IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.06.2024

PRONOUNCED ON : 08.08.2024

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

THE HONOURABLE Mr. JUSTICE M.NIRMAL KUMAR

AND THE HONOURABLE Mr. JUSTICE N.ANAND VENKATESH

Crl.OP.Nos.4587, 2706, 3081, 3922, 5382, 6052, 6154, 6162, 6222, 6692, 2662 of 2024 and 19312, 11133 of 2023 **and**
Crl.MP.Nos.2879, 3365, 3936, 4412, 4413, 4488, 4500, 4501, 4556, 4557, 4923, 1956, 2241, 2242, 4489 of 2024 & 7001, 12976 & 12977 of 2023

Crl.OP.No.4587 of 2024

1.T.Balaji
2.T.Rajakumari ... Petitioners/
Accused No.1 & 2

.Vs.

1.The State rep.by
The Inspector of Police,
New Washermenpet Police Station
Chennai. ..1st Respondent/
(Crime No.575 of 2023) Complainant

2.Mr.K.Karthick ..2nd Respondent/
de facto Complainant

Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to call for the records of the FIR in Crime NO.575 of 2023 dated 29.12.203, on the file of the 1st respondent Police and quash the same.

COMMON ORDER

N. ANAND VENKATESH, J

The genre of case and counter-case is not a new phenomenon. In Kautilya's, ***Arthasastra*** cases and counter cases were dealt with only in a limited class of cases like robbery, duel etc., where there was a possibility of aggression on both sides. Kautilya said:

> *"In cases other than duel, robbery, as well as disputes amongst merchants or trade guilds, the defendant shall file no counter case against the plaintiff, nor can there be any counter case for the defendant."*

Though times have changed since the days of Kautilya, the central focus on the aggressor remains the same. In this reference, we are called upon to examine certain seminal questions relating to a case and counter case and the manner in which Courts and investigation agencies are required to handle them.

2.This Full Bench has been constituted pursuant to an order of the Hon'ble Chief Justice dated 26.03.2024, to answer the following questions of law:

i. Whether the police is required to mandatorily follow the procedure prescribed in Police Standing Order 566 while

investigating a case and case in counter?

ii. What is the effect of non-compliance with PSO 566? If and in what circumstances does non-compliance vitiate the prosecution?

iii. If in the event of the Court holding that the procedure provided under PSO 566 is not mandatory, should the Court come up with a set of guidelines to ensure proper investigation in a case and a case-in-counter?

iv. What is the procedure to be adopted by the Court trying offences in cases where the prosecution files a report under Section 173(2) Cr.P.C in both the case and case in counter?

3.The circumstances giving rise to the reference are as follows:

a. When Crl.O.P 3922 of 2024 had come up for hearing before one of us (N.Anand Venkatesh, J) a trend was noticed whereby investigations in a case and a case-in-counter were not being conducted in line with the Police Standing Order No.566 (Old No. 588-A) which required the police to find out the real aggressor and file a final report only against such a person or persons. However, the police were filing final reports in both cases mechanically resulting in the burden being shifted to the Courts to plough

through conflicting versions to decide who was the real aggressor.

b. It was also noticed that there were conflicting judgments of single judges on the issue as to whether PSO 588-A had any force of law and whether the investigating officers were enjoined to follow them while investigating a case and case in counter. In ***Vellapandy Thevar v State*** (1984 LW Cri 257), S.A Kader, J had quashed a final report for the failure of the investigation officer to follow the mandate of PSO 588-A. However, in ***V.R Ranganathan v State***, T.N Singharavelu,J held that violation of the PSO did not vitiate the order of cognizance. In ***Pandurangam v State***, (1987 LAW Cri 400) Ramalingam, J held that the PSO had no statutory force and that a failure to observe the PSO did not constitute an illegality. A few years later, in ***Krishnamoorthi v State***, a Division Bench of this Court consisting of David Annoussamy and Janarthanam, JJ took a contrary view, without noticing any of the earlier decisions, and issued directions to the police to follow the requirements of PSO 588-A while investigating a case and case-in-counter. The pendulum swung the other way when in ***Karthikeyan v State***, 1992 LW Cri 74, T.S Arunachalam, J held that the PSO had no force of law thereby essentially reiterating the earlier decision of

