Appellants vs. State represented by the Deputy Superintendent of Police, Valliyoor Sub Division, Nanguneri Sub Division (i/c) Kalakkadu Police Station, Tirunelveli District. .. Respondent (Cr.No.111/2007) REFERRED TRIAL (MD)No.1 of 2013 under Section 366 of the Cr.P.C. on the judgemnt of the trial Court dated 26.12.2012 in

S.C.No.59 of 2007 on the file of the II Additional District & Sessions Judge, Tirunelveli. Criminal Appeal filed under Section 374 of the Cr.P.C against the Judgment 26.12.2012 in S.C.No.59 of 2007 on the file of the II Additional District & Sessions Judge, Tirunelveli. !For 1st appellant ... Mr.I.Subramanian, Senior Counsel for M/s.K.Prabhu For 2nd appellant ... Mr.V.Kathirvelu, Senior Counsel for M/s.K.Prabhu ^For respondent ... Mr.S.Shanmuga Velayutham, Public Prosecutor, assisted by Mr.C.Ramesh, Addl.Public Prosecutors :ORDER (Order of the Court was made by S.NAGAMUTHU, J) Four people - A man, a woman and their two children - lost their lives. The lifeless bodies, with multiple injuries, were strewned in their house and out side. This gruesome, dastardly and cowardly act of murders was executed by the perpetrators on 20.04.2007. This occurrence, sent shock waves through out the southern districts of this State. Nobody had seen the occurrence. Three people were named as suspected accused. Investigation went on. Finally, charge sheet was laid against two different persons. The learned II Additional & Sessions Judge, Tirunelveli convicted and sentenced them to death in S.C.No.59 of 2007 (vide judgement dated 26.12.2012). The details of the charges and sentences are as follows:-

Accused	Charge	Finding	Sentence
A.1	302 r/w 34 I.P.C., (4 counts)	Convicted	Sentence of death besides a fine of Rs.1,00,000/- in default to undergo 1 year simple imprisonment. 3(2)(V) of the SC & ST (Prevention of Atrocities) Act (4 counts)
		Convicted	Imprisonment for life and to pay a fine of Rs.1,00,000/- (Rs.25,000/- x

4)	in default to undergo 1 year simple imprisonment. 449 I.P.C.,	Convicted	Imprisonment for life and to pay a fine of Rs.25,000/- in default to undergo 6 months simple imprisonment. A.2 302 r/w 34 I.P.C., (4 counts)
		Convicted	Sentence of death besides a fine of Rs.1,00,000/- in default to undergo 1 year simple imprisonment. 3(2)(V) of the SC & ST (Prevention of Atrocities) Act (4 counts)
		Convicted	Imprisonment for life and to pay a fine of Rs.1,00,000/- (Rs.25,000/- x

4) in default to undergo 1 year simple imprisonment. 449 I.P.C., Convicted Imprisonment for life and to pay a fine of Rs.25,000/- in default to undergo 6 months simple imprisonment. 2.Having imposed the above conviction and sentence, the trial Court has submitted the proceedings to this Court seeking confirmation as required under Section 366 of the Code of Criminal Procedure.

That is how the Referred Trial (MD) No.1 of 2013 is before this Court. Challenging the conviction and sentence, the accused have come up with Criminal Appeal (MD)No.19 of 2013.

3. When these matters were taken up for hearing on 30.01.2013, we went through the entire records thoroughly. Mr.I.Subramanian, learned Senior Counsel, appearing for the first appellant and Mr.V.Kathirvelu, the learned Senior Counsel appearing for the second appellant advanced arguments assailing the conviction and sentence imposed on the accused. Mr.S.Shanmuga Velayutham, the learned Public Prosecutor, however, submitted that the prosecution has proved the case against both the accused under all charges beyond reasonable doubts and pleaded for confirmation of the death penalty.

