Criminal Revision
PRESENT: THE HON'BLE MR. JUSTICE RAGHUNATH RAY
Judgment On: 12th FEBRUARY, 2010.
C.R.R. No. 4501 of 2008
Rajab Ali @ Sk. Rajab Ali….. Petitioner
Vs
1. The State of West Bengal
2. Enamul Haque Khan …… Opposite Parties

Point:
Investigation: Whether a Magistrate can direct the Investigating officer to conduct further investigation under Section 173(8) of Criminal Procedure Code even after taking cognizance of any offence by the Magistrate on the strength of Police report - Code of Criminal Procedure, 1973- S. 173(8)
.
Fact: By filing this application under section 401 read with section 482 of the Code of Criminal Procedure the revisionist has sought to challenge an order passed by the Ld. Additional Chief Judicial Magistrate whereby the Ld. Magistrate took cognizance of offences as alleged against accused persons for the second time on submission of charge-sheet u/s 498A / 382/34/120B IPC against them pursuant to 'reinvestigation'. It has been pointed out by the revisionist that I.O. has no statutory authority to conduct re-investigation and subsequent submission of a final report in the form of charge-sheet disregarding the earlier final report in respect of the revisionist is also not permissible under law.

Held: Section 173(8) recognizes the power of the police to conduct further investigation after submission of the Police report in final form. The section itself makes it clear that even after taking cognizance of any offence by the Magistrate on the strength of Police report first submitted, it is open to the Investigating officer to conduct further investigation and can submit supplementary charge-sheet on the basis of such further investigation. So, this section confers an express and specific power on the police to carry out further investigation after cognizance is taken by the ld. Magistrate. It is also settled position of law that in appropriate cases, the ld. Magistrate can also direct further investigation. Therefore, the question of conducting reinvestigation in terms of section 173(8) Cr.P.C. does not arise at all taking of cognizance on the basis of C.S. submitted afresh it is to be noted that submission of charge–sheet in this fashion pursuant to further investigation is not permitted by section 173 (8) Cr. P.C. (Paragraph – 22)
It is well-settled position of law that upon receipt of a Police Report under section 173 (2) of the Code 1973 a Magistrate is entitled to take cognizance of an offence

under section 190 of the Code, even if the Police Report is to the effect that no case is made out against the accused. (Paragraph – 23)

Cases cited: (2007) SCC (Cri) 264 MC Mehta (Taj Corridor Scam) – Petitioner – Vs – Union of India
AIR 1999 SC 2267 (Munir Alam Vs. Union of India & Ors., Respondent)
(2009) 2 Supreme Court Cases (Cri) 1047
(2009) 1 SCC 441 : (2009) 1 SCC (Cri) 523 (Ramchandran v. R. Udhayakumar)
(2007) 1 SC (Cri) 264 [M.C. Meheta (Taj Corridor Scam), petitioner v. Union of India.. Respondents)
ILR 37 Cal 412
(2003)6 SCC195 (Union of India, appellant Vs. Prakash P. Hinduja and Ors., Respondent).

For the Petitioner : Mr. Debabrata Acharya
Mr. Sital Samanta
For the State : Mr. Joy Sengupta
For the Opposite Party No. 2 : Mr. Snehasis Jana

RAGHUNATH RAY, J. :
By filing this application under section 401 read with section 482 of the Code of Criminal Procedure the revisionist has sought to challenge an order dated 23.09.2008 passed by the learned Additional Chief Judicial Magistrate, Ghatal, Midnapore (W) in G.R. Case No. 3 of 2007 whereby the ld Magistrate took cognizance of offences as alleged against accused persons for the second time on submission of charge-sheet u/s 498A / 382/34/120B IPC against them pursuant to 'reinvestigation'.
2. Shorn of unnecessary details the background facts leading to filing of this revision may be summarized as under ;
FIR lodged by Enamul Haque Khan, the father of Mohabudan @ Moudam Bibi discloses that her marriage was solemnized with Sk. Jane Alam in accordance with the Muslim religious rites eight years back followed by payment of sufficient dowries including cash and gold ornaments. The wife was, however, subsequently subjected to brutal torture by her husband and in-laws both physical and mental for bringing further dowries from her parents. On her parents' failure to meet further dowry demands accused persons frequently tortured her. However, on payment of further dowry both in cash and kind there was an amicable settlement at the intervention of relations. Two sons were also born out of the said wedlock.
3. On 08.01.07 at about 11 AM all the nine accused named in the FIR set her ablaze while she was asleep. In such a condition when she cried for help, para people rescued her and she was removed to a hospital at

chandrakona. Because of her precarious condition, she was shifted to Medinipur medical college where she succumbed to her burn injuries at about 02.30 AM mid-night. She, however, told her parents and other relations that her parents-in-laws and their three sons including her husband hatched conspiracy and set fire on her.

