

**SUPREME COURT OF INDIA**

Shantibhai J.Vaghela

Vs.

State of Gujarat

Crl.A.No.1805 of 2012

(P. Sathasivam and Ranjan Gogoi JJ.)

09.11.2012

**JUDGMENT**

**RANJAN GOGOI, J**

1. Leave granted.

2. The present appeals seek to challenge a judgment dated 10.01.2011 passed by the High Court of Gujarat at Ahmedabad allowing Criminal Miscellaneous Application No. 13519 of 2009 filed by the accused (respondents herein) seeking quashing of the criminal case registered against them under Section 304 of the Indian Penal Code. By its aforesaid order the High Court has also dismissed Special Criminal Application No. 770 of 2009 filed by the appellants, Shantibhai J. Vaghela and Prafulbhai J. Vaghela, seeking investigation of the aforesaid case against the accused by the Central Bureau of Investigation. The High Court has, however, directed that the proceedings against the accused –respondents so far as the offence under Section 304A of the IPC and Section 23 of the Juvenile Justice (Care and Protection) Act, 2000 may continue.

3. The core facts in which the aggrieved parties had moved the High Court may now be noticed:

The appellants – Shantibhai J. Vaghela and Prafulbhai J. Vaghela, who are related to each other, are the fathers of one Dipesh (born 1998) and Abhishek (born 1999). The aforesaid two children were admitted in Class VI and V respectively in a Gurukul located in an Ashram of Sant Shree

Asharamji situated at Motela. They were residing in the Gurukul of the Ashram. On 03.07.2008 both the children had gone to the dining hall of the Gurukul at about 8.00 PM to have their dinner. At the time of taking the attendance of the students after dinner, the watchman, one Shri Naresh Dangar, could not find the children and therefore had informed the said fact to Gruhapati Shri Pankajbhai Saksena. On receipt of the said information the aforesaid person, i.e. Pankajbhai Saksena contacted the appellant – Prafulhai J. Vaghela on telephone to convey the information that the children were not to be found in the Gurukul. Both the appellants – Shantibhai B. Vaghela and Prafulbhai J. Vaghela immediately came to the Gurukul and after meeting Pankajbhai Saksena and some other persons working in the Gurukul, the appellants went in search of the missing children. However, they could not be recovered till about 12.30 AM. At the suggestion of Shri Pankajbhai Saksena that the children may have gone to sleep in some other place the search for the children was abandoned and resumed at about 6.00 AM of the following morning, i.e., 04.07.2008. Though the search had continued throughout the day the children could not be located. The appellants insisted that the Ashram should inform the police about the disappearance of the two children. However, the Ashram authorities avoided doing so on one pretext or the other and eventually the appellants themselves informed the concerned police station at about midnight of 04/05.07.2008. On 05.07.2008 at about 6.30 PM the dead bodies of the children were found from the bed of the river Sabarmati which was located by the side of the Ashram. The dead bodies were promptly sent for post-mortem examination and, thereafter, were handed over to the respective families for cremation.

4. It appears that there was a public out cry over the incident and the State Government by Notification dated 21.07.2008 appointed a Commission of Inquiry consisting of a retired Judge of the High Court of Gujarat. It appears that an elaborate inquiry/investigation of the incident was carried out, initially, by the Sabarmati Police Station of Ahmedabad city and, thereafter, by the CID Crime Branch under the direct supervision of Deputy Inspector General of Police. In the course of the inquiry, statements of the several inmates of the Ashram were recorded. Of particular significance would be the examination of one Hetalben Swarupbhai who had first noticed the dead bodies floating in the Sabarmati river at about 10.00 AM of 04.07.2008. In the course of the aforesaid inquiry/investigation summons under Section 160 of the Code of Criminal Procedure were issued to Journalists of different newspapers as well as the electronic media to gather information with regard to the incident in question. Similarly, a press note was also

issued in the newspapers asking for information in respect of the incident. However, there was no response to the summons issued or the press note published by the investigating agency. While the aforesaid inquiry/investigation was continuing, the appellants - Shantibhai J. Vagehla and Prafulbhai J. Vaghela instituted Special Criminal Application No.770 of 2009 in the High Court. In the said application details of the incident, as noticed above, were mentioned by the appellants who had sought an order directing the Superintendent of Police, CBI, Gandhinagar (impleaded as respondent No.2) to register the criminal offence(s) as may be disclosed by the statements made in the application filed before the High Court and for further directions to carry out a proper investigation in respect of the incident of the mysterious death of the two children.