4. During the course of arguments, we found a lot of disturbing factors in the investigation and in the evidence let in before the lower Court and thus, prima facie, we felt that it may be difficult for this Court to confirm the conviction. On 30.01.2013, when the matter was heard, neither the officers who investigated the case, nor any other responsible officer, like the Deputy Superintendent of Police, Tirunelveli, who is posted with the facts of the case was present before this Court to assist the learned Public Prosecutor. One Woman Inspector of Police was present along with the case diary. When we raised certain queries on certain important points, she expressed her inability to explain as she had no knowledge of any of the facts of the case. 5.Having gone through the records, we were shocked to find that though it is a very serious case where a husband, wife and their two children have been killed mercilessly in a brutal manner, the investigation had not been done thoroughly to bring on record legally acceptable evidence so as to ensure punishment for the real culprits. Therefore, we directed the Deputy Inspector General of Police, Tirunelveli, the Superintendent of Police, Tirunelveli and the Officers who investigated the case to appear before this Court today. The matter was accordingly adjourned.

6. Today (31.01.2013), when the matters were taken up, the Deputy Inspector General of Police, Tirunelveli Range, the Superintendent of Police, Tirunelveli, Mr.Suresh Kumar, and Mr.Murugesan, the officers who investigated the case were

all present. When we asked the Deputy Inspector General of Police as well as the Superintendent of Police as to whether they had any occasion to visit the Court when the trial was conducted before the trial Court, they answered in the negative. However, the Superintendent of Police told the Court that when the trial before the lower Court was in progress, he had an occasion to go through the records and he himself was not satisfied with the investigation as there were a lot of flaws committed by the Investigators. He further stated that at that stage, since the trial was in progress, he was not in a position to take further steps for further investigation. When he was asked by this Court as to whether he sought for any legal opinion from the learned Public Prosecutor for further investigation, he answered in the negative. To the question as to why he did not get legal opinion, the Superintendent of Police had no explanation to submit to this Court.

7. Now, let us move on to the important facts of the case:- PW.1 is the sister's son of the deceased Jeyakumar (hereinafter referred to as "D1"). Mrs. Shanmugathai, the wife of D1 is referred to as "D2". D1 and D2 had two children by name, Chithra and Indira, who are referred to as "D3" and "D4" respectively. All the four deceased (D1 to D4) were residing in their farm house in the occurrence village. It is the prosecution case, P.W.3, the father of D2, found D2 alone at her house lastly alive on 19.04.2007 at 5.00 p.m. P.W.1 had gone out and thus, P.W.3 was not available at his house. Thereafter, according to P.W.1, on 20.04.2007, at 7.00 a.m., when he was proceeding to the house of the deceased, he found D1 lying dead with multiple injuries along with a cycle somewhere near his house. According to his further evidence, he rushed towards the farm house of the deceased where he found D2 dead with multiple injuries on her body. Then, when he searched for the two young children, D3 and D4, he found the door of a room in the house broken and behind the doors, D3 and D4 were also found dead with multiple injuries. According to the case of the prosecution, the occurrence had taken place at 6.30 p.m., on 19.04.2007.

8. Thereafter, according to PW.1, he made a complaint to the police (vide Ex.P1) at 8.00 a.m., on 20.04.2007. In Ex.P1, PW.1 has stated that 10 days prior to the occurrence, in respect of Kodai festival, there were quarrels between D1 and three other persons, by name, Mathi son of Thirumalai, Subramanian son of Perumal

and Mariappan son of Sudalaimuthu and in that quarrel, those three persons intimidated the deceased of dire consequences soon. In Ex.P1, he has further stated that from the above incident, he suspected that the above three persons, namely, Mathi, Subramanian and Mariappan, should have committed the murders. Therefore, the case was registered against those three persons under Section 302 IPC. Strangely, the case was not registered under Section 302 IPC for 4 Counts and instead, it was registered for only one count. The officer, who registered the case, is also present before this Court. When we asked her as to why she had not registered the case for 4 counts, as the complaint had alleged death of 4 persons, she has no explanation to offer.