4. On the basis of such allegations, Chandrakona PS Case No. 03/07 dated 09.01.07 under section 498A/302/34 IPC was started against all the accused. On completion of investigation, the investigating agency submitted the charge-sheet No. 108 of 2007 under section 498A/302/34 IPC on 08.10.07 against nine accused persons with a prayer for discharge of accused Rajab Ali, the revisionist. Subsequently, the de facto complainant raised objection to such prayer of discharge on 29.01.08 followed by a prayer for further investigation. Having heard the ld. Counsel for the de-facto complainant and also ld. A.P.P., and considered the relevant materials as have been made available in the CD, it was opined by the ld. A.C.J.M., Ghatal that there are sufficient materials against accused Rajab Ali, the victim's uncle – in - law for commission of alleged offences under section 498A/ 302 / 34 IPC. Accordingly, ld. Magistrate directed 'reinvestigation'
under section 173(8) Cr. P.C. On completion of
'reinvestigation' the I.O. submitted charge–sheet No. 79/08 under section 498A/302/34/120B IPC against all the ten accused persons including Rajab Ali, the revisionist showing him as on absconder. On 30.09.08 cognizance was taken and W/A was issued by the ld. Magistrate against absconding accused Rajab Ali, the revisionist.

5. Being aggrieved by and dissatisfied with the afore- mentioned order dated 30.09.08, this revision was preferred by accused revisionist Rajab Ali mainly on the ground that I.O. has no statutory authority to conduct re-investigation and subsequent submission of a final report in the form of charge-sheet disregarding the earlier final report in respect of the revisionist is also not permissible under law.

6. Mr. Acharya appearing on behalf of the revisionist submits that the ld. Magistrate has committed a serious illegality by directing reinvestigation and further taking cognizance for the second time in respect of chargesheet submitted afresh against accused persons including the revisionist. According to him, the I.O. has also misdirected 'reinvestigation' by obtaining opinion of the Public Prosecutor. Referring to section 36 Cr. P.C. it is submitted by him that this section confers upon a superior police officer such power that is conferred on officer – in – charge of a police station. But the I.O. is not authorised by law to take opinion of the Public Prosecutor prior to filing of a charge – sheet. In this connection reliance is placed by him upon a ruling of the Hon'ble Apex Court reported in (2007) SCC (Cri) 264 MC Mehta (Taj Corridor Scam) – Petitioner – Vs – Union of

India. Referring to Taj Corridors Scam case more particularly paragraph 29 of the said decision it is argued by him that the Public Prosecutor may have to deal with different spheres of administrational justice but he can not be involved in investigation. There is no legal sanction for any joint endeavour by the I.O. and Public Prosecutor for filing report in any criminal case. Relying upon a recent ruling of the Hon'ble Apex Court it is further argued by him that there is no scope for reinvestigation u/s 173(8) Cr. P.C. In this context he also refers to another ruling of the Hon'ble Apex Court reported in AIR 1999 SC 2267 (Munir Alam Vs. Union of India & Ors., Respondent) and submits that the ld. Magistrate acted illegally by directing reinvestigation of the instant case. Therefore, he urges this court to set aside order impugned whereby cognizance was wrongly taken in respect of offences 498A / 302/34 IPC., pertaining to G.R. Case No 3 of 2007 for the second time against all accused including the revisionist.

7. Mr. Joy Sengupta, Advocate, appearing on behalf of the state points out that the order directing reinvestigation passed by the ld. Magistrate on 29.01.08 is not under challenge in this case. In fact, such move, if contemplated is now barred by limitation. It is also submitted by him that the order impugned taking cognizance in respect of offences under section 498A/ 302/34/120B IPC does not reflect that ld. Magistrate ever took into consideration the opinion of the ld. Public Prosecutor. There is, however, nothing on record to indicate that the investigation of this case was conducted as per opinion of the ld. Public Prosecutor or for that matter ld. Public Prosecutor had any role in causing reinvestigation of this case or assisting the I.O. in this regard in course of 'further investigation'. That apart, by referring to certain pages of CD it is further submitted by him that there are sufficiently strong incriminating materials on record indicating involvement of all accused including Rajab Ali, the revisionist prima facie in commission of offences u/s 498A/302/34/120B IPC as alleged against them. Mr. Snehasis Jana, appearing on behalf of de-facto complainant Opposite Party No. 2, however, adopts the entire argument of the state so advanced by Mr. Sengupta.