this Court in ***Pandurangam v State***, (1987 LW Cri 400). The attention of Arunachalam, J was unfortunately not drawn to the decision of the Division Bench in ***Krishnamoorthi v State.***

c. After a decade, the pendulum once again swung the other way when a Division Bench of Prabha Sridevan and K.N Basha, JJ in ***Venthimuthu v State***, (2007 2 MLJ Cri 405), reiterated the requirement of the police following PSO-588A and held that the omission to do so had resulted in a perfunctory investigation. However, in ***Velladurai v State***, (2016 Cri LJ 3985), another Division Bench took the view that PSO 588-A was merely an administrative instruction having no force of law and that a failure to follow the same did not constitute any illegality.

d. Thus, there existed a see-saw between decisions of single judges as well as Division Benches as to whether PSO 588-A (presently PSO 566) had the force of law and secondly, whether the police were under a duty to follow the drill of PSO 588-A while investigating a case and case in counter. This being an important aspect of police work, the learned single judge thought it imperative that these issues ought to be definitively settled so that investigation officers and Courts trying such cases are not lost in

the thicket of conflicting precedents.

e. By an order dated 22.02.2024, this Court had clubbed similar matters and the entire batch was posted on 21.03.2024 whereupon the order of reference was made setting out the four questions which have already been set out above.

RIVAL SUBMISSIONS

4.We have heard Mr.P.S.Raman, the learned Advocate General assisted by Mr. R. Muniyapparaj, Mr. V.C. Janardhanan, Mr. Sharath Chandran, Mr. Aiyapparaj and Mr. G.R Hari, learned counsel.

5.Mr.P.S.Raman, the learned Advocate General assisted by Mr.R. Muniyapparaj contended that PSO 566 finds a place in the PSO issued by the Government through G.O.Ms 362, dated 28.09.2020. The G.O was made in exercise of executive power. Since there is no provision as to how an investigating officer is to investigate a case and case in counter, the State had thought it fit to issue the above G.O in the exercise of its executive power under Article 162 of the Constitution. As there existed no legislation there was no real conflict in issuing executive orders to supplement the existing law. Reliance was placed on the decision of the Hon'ble Supreme Court in

Bishambhar Dayal v State of Uttar Pradesh, (1982) 1 SCC 39. According to the Advocate General, PSO 588-A is nothing but a reproduction of the directions issued by this Court in ***Thota Ramakrishnayya v State*** (1954 MWN Cri 9) with the result that the issue of whether PSO 566 was mandatory or not was beside the point since a judicial order was already holding the field which required the police to investigate a case and case in counter in a particular manner.

6.The learned Advocate General further submitted that an executive order cannot be issued if any legislation is holding the field and that the decision of the Hon'ble Supreme Court in ***Sudhir v State of M.P*** (2001) 2 SCC 688, would show that there existed no procedure under the Cr.P.C to investigate a case and case in counter. Hence, there existed no bar to pass executive orders under Article 162. It was further contended that the procedure as to how a case and case in counter is to be tried has been explained by the Hon'ble Supreme Court in ***Nathilal's case*** (1990) Supp SCC 145, which has been reiterated in ***Sudheer v State of M.P***, *supra.*

7.Mr. V.C. Janardhanan, learned counsel contended that PSO 588-A was merely an administrative instruction having no force of law as has been

rightly held by the single judge in ***Pandurangam v State***, 1987 LW Cri 400.