9. After that, the investigation was taken up by one Kalyanasundaram, Inspector of Police, followed by one Suresh Kumar and Murugesan. Initially, the investigation was directed as though the assailants were the persons who were mentioned in the FIR as accused. The inquests were conducted by four different officers. From the evidence of PW.28 (Investigating Officer) we are able to see that a finger print expert was called to examine the place of occurrence to search for any chance finger prints of the culprits. He has admitted that finger prints were noticed on the wall of the house. Even in the Observation Mahazar (Exhibit P.2), it has been mentioned that on the wall of the kitchen, blood stained finger prints were found. But, during trial, nothing has been brought on record as to whether any such chance finger print was really lifted or nothing was found. Unfortunately, the finger expert has not been examined before the trial court and records pertaining to his proceedings have not been produced before the Court.

10. PW.29 (subsequent Investigating Officer) would further state before this Court after referring to the case diary, that since assailants were not known, police sniffer dog was brought to the place of occurrence on the request of PW.28 to help the investigation. But what was the help rendered by the police sniffer dog has also not been explained to the Court by means of any evidence.

11. Now comes the crucial aspect. As we have already pointed out, three persons by name Mathi, Subramanian and Mariappan were the suspected accused as per the F.I.R. PW.28 has stated, in Chief Examination, that in his secret investigation,

he found that the persons who had been mentioned as the assailants in the complaint were not really involved in the crime and therefore, he omitted them from the case.

12. We are unable to understand, under what provision of law, he claims to have power to do secret investigation in respect of the involvement of certain persons in the crime and to keep the records of such investigation secretly without producing the same before the Court. But no evidence has been let in before the Court relating to the materials collected during the investigation to come to such a conclusion that the FIR named accused are not the real assailants. No witness has been examined before the trial Court to substantiate the contention of the prosecution that the FIR named persons are not the real assailants. Apart from that, no notice was issued to the complainant in this regard as per the law laid down by the Hon'ble Supreme Court in *Bhagwant Singh v. State* (1985(2) SCC 537).

13. Now, let us see as to how P.W.28 came to the conclusion that these accused, now before this Court are the real perpetrators of this crime. The first accused surrendered before the Court on 20.04.2007. After the surrender of the first accused according to PW.28, as a result of his secret investigation, he came to know that these accused were the real assailants and not the persons who were mentioned in the FIR as accused. Thereafter, he examined a few witnesses including one Ramakrishnan (PW.17) on 21.04.2007 at 1.00 p.m. PW.17 has stated in his evidence that he found these two accused in a motor cycle at a place known as "Manimutharu Kalvai" with blood stains on their dress. When PW.17 asked them as to how they got bloodstains on their dress, the accused told him that a dog made an attempt to bite them and with a view to ward off, they cut the dog and that is how they came to sustain bloodstains on their dress. After telling him so, they left the place in the motor cycle. This witness was examined by P.W.28 on 21.04.2007 at 1.00 p.m. According to P.W.28, it is because of the fact that the first accused had voluntarily surrendered before the Court and because P.W.17 told him on 21.04.2007 that he saw these accused with weapons with bloodstains, he concluded that these two are the real culprits. But, in his evidence, P.W.17 has stated that at the time when inquests were conducted on all the four

bodies of the deceased, he was present and at that time, he did not say anything about the above fact either to the police or to anybody else. According to the learned Senior Counsel appearing for the accused, this witness has been planted after 21.04.2007 to make out a case against the accused.

14. Apart from that, the prosecution relies only on the evidence of PW.3, who is the father of D2. He has stated that he found these two accused armed with weapons near Manimutharu Kalvai on 19.04.2007 a little later than 5.00 p.m. He has further stated that on 19.04.2007, D2 told P.W.3 that D1 had illicit intimacy with the wife of A.1 and so, he would take revenge on D1. According to the learned Senior Counsel for the appellants, had it been true that he had seen these two accused with Aruval and knowing that they were inimical towards the deceased, he would not have omitted to tell the police at the time of inquest itself that he saw these accused moving with Aruvals. According to the prosecution case, untill 21.04.2007, he did not say anything about the above fact either to the Police or to any of his family members. But, according to P.W.3, he was examined by the police only after 10 days of the occurrence.