8. The sole point for consideration in this case is whether ld. Magistrate is justified in ordering reinvestigation of this case u/s 173 (8) Cr. P.C. and taking cognizance for the second time on the final police report submitted in the shape of charge-sheet afresh.

9. Annexure 'C' to the present petition indicates that the de-facto complainant raised objection against the prayer for discharge of FIR named accused Rajab Ali, the revisionist and prayed for "further investigation by any I.O. other than previous I.O." in his application dated 17.12.07. Such a specific prayer of the de-facto complainant for 'further investigation', was, however, mistakenly taken as the prayer for 're-investigation' by the ld. Magistrate.

10. On consideration of submission advanced by ld. Counsel for de-facto complainant and ld. A.P.P. and also statements of different witnesses recorded u/s 161 Cr. P.C. as are available in the CD, the ld. Magistrate opined that there are sufficient materials establishing prima facie commission of offences u/s 302/498A / 34 IPC as alleged against accused Rajab Ali, the uncle-in-law of the deceased victim. He played an active role in commission of offences as alleged. However, misled by an erroneous impression that the de-facto complainant has filed a petition praying for 'reinvestigation' the ld. Magistrate passed an order as under:-

"Hence, the prayer of the re-investigation u/s 173(8) Cr. P.C. is allowed. Let the case be sent for re-investigation u/s 173(8) Cr. P.C."

11. As already pointed out earlier there was no prayer on the part of the defacto complainant for re-investigation. It is also pertinent to mention that the very section 173(8) Cr. P.C. quoted by the ld. Magistrate also does not speak about re-investigation. In fact, 'further investigation' is only mandated by the said section, and the ld. Magistrate has, in fact, directed investigation u/s 173(8) Cr. P.C. in terms of the de-facto complainant's prayer for further investigation. Evidently such an irregular order has been passed because of sheer non-application of mind on the part of the ld. Magistrate. Therefore, for all practical purposes, the order dated 29.01.08 tends to show that ld. Magistrate intended to pass an order for 'further investigation.' At any rate, there is no doubt that he has used the word "re-investigation" wrongly in his order under reference.

12. It has rightly been pointed out by the ld. Counsel for the revisionist that the Ld. Magistrate has no power directing re-investigation of a criminal case. In this context reliance can be placed upon Mitabhai Pashabhai Patel's case reported in (2009) 2 Supreme Court Cases (Cri) 1047. It has been made clear
11
by the Hon'ble Apex Court that "further investigation" and "re-investigation" stands on a different footing and a distinction exists between re-investigation and further investigation. It is, therefore, held :

"Direction of a re-investigation, however, being forbidden in law, no superior court would ordinarily issue such a direction". In Ramchandran Case reported in (2009) 1 SCC 441 : (2009) 1 SCC (Cri) 523 (Ramchandran v. R. Udhayakumar) in para 7 page 415 it is observed as under ; --

"At this juncture it would be necessary to take note of Section 173 of the Code, From a plain reading of the above section it is evident that even after completion of investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under sub-section (8), but not fresh investigation or reinvestigation."

13. Such being the legal position there is not doubt that the ld. Magistrate has committed wrong in directing 're-investigation' instead of 'further investigation' at the instance of the de-facto complainant and such order was also passed by the ld. Magistrate u/s 173(8) Cr. P.C. ex-facie That

apart, on perusal of CD it is also quite evident from the relevant entries made therein that the second I.O. proceeded to undertake 'further investigation' in this case and accordingly he examined at least three more witnesses in course of such 'further investigation'. He, however, did not record afresh the statements of as many as eight witnesses examined earlier by the previous I.O.

14. 'Further investigation' or 're-investigation', as the case may be, has, however, been seriously assailed by the ld. counsel for the revisionist on the ground that the I.O. has allowed the ld. PP to take part in the investigation by obtaining PP's opinion which is legally impermissible. In Taj Corridor Scam Case reported in (2007) 1 SC (Cri) 264 [M.C. Meheta (Taj Corridor Scam), petitioner v. Union of India.. Respondents), it is held as follows :-

'there is no stage during which the investigating officer is legally obliged to take the opinion of the PP or any authority except the superior officer in the rank as envisaged in section 36 Cr. P.C.'

15. In the case in hand on perusal of CD it appears that the I.O. took prior permission of the Circle Inspector, a superior officer, for submission of charge-sheet. A close look to the CD further reveals that on completion of the process of collection of further evidence and materials in course of 'further investigation', all on a sudden, the I. O. thought it necessary to have 'valued opinion of the PP for disposal of this case.' The reasons for taking 'valued opinion' from the PP are best known to the I.O. Although order impugned speaks for 're-investigation' under section 173(8) Cr. P.C. the I.O. conducted 'further investigation' through the process of collection of further materials by way of examining more witnesses. However, ultimately, after obtaining opinion of ld. P.P. and prior permission of his superior, the I.O. submitted charge14 sheet afresh instead of filing supplementary charge-sheet as required u/s 173 (8) Cr.P.C.