5. During the pendency of the aforesaid Special Criminal Application No.770 of 2009, FIR dated 07.11.2009 was formally lodged by one Shri H.B. Rajput, Inspector, CID Crime, Gandhinagar in the Gandhinagar Police Station in respect of the incident alleging commission of offences under Section 304/34 of the Indian Penal Code and Section 23 of the Juvenile Justice (Care and Protection) Act. Seven inmates of the Ashram were named as the accused who were suspected to be involved with the offences alleged.

6. The FIR lodged against the seven inmates of the Ashram, in so far as the offence under Section 304 IPC is concerned, came to be challenged before the High Court by the accused named therein. Criminal Miscellaneous Application No. 13519 of 2009 filed by the aforesaid accused was heard along with Special Criminal Application No. 770 of 2009 filed by appellants – Shantibhai J. Vaghela and Prafulbhai J. Vaghela. Both the applications were disposed of by the High Court by the impugned order dated 10.01.2011. As already noticed, the High Court, on the basis of the conclusion that no offence against the accused under Section 304 IPC was made out, has quashed the FIR in so far as the aforesaid provision of the Penal Code is concerned. However, investigation and further steps with regard to the offence under Section 304 A and Section 23 of the Juvenile Justice (Care and Protection) Act is concerned was permitted to continue. The High Court by the aforementioned order also disposed of Special Criminal Application No. 770 of 2009 filed by the two appellants as having become infructuous. Aggrieved by the said aforesaid order dated 10.01.2011 the State of Gujarat and the parents of the deceased children – Shantibhai J. Vaghela and Prafulbhai J. Vaghela have instituted the present appeals. It may be specifically noticed, at this stage, that while the appeals had remained pending before the Court, charge sheet dated 31.08.2012 under section 304- A/34 and section 114 IPC as well as Section 23 of

the Juvenile Justice (Care and Protection) Act has been submitted against the 7 accused named in the FIR dated 7.11.2009.

7. We have heard Shri Colin Gonsalves, Learned senior counsel for the appellants Shantibhai J. Vaghela and Prafulbhai J. Vaghela, Mrs. H. Wahi, learned counsel for the State, Shri Shekhar Naphade, learned senior counsel for the respondents and Shri H.P. Raval, ASG.

8. Shri Gonsalves has very elaborately taken us through the materials on record particularly the FIR dated 07.11.2009, the post-mortem reports and the several correspondences exchanged between the officers of the investigating agency and the Department of Forensic Medicine, BJ Medical College, Ahmedabad as well as the Deputy Director of the State Forensic Laboratory with regard to certain findings recorded in the post-mortem report. It has been submitted that a consideration of the aforesaid materials clearly indicate that the High Court was not justified in interdicting the investigation of the case registered in so far as the offence under Section 304 IPC is concerned. According to the learned counsel, there is ample room for due investigation of the said offence and, therefore, the same should be allowed to be brought to its logical conclusion. It is further submitted that notwithstanding the filing of the charge sheet dated 31.08.2012 there is ample power in the court to order investigation in so far as the offence under Section 304 IPC is concerned. It is also contended that having regard to the pre-eminent social status of the Bapuji Ashram and the evident role of the Ashram authorities in scuttling the fair investigation of a palpable crime, further investigation by the independent agency like the CBI should be ordered by this court.

9. Learned counsel for the State of Gujarat has submitted that the State is aggrieved by only that part of the order by which investigation of the offence under Section 304 IPC has been interfered with by the High Court. Learned State counsel has categorically submitted that further/fresh investigation in so far as the offence under Section 304 IPC is concerned can be effectively performed by the State Police and in fact the State is agreeable to constitute a Special Investigation Team for the said purpose if so ordered by the court.