15. Now, the learned Public Prosecutor pleads for confirmation of death sentence only on the following circumstances:- "(i) enmity between the accused and the deceased family. (ii) PW.3 had seen these two accused armed with weapons near Manimutharu Kalvai a little later than 5.00 p.m., on 19.04.2007. (iii) PW.17 had also seen them with bloodstains on their dress near Manimutharu Kalvai, around 6.45 p.m on 19.04.2007. (iv) Lastly, after the accused were taken into custody, on their confession, the sickles were recovered." 16. We regret to state that, we are totally dissatisfied with the investigation. Prima facie, we are of the view that with the materials available on record by way of evidence, it will be too difficult for this Court to come to a definite conclusion that these two accused are the assailants. In the absence of any evidence, ruling out the possibility of the involvement of the FIR named accused, it will be difficult for the prosecution to face the argument advanced by the learned Senior Counsel. It is the law that in a case based on circumstantial evidence, there should not be any other hypothesis which is consistent with the innocence of the accused. Here, in this case, there is an alternative theory indicating the possibility of the involvement of the F.I.R., named

accused. The said alternative hypothesis is consistent with the innocence of the present accused. The prosecution has failed to rule out the said alternative hypothesis. 17. So far as the evidences of P.W.3 and P.W.17 are concerned, it is too difficult to believe them since P.W.17 has not explained as to why he kept silence until 1.00 p.m., on 21.04.2007 without informing anybody including the police about the alleged crucial facts known to them. Similarly, P.W.3 has not explained as to why for 10 days he kept silent and he did not disclose the fact that he saw the accused with weapons. All the four Inquest Reports (Exhibits P.29, 30, 31 nd

34) show that the inquests were completed at 1.30 p.m., on 20.04.2007. But the Investigating Officer was not aware of till the completion of the inquests that the present accused were the assailants. They concluded that the assailants were only the F.I.R., named persons and not the present accused. Similarly, the recovery of the material objects, allegedly on their confession, is also not beyond doubt. The Chemical Analysis Report (Exhibit P.16) shows that in all the Material Objects, including the dress materials of all the four deceased and the weapons, human blood of 'B' group was found. It has not been investigated as to what was the blood group of each deceased and how the blood group the other accused were not noticed in the weapons and the respective dress. Thus, with the available evidences, it may not be possible to sustain the conviction and to confirm the death sentence. We are forced to come to the conclusion, with pain, that had the investigation been done in a better manner, the truth would have been unearthed. 18. Yes, of course, we have come to the prima facie conclusion that the investigation had not been done thoroughly by the police to collect the legally admissible evidences to unearth the truth. But, on that score, in our considered opinion, simply, acquitting the accused will not amount to doing justice to the family of the victims. As we have already pointed out, it is a gruesome occurrence, where the husband, wife and two young children have been mercilessly done to death at their house with dangerous weapons. The injuries found on the bodies of the deceased would speak volumes about the diabolic and gruesome nature of the occurrence. 19. At this juncture, we would like to point out that the police in this State is a well organized force and the same is kept in high esteem in the mind of the public. So long as the police system in this State is vibrant and potential, the

crime rate in the State will surely fall and peace and tranquillity will be enhanced. We never underestimate the yeoman service rendered by the police force in this Country during difficult situations. The police force is certainly a force to be reckoned with. It is mainly responsible for the maintenance of the law and order ensuring peaceful living conditions for the people. But, in the recent years, from our experience, we apprehend, the confidence level of the public at large in the police force has been slightly reduced, mostly because of the indifference and inefficiency of few police officers. To illustrate one can quote the incidents which had recently happened in New Delhi, relating to the alleged rape and murder of a young girl in a running Bus. The entire nation saw the open rebellion of the people on the New Delhi Streets against the police inaction. It is not as though the law and the mechanism have got unpluckable loopholes. It is only the players who operate the system, at times, fail in their duty to unearth the truth and to bring to book the real culprits and get them convicted. The present case, in our opinion, is one such case which we find, suffers from shoddy investigation. 20. Now, the question is as to Whether it is permissible for this Court, at this stage, to order for further investigation and to collect further materials to find out the truth without causing any harm or prejudice to the accused. At the outset, one may not dispute that a referred trial under Chapter XXVIII of the Code of Criminal Procedure is a continuation of the trial. The Hon'ble Supreme Court has, on several occasions, declared that the power of the trial Court under Section 173(8) Cr.P.C., can be invoked at any stage before a final conclusion is arrived at in the case. Since the referred trial is a continuation of trial, we have no doubt in our mind, that we can invoke Section 173(8) of Cr.P.C., to order for further investigation in the case. Apart from the said provision, this Court is empowered under Section 367 of the Code of Criminal Procedure to receive any additional evidence in order to come to the correct conclusion. Yet another provision which imposes duty upon this Court to call any witness and to receive further evidence on any fact, to come to a right conclusion is Section 311 of the Code of Criminal Procedure. 21. Above all, besides the inherent power of this Court under Section 482 Cr.P.C., the power of this Court under Article 226 of the Constitution of India cannot be circumscribed by any of the provisions of the Code of Criminal Procedure. After all, the Code of Criminal Procedure is only a procedural law. The High Courts have been