16. On consideration of factual conspectus of the case in hand as analysed in preceding paragraphs in the light of judicial pronouncements referred to hereinbefore, I am of opinion that, order dated 29.01.08. directing 'reinvestigation' in all practical purposes, was a case of further investigation u/s 173 (8) Cr.P.C. and not re-investigation as directed by the Ld. Magistrate. It should, therefore, be read as 'further investigation' instead of 'reinvestigation. More so, whenever the said order is not under challenge in this case.

17. On the question of PP's alleged interference with the course of further such investigation, it is pointed out by the ld. Counsel for the state that PP's participation in the process of investigation cannot be substantiated from the relevant materials as are available in the CD. True, I.O. has also obtained prior permission from the superior officer as per of section 36 Cr. P.C. and, after attaching much importance to the opinion of the superior officer namely

C.I. in this case, submitted charge –sheet afresh. But the fact remains that the scheme of criminal procedure code does not provide any stage during which the I.O. is legally obliged to take the opinion of a PP. Being an appointee u/s. 24 Cr. P.C. for conducting prosecution and other procedure in the Court, the ld. PP is also authorised u/s 321 Cr. P.C. to submit a prayer for withdrawal of any case from the prosecution with the consent of the court. But law does not permit him to get involved in investigation of a criminal case in any manner. But in the present case materials as are available in the CD clearly indicate that PP's, opinion was sought for and the I.O. submitted the charge-sheet afresh after taking PP's 'valued opinion' into account.

18. Therefore, it can safely be concluded that I.O's action in requisitioning 'valued opinion' of the ld. PP for disposal of the case is absolutely illegal. In such a situation, submission of charge – sheet afresh by the I.O. after obtaining 'valued opinion' of PP is not in conformity with the established principles of law and procedure as enunciated in section 173(8) Cr. P.C.

19. As per finding already arrived at in para 16 of the Judgment, this court is to proceed on the footing that it was not a case of re-investigation as inadvertently ordered by the ld. Magistrate due to sheer non application of mind and it was definitely a case of further investigation as envisaged in section 173(8) Cr. P.C. Accordingly, I.O. also undertook further investigation and in course of such further investigation he collected further materials only as noted in the CD without having any mind to re-investigate the case. But the question remains as to why charge – sheet has been filed afresh instead of a supplementary charge – sheet as per legal requirement of section 173(8) Cr. P.C.

20. Taking the factual background of the instant case into consideration, it is felt necessary to examine the essential ingredient of section 173(8) Cr. P.C. which read as under :-

17

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

21. A bare perusal of the section itself makes it clear that, after submission of final report in the form of charge sheet under sub-section 2 of section 173 Cr. P.C., the I.O. is at liberty to obtain further evidence either oral or documentary and also, thereafter, to forward a further report or reports regarding such evidence in the prescribed form to the ld. Magistrate.

Therefore, officer –in –charge of the police station / I.O. is authorised to submit further report in the prescribed form formally described as supplementary charge sheet which, in fact, would supplement the charge sheet already filed earlier. It is also settled position of law that the ld. Magistrate is not bound to accept final report in the form of the charge sheet submitted by the police if he feels that the evidence and materials collected by the Investigating Agency justified the prosecution of the accused or a particular accused.

22. It is, therefore, quite evident that the section 173(8) recognizes the power of the police to conduct further investigation after submission of the Police report in final form. The section itself makes it clear that even after taking cognizance of any offence by the Magistrate on the strength of Police report first submitted, it is open to the Investigating officer to conduct further investigation and can submit supplementary charge-sheet on the basis of such further investigation. So, this section confers an express and specific power on the police to carry out further investigation after cognizance is taken by the ld. Magistrate. It is also settled position of law that in appropriate cases, the ld. Magistrate can also direct further investigation. Therefore, the question of conducting reinvestigation in terms of section 173(8) Cr.P.C. does not arise at all.