The learned counsel drew our attention to the decision of the Hon'ble Supreme Court in ***State of Andhra Pradesh v Venugopal***, AIR 1964 SC 33 wherein it was held that the PSO has no force of law. Consequently, PSO 588-A cannot be construed as mandatory. At best, it is merely a set of administrative instructions to the police. The learned counsel invited the attention of this Court to the provisions of Articles 13, 246, 254, 367 and 372 of the Constitution of India and contended that the PSO does not fit into any of the aforesaid categories of law. Reliance was placed on the decision of the Hon'ble Supreme Court in ***Edward Mills v State of Ajmer***, AIR 1955 SC 25, to contend that to come within the definition of law, the order in question must be legislative and not merely an executive order. The learned counsel further contended that this Court should not issue directions since that would amount to judicial legislation which was impermissible. The remedy, if any, lay at the door of the legislature, says the learned counsel.

8.Mr. Sharath Chandran, learned counsel submitted that G.O.Ms. 362, dated 28.09.2020, has been issued in exercise of executive power under Article 162 of the Constitution. An executive order under Article 162 has the force of law in the absence of any legislation or subordinate legislation

holding the field. Reliance was placed on the decisions of the Hon'ble Supreme Court in ***Lavu Narendranath v State of Andhra Pradesh***, (1971) 1 SCC 607 and ***Paul Manoj Pandian v Veldurai*** (2011) 5 SCC 214. Our attention was invited to the decision of the Full Bench of the Kerala High Court in ***Augustine v State of Kerala***, 1982 KLT 351 (FB) to explain the meaning of the term "case and case-in-counter". According to learned counsel the test propounded by Ramaswami,J in ***Thota Ramakrishnayya v State*** (1954 MWN Cri 9), applied to a case of rival versions of the same incident. In other words, there must be two inconsistent versions of the same incident. In such cases, the filing of a final report in both cases is impermissible.

9.It was contended that the decision of Ramalingam, J in ***Pandurangam v State***, (1987) LW Cri 400, was incorrect as it had misconstrued the PSO to be devoid of legal effect since it could not be traced to any statutory provision. According to learned counsel, the learned single judge had committed a serious error in presuming that every order must be traceable only to a statute. PSO was given effect through an executive order on account of the fact that there existed no legislation. The same error was repeated in the decisions of this Court in ***Karthikeyan v State***, 1992 LW Cri

74 and ***Velladurai v State***, (2016 Cri LJ 3985). As to the procedure to be followed by the Court, the decision in ***Sudhir v State of M.P*** (2001) 2 SCC 688 had approved the decision of this Court in ***Krishna Pannadi: In Re***, (1930) 31 LW 233. In ***Re: Mounaguruswami***, (1932) ILR 56 Mad 159, a Full Bench of this Court had affirmed the view in ***Krishna Pannadi: In Re***, (1930) 31 LW 233. But these decisions were rendered when trials were held with the aid of juries/assessors and there is a specific reference in these cases to the effect that the counter case must be tried with the aid of a different jury/assessors.

10.Mr. Aiyapparaj and G.R. Hari, learned counsel, brought to the notice of this Court, the decision of the Hon'ble Supreme Court in ***Upkar Singh v Ved Prakash***, (2004) 13 SCC 692, and pointed out the various scenarios of counter cases and the difficulties experienced by IO's while investigating these type of cases.

WHAT CONSTITUTES A CASE AND COUNTER CASE?

11.Having heard the learned Advocate General and learned counsel, it is first necessary to set out as to what constitutes a case and case-in-counter.

12.The expression has not been defined anywhere, but the term has acquired a definitive meaning in judicial decisions. In ***Re: Jaggu Naidu***, 1932 Mad Cr Cases 235, a Division Bench of this Court had observed that two cases are really 'counter' to each other in the sense that they put forward two versions of the same incident one of which must be false. This observation was cited by P.N Ramaswami, J in ***Thota Ramakrishnayya v. State*****,** 1954 MWN (Cri) 9, who termed the expression as putting "*forward two versions of the same incident one of which must be false should be sent to the sessions court*". This view was reiterated in ***Pandurangam v State***, 1987 LW (Cri) 400.