empowered by the people of this Country under Article 226 of the Constitution of India to issue any order to do justice to the parties. On a mere technical ground, purely relating to procedure, this Court cannot remain silent and abdicate its duty so as to allow justice to fail. Therefore, in view of the above specific provisions contained in the Code of Criminal Procedure as well as the power under Article 226 of the Constitution of India, we deem it absolutely necessary for this Court to order for further investigation in this case. 22. When this was pointed out, the learned Senior Counsel appearing for the accused objected to the said course. According to him, it is not only on the flaws pointed out in the investigation that he pleads for acquittal of the accused, but also on the other facts and circumstances culled out from the evidences available on record that will go to show prove that the prosecution has failed to prove the case beyond reasonable doubts. However, the learned Senior Counsel has exhibited his fairness by not disputing the power of this Court to order for further investigation.

23. In this regard, we may usefully refer to the judgment of the Hon'ble Supreme Court in AIR 195.S.C. 469 (Jumman and others v. The State of Punjab) wherein the Hon'ble Supreme Court has held in Paragraph No.12 is as follows:- "12. It is clear from a perusal of these provisions, that in such circumstances the entire case is before the High Court and in fact, it is a continuation of the trial of the accused on the same evidence and any additional evidence and that is why the High Court is given power to take fresh evidence if it so desires. In an appeal under O.41, Civil P.C., an appellate Court has to find whether the decision arrived at by the court of first instance is correct or not on facts and law; but there is a difference when a reference is made under S.374, Criminal P.C., and when disposing of an appeal under S.423, Criminal P.S., and that is that the High Court has to satisfy itself as to whether a case beyond reasonable doubt has been made out against the accused persons for the infliction of the penalty of death. In fact the proceedings before the High court are a reappraisal and the reassessment of the entire facts and law in order that the High Court should be satisfied on the materials about the guilt or innocence of the accused persons. Such being the case, it is the duty of the High Court to consider the proceedings in all their aspects and come to an independent conclusion on the materials, apart from the view expressed by the Sessions Judge. In so doing, the High court will be assisted

by the opinion expressed by the Sessions Judge, but under the provisions of the law above- mentioned it is for the High Court to come to an independent conclusion of its own." 24. Jumman's case, referred to above, came to be considered by the the Hon'ble Supreme Court, later on, in *State of Maharashtra v. Sindhi*, (1975) 1 SCC 64. wherein, in paragraph No.14 of the said judgment, the Hon'ble Supreme Court has held as follows:- "14. From the above conspectus, it emerges clear that so far as an accused person sentenced to death is concerned, his trial does not conclude with the termination of the proceedings in the Court of Session. The reason is that the death sentence passed by the Court of Session is subject to confirmation by the High Court. A trial cannot be deemed to have concluded till an executable sentence is passed by the competent court. Viewed from that standpoint, the confirmation proceedings under Sections 374, 375 and 376, Chapter XXVII of the Code of 1898, are in substance a continuation of the trial." (Emphasis supplied) 25. Later on, the Hon'ble Supreme Court in *Sunil Batra v State* (1978 (4) SCC