10. In reply, Shri Naphade, learned senior counsel for the accused, has urged that registration of a FIR alleging a specific criminal offence against any person and investigation of the same can be made only on the basis of some acceptable material disclosing the commission of the offence alleged. No such basis is

discernible in the present case. According to learned counsel a reading of FIR does not reveal any material to establish any of the ingredients of the offence under Section 304 IPC against any of the accused. What has been alleged in the FIR, according to learned counsel, is negligence or lapses on the part of the Ashram authorities in not conducting a timely, proper and effective search of the missing children; in not informing the police about the incident and in not blocking the passage from the Ashram to the Sabarmati river. The High Court, according to learned counsel, therefore, rightly ordered investigation of the offence under Section 304 A IPC and charge sheet has been filed against all the accused under the aforesaid Section of the Penal Code. Shri Naphade has further urged that no material, whatsoever, has been brought on record to implicate any of the accused with the offence under Section 304 IPC. Shri Naphade has also submitted that the post- mortem report does not rule out and, in fact, the same strongly suggests that death of children had occurred due to drowning and the injuries on the bodies and the disappearance of some of the vital organs of deceased – Dipesh is due to the attack on the dead body by wild animals. Learned counsel, therefore, has contended that no case for further investigation, much less by an independent agency, is made out.

11. It may be appropriate at this stage to notice the opinion rendered by the Department of Forensic Medicine, BJ Medical College, Ahmedabad with regard to the cause of death of Dipesh and Abhishek which may be conveniently extracted below:

“Deceased Dipesh Prafulbhai Vaghela:

-Body is in stage of decomposition and mutilation.

-No ante mortem injury is detected over available parts of body.

-Toxicology report shows “No chemical poison detected.

-FSL report shows “Presence of diatoms could not detected.

Considering above, FSL report and postmortem findings possibility of death due to drowning cannot be ruled out, however, “no definite opinion regarding cause of death can be given.”

Deceased Abhishek Shantilal Vaghela:

“ -Body is in stage of decomposition.

-No ante mortem injury is detected over available parts of body.

-Toxicology report shows “No chemical poison detected”.

-FSL report shows “Presence of diatoms could not detected.

Considering above, FSL report and postmortem findings possibility of death due to drowning cannot be ruled out. However, “no definite opinion regarding cause of death can be given.”

12. To appreciate the contentions advanced by the rival parties, relevant portions of the post-mortem report of Dipesh Prafulbhai Vaghela may also be extracted hereunder:

“ . . . . .

(2) External examination

. . . . .

(12) Proof of dead body it |Body is in state of decomposition | |signs – (during examination of |hence PM lividity is not | |dead body its – hips, waist, dead |appreciated. Foul smell is coming | |body thighs or some growth, |from body. The skin and soft | |blackening of some parts after |tissue are missing at lower part | |death if any) if swelling of any |of frontal neck front and sides of| |part then examination of fluid in |chest and abdomen, lower part of | |it condition of the skin. |right leg, distal part of both the| |feet. Rest of the skin of face | |available part of front of neck, | |lower part of thighs and legs are | |discoloured brownish black while | |available part of back of scalp | |neck chest abdomen gluteal region | |and upper part of front and back | |of thighs are less discolored. | |Marbeling is present on both the | |lower limbs specially on anterior | |aspects. Skin is easily peeled off| |at places, scalp, hair easily | |peeled off maggots of size 0.2 to | |0.5 cms. crawling all over the | |body. External genetelia distended| |due to decomposition. Chest and | |abdominal cavity are exposed, both| |sides of ribs and vertebral column| |are seen externally.