13.In ***Augustine v State of Kerala***, 1982 KLT 351 (FB), a Full Bench of the Kerala High Court observed:

> *"Before going into the propriety of the procedure canvassed by the appellants, it is desirable to deal with the connotation of the term "case and counter" which is very often used during criminal trials. The term in its general import stands for cases registered on the basis of rival versions of the same incident."*
>
> *In the case and counter case of the type we are concerned the rival versions put forward may not stand together and if the main case is true, the counter case would*

necessarily be false."

The opening words of PSO 566(2) also adopt the same view when it says *"In a complaint and counter-complaint obviously arising out of the same transaction."*

14.From the above, it is discernible that a case and counter case are

(i) rival versions

(ii) of the same incident/transaction

(iii) one of which must be necessarily false.

In the above type of cases where all the above conditions (i-iii) are cumulatively satisfied, the IO cannot file two final reports since if one version is true the other version must necessarily be false. This reference concerns these types of cases and how these cases are to be investigated and tried. For ease of convenience, we term these as **Type I cases**.

15. The above type should be distinguished from another variant of a case and case in counter which, for convenience, may be called **Type II**. This type is illustrated by the Full Bench as under:

> *There can also be case and counter case where both the prosecuting agencies are private individuals. Thus A may sustain injuries at the hands of B and in the course of the*

same transaction B may sustain injuries at the hands of A. Both A and B would be having their own versions of the occurrence which would be conflicting with each other. In such cases if A and B prefer complaints against each other, those cases also come under the purview of 'case and counter.'

16.In the above example, though there are two versions of the same incident it is a case where both parties may have overstepped the bounds of the law and each party may have committed independent offences justifying the filing of two final reports. A good example of this type is a case of factious rioting. The Police Standing Orders, also contain guidance on how an investigation officer should deal with a case of factious rioting, affray etc. PSO 703 (i) deals with factious rioting and reads as follows:

"(i) In a factious rioting, a Police Officer should not be content himself with laying charge-sheets against both the contending parties, making the prosecution witness in one case, the accused in the other and vice versa , and put forward their versions to the court without any attempt at finding out the truth. If complaints of the offence of rioting containing two divergent versions are given by the parties, it is the duty of the Investigating officer to find out which case is true and charge it. The easier course of referring both the case and the counter case undetectable should not be adopted. An impartial, efficient and painstaking investigation should invariably disclose the true facts of any occurrence. ***The laying of charge sheets in both the case and the counter-case should be resorted to only in exceptional cases or where as stated below, both the parties are guilty of aggression and lawless acts.***

(ii) The principles set forth above apply mutatis mutandis to all tension and clashes between parties, whether they are due to faction or communal or political differences. In such cases, the police should remain completely neutral, but that does not mean that they should not make a distinction between the aggressors and the victims. When a group takes the law into its hands with a view to imposing its will or programme upon those opposed to it, the latter have a right conferred upon them by law to act in defence of their lives and properties. Whenever trouble occurs or is anticipated between two parties, the police should distinguish between the aggressor and the victim in the matter of action under preventive or specific sections of law, the leaders of both the parties being charged in specific cases or put up under security sections, only where there is evidence to show that both the parties have been committing aggression. Where one party has been forced to act in self-defence, only the aggressive party should ordinarily be proceeded against."

17. Thus a **Type II** case and counter case is where there are

i. rival versions

ii. of the same incident/transaction

iii. both parties have exceeded the bounds of law and committed offences against each other.

18. The following extract from the decision of the Division Bench of the Karnataka High Court ***State of Karnataka v. Balappa Bhau Vadagave*****, ILR 1984 Kar 21,** explains this genre of cases**:**