494) in paragraph No.223, while following the said view, has held as follows:- "223. The expression "prisoner under sentence of death" in the context of sub-section (2) of Section 30 can only mean the prisoner whose sentence of death has become final, conclusive and indefeasible which cannot be annulled or voided by any judicial or constitutional procedure. In other words, it must be a sentence which the authority charged with the duty to execute and carry out must proceed to carry out without intervention from any outside authority. In a slightly different context in *State of Maharashtra v. Sindhi alias Raman*⁷⁰ it was said that the trial of an accused person under sentence of death does not conclude with the termination of the proceedings in the Court of Session because of the reason that the sentence of death passed by the Sessions Court is subject to confirmation by the High Court. A trial cannot be deemed to have concluded till an executable sentence is passed by a competent court. In the context of Section 303 of the Indian Penal Code it was said in *Shaik Abdul Azeez V. State of Karnataka*⁷¹ that an accused cannot be under sentence of imprisonment for life at the time of commission of the second murder unless he is actually undergoing such a sentence or there is legally extant a judicially final sentence which he is bound to serve without the requirement of a separate order to breathe life into the sentence

which was otherwise dead on account of remission under Section 401 Cr PC. Therefore, the prisoner can be said to be under the sentence of death only when the death sentence is beyond judicial scrutiny and would be operative without any intervention from any other authority. Till then the person who is awarded capital punishment cannot be said to be a prisoner under sentence of death in the context of Section 30, sub-section (2). This interpretative process would, we hope, to a great extent relieve the torment and torture implicit in sub-section (2) of Section 30, reducing the period of such confinement to a short duration." 26. From the above judgments, it is ipso facto clear that the trial, in the present case, has not concluded and that the imposition of death sentence by the trial Court is not executable as the same needs the confirmation by this Court. As has been held by the Hon'ble Supreme Court, what is pending before this Court is nothing but the continuation of trial. Thus, the present referred trial proceedings can, at no stretch of imagination, be construed as an independent proceeding. In short, it is a trial in continuation of the lower Court proceedings. 27. The next question is "Whether after filing of the final report and that too after the completion of recording of evidence on both sides, the trial Court could order for further investigation?" To answer this question, we find no difficulty, since the Hon'ble Supreme Court had, in the past, on several occasions, examined the said question and answered the same in the affirmative. It would suffice for us to refer to some of the judgments of the Hon'ble Supreme Court on this point.

28. In *Hasanbhai Valibhai Qureshi v. State of Gujarat*, (2004) 5 SCC 34, in paragraph Nos. 12 and 13 it has been held as follows:- 12. Sub-section (8) of Section 173 of the Code permits further investigation, and even dehors any direction from the court as such, it is open to the police to conduct proper investigation, even after the court took cognisance of any offence on the strength of a police report earlier submitted. All the more so, if as in this case, the Head of the Police Department also was not satisfied of the propriety or the manner and nature of investigation already conducted.

13. In *Ram Lal Narang v. State (Delhi Admn.)*² it was observed by this Court that further investigation is not altogether ruled out merely because cognisance has been taken by the court. When defective investigation comes to light during course

of trial, it may be cured by further investigation, if circumstances so permitted. It would ordinarily be desirable and all the more so in this case, that the police should inform the court and seek formal permission to make further investigation when fresh facts come to light instead of being silent over the matter keeping in view only the need for an early trial since an effective trial for real or actual offences found during course of proper investigation is as much relevant, desirable and necessary as an expeditious disposal of the matter by the courts. In view of the aforesaid position in law, if there is necessity for further investigation, the same can certainly be done as prescribed by law. The mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial as well as effective justice. We make it clear that we have not expressed any final opinion on the merits of the case." 29. From the above judgment, there can be no difficulty to firmly conclude that, at any stage, before the final conclusion of the trial, the trial Court has got power to order for further investigation, when the Court is satisfied that the investigation was flawed. 30. The next question is "While hearing a referred trial case under Chapter XXVIII of Cr.P.C., can the High Court exercise the said power under Section 173 (8) of Cr.P.C.?" 31. In this regard, we may refer to the judgement of the Hon'ble Supreme Court in *State of Maharashtra v. Farook Mohammed Kasim Mapkar and others* (2010 (8) SCC

582) wherein the Hon'ble Supreme Court has held that the power of this Court, in an extra-ordinary situation, could be invoked under Article 226 of the Constitution of India though an adequate remedy is available in the Code of Criminal Procedure.