23. Regarding taking of cognizance on the basis of C.S. submitted afresh it is to be noted that submission of charge –sheet in this fashion pursuant to further investigation is not permitted by section 173 (8) Cr. P.C. Therefore, ld. Magistrate was not required to take cognizance for the second time since cognizance was, already taken by him on the basis of Police Report submitted in terms of section 173(8) Cr. P.C. by the first I.O. vide order dated 08.10.07. In this context it should be borne in mind that it is well-settled position of law that upon receipt of a Police Report under section 173 (2) of the Code 1973 a Magistrate is entitled to take cognizance of an offence under section 190 of the Code, even if the Police Report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of witnesses examined by the Police during the investigation and take cognizance of the offence complained of and order issue of process to the accused. Section 190(1) (b) of the said court does not lay down that a Magistrate can take cognizance of an offence only if the I.O. gives an opinion that the investigation has made out a case against the accused.

24. Therefore, in my considered view, the ld. Magistrate can ignore the conclusion arrived at by the I.O. and independently apply his mind to the facts emerging from investigation or further investigation as the case may be and take cognizance of the offence, if he thinks fit, in exercise of his power under section 190(1)(b) of the said code and direct the issue of process to the accused. The word ‘cognizance’ is used in the code to indicate the point when the Magistrate or a Judge first takes judicial notice of an offence. The

Magistrate is also not required to mention the documents which he considered for satisfying himself to take cognizance. Basing upon observation available in Emperor V Soumitra Mohan Chakraborty reported in ILR 37 Cal 412 it can be echoed as under :-

" *Taking cognizance does not involve any formal action or indeed action of any kind but accrue as soon as, a Magistrate as such applies his mind to the suspected commission of an offence"*

25. Viewing the entire matter in the light of foregoing discussions I am to opine that it was redundant on the part of the ld. Magistrate to take cognizance again on the basis of charge-sheet submitted afresh pursuant to further investigation. More so, whenever Section 173(8) postulates that further investigation is not precluded after submission of report in terms of section 173(2) Cr. P.C. and I.O. can collect further evidence both oral and documentary, and submit supplementary charge-sheet. So there is no scope to submit charge-sheet afresh on that score. In such trajectory, I feel constrained to hold that the Ld. Magistrate was wrong in accepting fresh charge-sheet instead of supplementary charge-sheet on the basis of further investigation which was required to be submitted by the I.O. Such being the legal and factual position, order impugned dated 23.09.08 is not sustainable either factually or legally.

26. In this context, it is importantly important to note that the ld. Magistrate has failed to appreciate the well-settled proposition of law that he is not bound to accept final report submitted by the police if he feels that the evidence and materials collected by the investigation agency justifies prosecution of the accused persons or a particular accused, he may not accept the final report in respect of a particular accused (vide (2003)6 SCC 195 (Union of India, appellant Vs. Prakash P. Hinduja and Ors., Respondent). Against such legal backdrop it is held that ld. Magistrate has failed to exercise his discretion with abundant care and caution and such failure or his part has resulted in ordering 'reinvestigation' which is not in conformity with the mandate of section 173 (8) Cr. P.C. Therefore, it was quite open to him to decide the issue as to whether there were sufficient materials for proceeding against the revisionist. In fact, without having recourse to further investigation, ld. Magistrate could have formed his own independent opinion on the basis of evidence and materials as were available at that material point of time and proceeded against the revisionist, in accordance with law.

27. He has, thus failed to exercise discretion vested upon him in that fashion. Be that as it may, the fact remains that the order impugned dated 23.09.08 is liable to be set aside. However, to secure the ends of justice I am of the view that necessary direction should be passed upon the ld. Magistrate to carefully scrutinize the materials collected by the first I.O. against the accused and also further materials sans ld. PP's opinion which has been brought on record by the second I.O. and to form an independent opinion as

to whether the evidence and materials as are available in the CD are sufficient to indicate involvement of the revisionist Rajab Ali, prima facie in commission of the offence as alleged against him.

28. In such circumstances, since order impugned dated 23.09.08 thus suffers from legal infirmity, the same is hereby set aside with a direction upon the ld. Magistrate to take stock of the entire situation as per his own reading and assessment of the evidence collected by both the I.Os in course of their investigation and further investigation without taking into consideration the opinion of ld. PP so collected by the second I.O. and to form his independent opinion about sufficiency / insufficiency of such evidence and relevant materials so collected by both of them and to proceed against the accused Rajab Ali, the revisionist in accordance with law and in the event of his opinion being affirmative, necessary process sould be issued against him as expeditiously as possible preferably within two months from the date of communication of this order.

29. It is, however, made clear that tentative observations, if any made in the body of this judgment and order in connection with the disposal of this revision need not be taken into account by the ld. Magistrate, when he would form his own independent opinion in this regard.

25

The revision is allowed on contest in part with the observations as indicated hereinbefore accordingly.

C.R.R 4501 of 2008 thus stands **disposed of.**

(Raghunath Ray, J.)