Sternum, both | | clavicles and costal cartilages | | found missing. Mass of tissue line | | attached with neck contain | | trachea, oesophagus part of both | | lungs heart covered with peri | | cardium and part of stomach. Rest | | of abdominal organs are missing. | | Both the upper limbs are missing | | with scapulae. Skin and soft | | tissue in lower part of right leg | | missing under line bones exposed. | | Distal part of right foot | | including toes missing, | | metatarsals are exposed. Distal | | part of left foot including toes | | missing metatarsals exposed the | | missing tissues of the body is | | attached with the changes of post | | mortem phenomena. Margins of | | missing tissues are pale, | | irregular without vital reactions | | and nibbling due to animals | | appreciated. | | | | (13) Appearance of dead body- Facial features are bloated and | | normal or swollen, condition of distorted. Eyes open, eye balls | | eyes, condition of tongue, face, | | softened decomposed and protruded. | | type of discharges from ears or Mouth is open tongue protruded | | nostrils (if any). | | outside oral cavity. No discharge | | noted from ear, nose and mouth. | | Both the ears are eaten up in | | pinna region, margins irregular, | | pale and without vital reaction. | | | | (14) Condition of skin – blood Nibbling due to animals found in | | stain etc. If probability of | | both pinna right lower limbs, both | | drowning then imprints of biting | | feet chest abdomen. Margins are | | by aquatic animal (cutis Anserina) | | pale, irregular and without vital | | if any, record be made regarding | | reactions. | | wrinkles on skin. | | | | | | . . . . . | |

(3) Internal examination

| . . . . | | (20) Chest:- | | (c) Trechia larynx identified | | (c) Larynx, trachea and thyroid | | food particles and mud found | | bone | | present and appreciated in trechea | | thyroid bone and larynx identified | | and intact. No injury appreciated | | ..... | | in available parts including soft | | tissue of neck. | | | | (21) . . . . | | Small intestine its contents | | Missing | | Large intestine Its contents | | Missing | | Liver its wt. gall bladder | | Missing | | Stomach suprarenals | | Missing | | Spleen (with wt.) | | Missing | | Kidneys (with wt.) | | Missing | | Bladder | | Missing | | Genitalia | | No injury found. |

Abhishek Shantilal Vaghela:

“ . . . . .

(2) External examination

.....

(12) Proof of dead body it |Body is in stage of decomposition | |signs – (during examination of |hence PM lividity is not | |dead body its – hips, waist, dead |appreciated. Foul smelling gas | |body thighs or some growth, |coming from the body brown black | |blackening of some parts after |discoloration of skin found on | |death if any) if swelling of any |face, chest, abdomen, both upper | |part then examination of fluid in |limbs and lower part of both the | |it condition of the skin. |thighs and both legs while upper | |part of thighs back of chest, | |gluteal region is less | |discolouration. Skin is early | |peeled off at places scalp hair | |early peeled off. Marbelling is | |present on chest shoulder and | |thighs more on anterior aspects. | |Maggots of size 0.2 to 0.5 cms. | |Crawling all over the body at | |places. Abdomen and external | |genitalia distended due to | |decomposition gases. Anal canal | |rectum part of sigmoid colon is | |prolapsed out of anus due to | |decompositions toes of right foot | |except greater toe are missing | |degloving of skin of both hands | |found present due to | |decomposition. | | (13) Appearance of dead body- |Facial features are blotted and | |normal or swollen, condition of |distorted. Eyes open eye ball | |eyes, condition of tongue, face, |soften decomposed and protruded | |type of discharges from ears or |out from its sockets. Mouth is | |nostrils (if any). |semi-opened, tongue protruded out | |from oral cavity. White frothy | |fluid is coming from nose and | |mouth. Both the ears are eaten in | |pinna region by animals. | | | (14) Condition of skin – blood |Both ears in pinna region and toes |stain etc. If probability of |of right foot except greater toe | |drowning then imprints of biting |eaten by animals. | |by aquatic animal (cutis Anserina) | |if any, record be made regarding | |wrinkles on skin. | | | . . . . | | (17) Blunt or cut injuries on |1. Both ears in pinna region are | |external parts of body, its type, |missing. Margins are irregular | |condition size and direction be |pale without vital reactions | |noted with proper care and |nibbled by animals. | |probable time of injury and its | |reason be noted. | | | |Petechial haemorrhage or |2. Second, third, fourth and fifth | |collection seen if any, then |toes of right foot are missing | |condition of muscles and ligaments |meta torsals bones exposed, | |under the skin of that area? |margins irregular and pale, No, | |vital reactions found. Present | |Notice:- if there are innumerable |nibbling by animals appreciated. | |injuries which can't be noted in | |given space, then a signed |No, ante mortem injury detected | |supplement be attached to it with |over the available parts of the | |details |body. | | | |..... | |