32. Next, we may refer to the judgement of the Hon'ble Supreme Court reported in (2006) 7 Supreme Court Cases 296 (*Popular Muthiah v. State represented by Inspector of Police*) wherein in paragraph 48, the Court has held as follows:- "48. The High Court while passing the impugned judgement did not bear the said principles in mind. It went beyond its jurisdiction in directing the prosecution of the appellant before us. In a case of this nature, where a superior court exercises its inherent jurisdiction, it indisputably should remind itself about the inherent danger

in taking away the right of an accused. The High Court should have been circumspect in exercising the said jurisdiction. When a power under sub-section (8) of Section 173 of the Code of Criminal Procedure is exercised, the court ordinarily should not interfere with the statutory power of the investigating agency. It cannot issue directions to investigate the case from a particular angle or by a particular agency. In the instant case, not only the High Court had asked reinvestigation into the matter, but also directed examination of the witnesses who had not been cited as prosecution witnesses. It furthermore directed prosecution of the appellant which was unwarranted in law." 33. In Paragraph Nos. 54 to 56, the Hon'ble Supreme Court has held as follows:- 54. We have noticed herein before that the jurisdiction of the learned Magistrate in the matter of issuance of process or taking of cognizance depends upon existence of conditions precedent therefor. The Magistrate has jurisdiction in the event a final form is filed (i) to accept the final form; (ii) in the event a protest petition is filed to treat the same as a complaint petition and if a prima facie case is made out, to issue processes; (iii) to take cognizance of the offences against a person, although a final form has been filed by the police, in the event he comes to the opinion that sufficient materials exist in the case diary itself therefor; and (iv) to direct reinvestigation into the matter. (See *Abhinandan Jha v. Dinesh Mishra* (AIR 196.SC

117) and *Minu Kumari v. State of Bihar* (2006) 2 SCC (Cri

55. Similarly, the power of the Sessions Judge to summon a person to stand trial with the other accused in exercise of its jurisdiction under Section 319 of the Code of Criminal Procedure is also limited inasmuch as from the evidence of the witnesses, it must clearly be found that the proceedee had a role to play in the commission of an offence.

56. So far as inherent power of the High Court is concerned, indisputably the same is required to be exercised sparingly. The High Court may or may not in a given situation, particularly having regard to lapse of time, exercise its discretionary jurisdiction. For the said purpose, it was not only required to apply its mind to the materials on record but was also required to consider as to whether any purpose would be served thereby.

34. Applying these principles stated by the Hon'ble Supreme Court more particularly, in Popular Muthiah's case, we have no doubt in our mind that going by the extra-ordinary situation prevailing in this case, we are of the view that it would be in the interest of justice to direct further investigation in the case. At the same time, we wish to clarify that this direction should not be misconstrued as though it is a direction to take up the investigation in a particular manner or direction. It is absolutely open for the Investigating Officer to do further investigation objectively in accordance with law and submit a report to this Court. 35. The learned Senior Counsel appearing for the accused would submit that without setting aside the conviction, it may not be possible for this Court to order for further investigation. We have very anxiously considered this submission. As we have already pointed out, the trial has not concluded and this referred trial is a continuation of the trial. So, without disturbing the judgment of the trial Court, we can order for further investigation. Ofcourse, in all the cases cited before us, including *Zakira Habibulla H. Sheikh v. State of Gujarat* (2004 (4) SCC

158) the judgement of the Court below was set aside. But none of the case cited before us relates to referred trial. Thus, in a referred trial proceeding, we hold that further investigation can be ordered without reversing the trial Court judgement. In our considered view, on such further investigation, if any fresh evidence is collected, either in favour of the accused or against them, this Court will receive the same under Section 367 Cr.P.C., to do justice. For any reason, if it is found out that there are other persons who are the real assailants, then, this Court will have to set aside the judgement of the trial Court and remand the case back to the trial Court to invoke the power under Section 319 Cr.P.C., and then to proceed further with the trial. In the event, no further evidence is collected on further investigation, then this Court will have to answer the referred trial with the already available evidence. At this stage, we do not want to express any more opinion about our future course of action. Therefore, we stop with this.