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"A careful reading of all these rulings would reveal that it is the duty of the police while investigating a case and a counter-case to investigate both the cases as provided under Chapter XII of the Code and after completing the investigation assess the material collected to find out whether on the material collected, there is a case to place the accused before a Magistrate for trial and if so, take the necessary steps for the same, by filing a charge-sheet under Section 173 Cr. P.C. There may be a case where it may happen that each party has committed the offence and that each party has over-stepped the bounds of law and if the investigating officer on the assessment of the evidence reach such a conclusion, it is perfectly open to him to place charge-sheet in both the cases as there would be nothing incompatible in them. But on the other hand, if the investigation reveals that if one case is true, the other must necessarily be false, then the police should file charge-sheet in the case in which the investigation disclosed a case to place the accused before the Magistrate for trial and refer the other case to leave the aggrieved party to pursue the matter by him. Judicial verdict is consistent in deprecating the conduct of the police in placing charge sheets in both the case and the counter-case, which are contradictory, in the sense, that if one is true, the other must necessarily be false, solely with a view to shirk their responsibility, being afraid of the possibility or probability of imputing partiality and for evading the same, filing charge-sheets in both the cases to appease both the parties leaving the matter to be decided by the court."

19.Thus, the preponderance of judicial opinion is that a case and case-in-counter are cases registered based on rival versions of the same incident. In other words, the crucial test is whether the rival versions put forward pertain to the same incident. If the answer is in the affirmative, they would come within the scope of the expression "*case and case-in-counter*. Whether such cases would fall within the category of Type I or Type II case and counter case and whether the two versions put forward can or cannot stand together,would depend on the facts of each case. In other words, if the two rival versions cannot stand together ie., if one version is true the other must necessarily be false, it would fall within the Type I category and the filing of two final reports in such type of cases is legally impermissible.

20.We have come across cross cases where in the latter case there is a variation in time, place, or other circumstances warranting a reasonable inference that they are not parts of the same transaction; the earlier occurrence may even be a motive for the latter one. This category of cases may be rival versions but are not of the same transaction/incident and cannot be categorised as case and case-in-counter.

21.Having set out the scope of the expression "case" and "case-in-counter" we now proceed to examine the questions raised in this reference. For the sake of convenience we propose to divide the discussion into two parts: The first part, comprising of questions (1), (2) and (3) concerns the procedure to be followed by the police while investigating a case and case-in-counter and the second part comprising of question No.(4) pertains to the procedure to be followed by the Court while trying a case and case-in-counter.

PART - I (Questions 1-3)

22.The answer to the question as to whether PSO 566 (Old PSO 588-A) is mandatory or directory requires an examination of how the PSO was initially brought about pursuant to the decision of this Court in *Thota Ramakrishnayya's* case, *supra*. In Thota Ramakrishnayya, two rival factions clashed resulting in the death of one Narayya, and various injuries to persons belonging to both sides. Two rival versions were given of the incident. The first version was given by one GV and another by T.R. The second version given by T.R. was diametrically opposed to the version given by G.V. On the complaint of G.V, the police registered a case and completed the

investigation and filed a final report. The case was later committed to the Sessions Court as S.C 30 of 1951. Finding that the police were dragging their feet on the complaint of T.R and alleging that the police were partisan in investigating the case one N filed a private complaint in C.C 262 of 1950. The police were now alarmed and to diffuse any allegation of bias they quickly filed a final report in the case founded on the version given by T.R also. The result of this curious situation is best summed up in the words of P.N Ramaswami, J.

> *"The police obviously stampeded by these moves on the part of both the sides and apparently frightened that they would be falsely accused of partnership if they charged one side only have charged both the cases with the singular result that in regard to the* ***same rioting at the same place and at the same time****,* ***they have put forward two diametrically opposed versions as truthful versions*** *and the Circle inspector who was examined as P. W. 23 in this case has unabashedly explained this as follows: "I thought that the accused were the aggressors and I was consulting my superiors whether the prosecution party should be prosecuted. Finally it was settled that the court should decide it. Hence the delay in filing the charge sheet in the counter-case."*

23. It is in the aforesaid factual backdrop that Ramaswami, J., had made the following observations:

> *"The principles which can be evolved from these decisions can be compendiously set out as follows: If complaints of the offence of rioting be given by both the parties during investigation, the investigating officer should enquire into*

both of them and adopt one or the other of the two courses, viz., to charge the case where the accused were the aggressors or to refer both the cases if he should find them untrue in material particulars. If he finds that the choice of either course is difficult, he should seek the opinion of the Public Prosecutor of the District and act accordingly."