(3) Internal examination

|| (20) || (c) Larynx, trachea and thyroid || (c) No injury found in soft tissue || bone || and muscles of neck. Hyoid bone || and thyroid cartilage intact few || food particles and mud appreciated || in trachea ||

13. We have already referred to the series of communications exchanged between the officers of the investigating agency and the Department of Forensic Medicine, BJ Medical College, Ahmedabad as well as the Deputy Director of the State Forensic Laboratory in an earlier part of this order. Such communications are in the form of queries made by the investigating agency and the replies of either the Department of Forensic Medicine of the BJ Medical College or the authorities of the State Forensic Laboratory to such queries. The relevant contents of the said correspondence placed before us may be summarized below:

1. Though there are tear marks over the clothes there are no cut marks found on the bodies of the deceased.
2. Presence of diatoms in cases of death by drowning may not always be found e.g. in case of dry drowning. At times the drowning medium (water) may not contain any diatoms.
3. Food particles and mud were found in trachea of both the deceased.
4. Animal bites were present on the bodies of both the deceased particularly in the region of the ears and toes in the case of deceased Abhishek and additionally in the feet, chest and abdomen of deceased Dipesh.
5. No shaving of scalp hairs was found in either case and also no injuries over the neck to draw blood were detected.
6. The disappearance of organs from the body of the deceased - Dipesh may have been due to wild animals pulling or carrying the same away.

14. Before proceeding any further in the matter it will be appropriate for us to notice the tenor of allegations mentioned in the FIR dated 07.11.2009 filed in respect of the incident in question. The aforesaid FIR was filed after more than one year of the incident and after holding of a detailed inquiry/investigation into the

incident. What has been alleged in the FIR is that on account of the delay on the part of the accused in organising a prompt and effective search of the missing children they could not be recovered alive, and in fact, even the dead bodies of the children could not be traced out for several days. The specific stand taken in the FIR is that had a prompt search been carried out, possibly, the children could have been found alive or, at least, the dead bodies could have been recovered earlier so as to enable an effective post-mortem of the bodies to determine the precise cause of death. It is also alleged that the Ashram authorities had advised the parents of the children to resort to various tantric practices to find out about the whereabouts of the children instead of promptly approaching the police. The failure of the said authorities to effectively man the gates behind the ashram adjoining the river bed have also been highlighted in the FIR as another omission on the part of the ashram authorities so as to give rise to the commission of the offence of culpable homicide.

15. Two other aspects of the matter also need to be dealt with at this stage. In the opinion rendered by the Department of Forensic Medicine BJ medical College, Ahmedabad with regard to cause of death of the two children, as extracted above, it is recorded that “presence of diatoms could not be detected”. Relevant literature has been laid before the court to show that: “diatoms are among the well known water planktons..... Every water body has its own diatom diversity..... Diatoms are commonly found in water bodies like ponds, lakes, canals and rivers etc. but their concentration can be low or high in a particular water body, depending upon the season.....”

16. The following extract from the works/literature placed before the court would also require a mention to understand the significance of the absence of diatoms as mentioned in the report of the Department of Forensic Medicine BJ Medical College, Ahmedabad.

“When drowning takes place, diatoms enter into the lung cavity of a person through the aspirated water and this water exerts a pressure on lung cavity and rupturing of the lung alveoli takes place. Through these entrances diatoms can enter into heart, liver, kidney, brain and bone marrow.....Analysis of diatoms present in the lungs, liver, spleen, blood and bone marrow has for many years been undertaken as a confirmatory test in possible drowning cases. However, the diatom test has been controversial since numerous cases of false negative and false positive results have been documented.....”