36. At this stage, we would only like to remind all stake holders in the System, the observations of the Hon'ble Supreme Court in *Zakira's* case (cited supra) wherein, it has been held that the Court should not be a silent spectator, mute to the manipulations and preferred to be indifference to sacrilege committed to justice.

"54. Though justice is depicted to be blindfolded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administer justice and not to ignore or turn the mind/attention of the court away from the truth of the cause or lie before it, in disregard of its duty to prevent miscarriage of justice. When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of courts and erode in stages the faith inbuilt in the judicial system ultimately destroying the very justice-delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings.

55. The courts, at the expense of repetition we may state, exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth. It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice, in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock fight and making a mockery of the criminal justice administration itself.

56. As pithily stated in *Jennison v. Baker*⁸: (All ER p. 1006d) "The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope." Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies, courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the court to ensure that full and

material facts are brought on record so that there might not be miscarriage of justice." 37. In the case on hand, if this Court does not order for further investigation, in our opinion, it will amount to total indifference on the part of this Court allowing sacrilege being committed to justice. Therefore, we deem it very appropriate to order for further investigation, that too without disturbing the judgement of the trial Court at this stage.

38. When we requested the learned Public Prosecutor to suggest an independent and efficient officer, not below the rank of an Additional Superintendent of Police, to entrust the case for further investigation, the Deputy Inspector General of Police and the learned Public Prosecutor suggested that one Mr.Mahendran, the Additional Superintendent of Police (Crime), Tirunelveli District is the competent officer to investigate the matter. The said suggestion is appreciated.

39. In view of the above, we issue the following directions:- (i) We hereby appoint Mr.Mahendran, the Additional Superintendent of Police (Crime), Tirunelveli District, to take up the case for further investigation; (ii) The respondent shall hand over all the records to him to enable him to do the investigation; (iii) The Deputy Inspector General of Police and the Superintendent of Police shall ensure adequate assistance including men power, to the Investigating Officer to enable him to do the investigation expeditiously; (iv) The Investigation Officer shall investigate the case independently, efficiently and fairly and collect all the materials available, either against the accused or in favour of the accused or against anybody else and submit the same by way of a report to this Court, preferably within a period of three months from today; (v)We further direct the Deputy Inspector General of Police, Tirunelveli to closely monitor the further investigation; (vi)The Registry shall list this case for further hearing as part-heard case on 19.04.2013, on which date, the Deputy Inspector General of Police, Tirunelveli Range and the Investigating Officer Mr.Mahendran shall appear before this Court; (vii)We direct the Director General of Police, Government of Tamil Nadu, to instruct all the Superintendents of Police in the Districts to ensure that as and when any appeal pertaining to life sentence or death sentence is listed for hearing before this Court, either the Investigating Officer or a responsible officer, who is posted with the facts of the case, is present before this Court to instruct the

learned Public Prosecutor; (viii) We also direct the Director General of Police, Government of Tamil Nadu, to issue instructions to the Investigation Officers in murder, rape and other similar serious cases to attend the Court promptly and to assist the Public Prosecutor during the course of trial; (ix) We make it clear that the observations made by us in this order relating to the quality and sufficiency of evidences are all only for the purpose of this order and the same shall not be misconstrued as a final conclusion on the issues. We further make it clear that the parties will be at liberty to raise all the grounds/points in their favour at the time of final hearing of this case and (x) We also make it clear that we may issue further directions, if need be, in this matter, during final hearing of the case. asvm/jbm To

1. The II Additional District & Sessions Judge, Tirunelveli.
2. The Deputy Superintendent of Police, Valliyoor Sub Division, Nanguneri Sub Division (i/c) Kalakkadu Police Station, Tirunelveli District. (Cr.No.111/2007)
3. The Public Prosecutor, Madurai Bench of Madras High court, Madurai.

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