If in respect of a single incident, two different versions are offered, and they are substantially divergent from one another, then it is the duty of the investigating officer to find out which version is true and charge that case only leaving the other version to be prosecuted if so advised after a referred charge-sheet being served on the complainant and in such cases also the rules for enquiry and trial as in case and counter should be followed."

24.Acting on the aforesaid observations of Ramaswami, J, the Government of Madras issued G.O.Ms.182, dated 23.01.1958, introducing PSO 553-A into the Police Standing Orders. The G.O reads thus:

ORDER:

The following amendment to Police Standing Order, Volume I is approved.

AMENDMENT

Police Standing Orders, Volume I – Order No 553.

Add the following as order No 553-A :

CHARGE SHEETS IN CASES AND COUNTER CASES

"553-A. In a complaint and counter-complaint obviously arising out of the same transaction the investigation officer should enquire into both of them and adopt one or the other of the two courses viz., (1) to charge the case where the accused were the aggressors or (2) to refer both the cases if he

should find them untrue. When the investigation officer proceeds on the basis of the complaint, it is his duty to exhibit the counter-complaint in the court and also to prove medical certificates of persons wounded on the opposite side. He should place before the court a definite case which he seeks it to accept. The investigating officer in such cases should not accept in toto one complaint and examine only witnesses who support and give no explanation at all for the injuries caused to the other side. The truth in these cases is invariably not in strict conformity with either complaint and it is quite necessary that all the facts are placed before the court to enable it to arrive at the truth and a just decision.

If the investigating officer finds that the choice of either course is difficult viz. to charge one of the two cases or to throw out both, he should seek the opinion of the Public Prosecutor of the district and act accordingly. A final report should be sent in respect of the case referred as mistake of law and the complainant or the counter-complainant, as the case may be, should be advised about the disposal by a notice in F 96 and to seek remedy before the specified Magistrate, if he is aggrieved by the disposal of the case by the Police.

(BY ORDER OF THE GOVERNOR)

T.P Kothandaraman,

Addl Deputy Secretary to Government."

25.PSO 553-A was later renumbered as PSO 588-A. Vide G.O.Ms. 362, dated 28.09.2020, the State Government has issued a fresh/updated list of Police Standing Orders where PSO 588-A has now been rechristened as PSO 566. For better appreciation, Clause (2) of PSO 566, which deals with case and counter cases is extracted hereunder:

"(2) Charge-sheets in cases and counter cases.—In a

complaint and counter complaint obviously arising out of the same transaction, the investigating officer should enquire into both of them and adopt one or the other of the two courses viz., (1) to charge the case where the accused were the aggressors or (2) to refer both the cases if he should find them untrue. He should place before the court a definite case which he asks it to accept. The investigating officer in such cases should not accept into one complaint and examine only witnesses who support it and give no explanation at all for the injuries caused to the other side. It is his duty to exhibit the counter-complaint in the court and also to prove medical certificates of persons wounded on the opposite side. The truth in these cases is invariably not in strict conformity with either complaint and it is quite necessary that all the facts are placed before the court to enable it to arrive at the truth and just decision.

(3) If the Investigating Officer finds that the choice of either course is difficult, viz., to charge one of the two cases or to throw out both, he should seek the opinion of the Public Prosecutor of the district and act accordingly. A final report should be sent in respect of the case referred as mistake of law and the complainant or the counter-complainant, as the case may be, should be advised about the disposal by a notice in Form No. 90 and to seek remedy before the specified Magistrate, if he is aggrieved by the disposal of the

case by the Police."

It is obvious that PSO 553-A (later 588-A) remains the same in its new avatar under PSO 566.

DOES PSO 566 HAVE THE FORCE OF LAW?