17. The second significant fact which has to be noted is the meaning of the expression “without vital reactions” as appearing in different parts of the post mortem reports under Col. 12,13,14 of part II – external examination. In the statement of the doctor who had conducted the post- mortem on the dead bodies of the children (as testified before the commission of enquiry appointed by the State Government), it has been explained that “if a person is living and is injured then whatever injury is caused, the process causing the injury is called vital reaction.” In fact in a published medical work placed before the Court by the learned counsel for the respondent, Shri Naphde, it is mentioned that when a wound is inflicted on a living organism a series of events is triggered called vital reaction.

18. Section 299 IPC defines culpable homicide as causing of death by doing an act with the intention of causing of death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that by such act death is likely to be caused. Under Section 300 IPC all acts of culpable homicide amount to murder except what is specifically covered by the exceptions to the said Section 300. Section 304 of Indian Penal Code provides for punishment for the offence of culpable homicide not amounting to murder.

19. Commission of the offence of culpable homicide would require some positive act on the part of the accused as distinguished from silence, inaction or a mere lapse. Allegations of not carrying out a prompt search of the missing children; of delay in the lodging of formal complaint with the police and failure to take adequate measures to guard the access from the ashram to the river, which are the principal allegations made in the FIR, cannot make out a case of culpable homicide not amounting to murder punishable under Section 304 IPC. To attract the ingredients of the said offence something more positive than a mere omission, lapse or negligence on the part of the named accused will have to be present. Such statements are conspicuously absent in the FIR filed in the present case. A reading of the relevant part of the opinion of the Forensic Medicine Department of the BJ Medical College Ahmedabad would go to show that possibility of death of the children by drowning cannot be ruled out. Expert opinion available on record indicates that mere absence of diatom will not exclude the aforesaid possibility. The relevant part of the post mortem report, as extracted, indicates presence of mud in the trachea of the children which fact also point to the possibility of death by drowning. The absence of any injuries on the body of the deceased; the attack on the bodies by wild animals and the possibility of the taking away of the missing organs of the deceased Dipesh by wild animals are all mentioned in the post-

mortem report. The said facts cannot be excluded or ignored while construing the prima facie liability of the accused named in the FIR. The absence of any positive material to show the practice of black magic in connection with the incident is another significant fact that has to be taken note of. Taking into account all the aforesaid facts it cannot be said that the High Court, in the present case, had committed any error in exercising its jurisdiction to interdict the investigation of the offence under section 304 IPC against the accused named in the FIR. Such power, though must be exercised sparingly, has to be invoked if the facts of any given case so demand. This is precisely what the High Court had done in the present case without departing from any of the well settled principles of law emanating from the long line of decisions of this court noticed in *Asmathunnisa Vs. State of Andhra Pradesh* rep. by the Public Prosecutor, High Court of Andhra Pradesh, Hyderabad[1].

20. Our above view, naturally, has to be understood to be confined to the present stage of the proceedings and without, in any way impairing the powers of the Trial Court under Section 216 or Section 323 of the Code of Criminal Procedure. In fact we reiterate as held by this court in *Central Bureau of Investigation Ors. Vs. Keshub Mahindra Ors.*[2] that the powers under the aforesaid provisions of the Code will always be available for exercise if subsequent facts would justify resort to either of the provisions. We also deem it appropriate to add that though several decisions of this court had been placed before us to demonstrate that it is open to this Court to direct further investigation by the CBI even after the State police may have filed the charge sheet upon completion of its investigation, we do not consider it necessary to go into any of the said decisions in view of our conclusions as recorded above. The mere reiteration of the availability of the judicial power to direct further investigations even after filing of the charge sheet as held in *Narmada Bai Vs. State of Gujarat Ors.*[3] would suffice for the present.

21. Consequently, and in the light of the foregoing discussions we dismiss the appeals subject to our observations as above.

[1] (2011) 11 SCC 259

[2] (2011) 6 SCC 216.

[3] (2011) 5 SCC 79