26.From the above discussion, it is clear that PSO 553-A and its successor PSO 566 were inserted pursuant to the exercise of executive power under Article 162 of the Constitution. Mr. V.C Janardhanan, learned counsel contended that PSO 566 is invalid as the State had no power to pass an executive order in an area covered by the Code of Criminal Procedure. To support this contention, our attention was drawn to the decision of the Hon'ble Supreme Court in ***Edward Mills Co. Ltd. v. State of Ajmer*, AIR 1954 SC** and the relevant portion that was relied upon is extracted hereunder:

> ***"****The first point does not impress us much and we do not think that there is any material difference between "an existing law" and "a law in force". Quite apart from Article 366(10) of the Constitution, the expression "Indian law" has itself been defined in Section 3(29) of the General Clauses Act as meaning any Act, ordinance, regulation, rule, order, or bye-law which before the commencement of the Constitution had the force of law in any province of India or part thereof. In our opinion,*

the words "law in force" as used in Article 372 are wide enough to include not merely a legislative enactment but also any regulation or order which has the force of law. We agree with Mr Chatterjee that an order must be a legislative and not an executive order before it can come within the definition of law."

27. The aforesaid decision was a case dealing with Article 372 of the Constitution which deals with the continuation of laws in force ie., laws which existed prior to the Constitution. It would indeed be extremely strange to assume that G.O.Ms. 362, dated 28.09.2020 was passed before the coming into force of the Constitution. That apart, the contention does not appear to us to be well founded for the reason that the power of the State to issue executive orders is a well-settled position in constitutional law. In ***Ram Jawaya Kapur v. State of Punjab*****,** AIR 1955 SC 549**,** the Hon'ble Supreme Court explained the concept of executive power in the following terms:

"It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.
.....The executive function comprises both the determination of the policy as well as carrying it into execution"

28. In the context of the State Government, the power to issue

executive orders is traceable to Article 162 of the Constitution which reads as follows:

> *"Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:*
> *Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof.*

29. From the above, it is clear that the executive power of the State is coterminous with the matters over which the State has power to make laws. This general power is subject to (a) the provisions of the Constitution and (b) the exercise of executive power is limited or is subject to any law made by Parliament or the State. Thus, an executive order cannot be issued if it runs counter to the provisions of the Constitution or is in respect of an area covered by legislation. It is for this reason that executive power is termed as residuary in character since its exercise can only be resorted to in areas which are not governed by any enacted law. The following passage from the decision of the Hon'ble Supreme Court in ***P.H. Paul Manoj Pandian v. P. Veldurai*****, (2011) 5 SCC 214,** puts the matter beyond any controversy:

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> "*Once a law occupies the field, it will not be open to the State Government in exercise of its executive power under Article 162 of the Constitution to prescribe in the same field by an executive order. However, it is well recognised that in matters relating to a particular subject in absence of any parliamentary legislation on the said subject, the State Government has the jurisdiction to act and to make executive orders. The executive power of the State would, in the absence of legislation, extend to making rules or orders regulating the action of the executive. But, such orders cannot offend the provisions of the Constitution and should not be repugnant to any enactment of the appropriate legislature. Subject to these limitations, such rules or orders may relate to matters of policy, may make classification and may determine the conditions of eligibility for receiving any advantage, privilege or aid from the State.*"

30..It was also strenuously contended by Mr. V.C Janardhanan, learned counsel that executive orders do not have the force of law. This submission cannot be accepted in the light of the decision of the Hon'ble Supreme Court in ***State of A.P. v. Lavu Narendranath*, (1971) 1 SCC 607,** wherein it was held as under:

> ***"****We have therefore to examine whether the Government had a right to prescribe a test for making a selection of a number of candidates from out of the large body of applicants for admission into the first year MBBS course and whether such action of the Government contravened any provision already made by the legislature in that respect. Under Article 162 of the Constitution the executive power of a State extends to the matters with respect to which the legislature of a State has power to make laws but this is subject to the provisions of the Constitution.*

The Executive have a power to make any regulation which would have the effect of a law so long as it does not contravene any legislation already covering the field and the Government Order in this case in no way affected the rights of candidates with regard to eligibility for admission: the test prescribed was a further hurdle by way of competition when mere eligibility could not be made the determining factor."

31. Similarly in ***P.H. Paul Manoj Pandian v. P. Veldurai,*** (2011) 5 SCC 214, it was held as follows:

"48. The powers of the executive are not limited merely to the carrying out of the laws. In a welfare State the functions of the executive are ever widening, which cover within their ambit various aspects of social and economic activities. Therefore, the executive exercises power to fill gaps by issuing various departmental orders. The executive power of the State is coterminous with the legislative power of the State Legislature. In other words, if the State Legislature has jurisdiction to make law with respect to a subject, the State executive can make regulations and issue government orders with respect to it, subject, however, to the constitutional limitations. Such administrative rules and/or orders shall be inoperative if the legislature has enacted a law with respect to the subject. Thus, the High Court was not justified in brushing aside the Government Order dated 16-11-1951 on the ground that it contained administrative instructions."

32. Thus, an executive order like a G.O issued in the exercise of powers under Article 162 cannot be brushed aside as having no force of law. We are of course aware that the word "law" appearing in Articles 21 and

300-A has been understood to mean enacted law. This on account of the fact that the infringement of a fundamental right requires the authority of enacted law and not a mere executive fiat. As we are not concerned, in this case, with any such contingency, it is not necessary for us to dwell on this aspect any further.

33.At this stage, we must notice that the subject of criminal procedure falls in Entry II of List III of Schedule VII of the Constitution. In ***Salma Mahajabeen v State***, (2021) 1 LW Cri 456, one of us (N. Anand Venkatesh, J) had the occasion to consider the scope of exercise of executive power vis-à-vis the provisions relating to criminal procedure in List III. After considering the decision of the Hon'ble Supreme Court in ***Union of India v V Sriharan,*** (2016) 7 SCC 1, it was held as follows:

> *"To complete the picture, it may also be necessary to notice Article 162 of the Constitution which declares that, subject to the provisions of the Constitution, the executive power of the State shall extend to all matters with respect to which the Legislature of the State has the power to make laws (i.e., matters prescribed in List II and III). The proviso to Article 162, however, qualifies the executive power of the State with respect to matters in the Concurrent List by declaring that for such matters falling within List III, the executive power of the State shall be subject to, and limited by, the executive power conferred by the Constitution or by any law made by Parliament."*

34. Thus, the competence of the State Government to pass an executive order in respect of a subject covered under the concurrent list is not open to doubt. The question is whether there exists any provision in any statute providing guidance for investigation and trial of cases and counter cases. This question is no longer res-integra. In ***Sudhir v. State of M.P.***, (2001) 2 SCC 688, the Hon'ble Supreme Court considered the issue as to how a case and case in counter ought to be tried. After referring to the earlier decisions of this Court, it was observed as under:

> *"We are unable to understand why the legislature is still parrying to incorporate such a salubrious practice as a statutory requirement in the Code. The practical reasons for adopting a procedure that such cross-cases shall be tried by the same court, can be summarised thus: (1) It staves off the danger of an accused being convicted before his whole case is before the court. (2) It deters conflicting judgments being delivered upon similar facts. (3) In reality the case and the counter-case are, to all intents and purposes, different or conflicting versions of one incident."*

35. It is, therefore, clear that neither the Cr.P.C nor any other statute contains any provision as to how a case and case in counter has to be investigated and tried. Consequently, the State Government was perfectly within its jurisdiction to issue an executive order in terms of issuing G.O.Ms. 362, dated 28.09.2020, which is the source of PSO 566, to deal with aspects

of investigation which are not covered by any enacted law.

IV THE PRECEDENTS

36.Having noticed the relevant PSO's which are presently in vogue and the source of power for its sustenance, we now turn to the question as to whether the directions contained in the PSO are mandatory or directory. The answer to this question has not been free from difficulty and has been the subject of several conflicting judgments of single judges and Division Benches.

37.In *State of Andhra Pradesh v Venugopal*, AIR 1963 SC 33, one of the questions before the Hon'ble Supreme Court was whether the failure to follow PSO 145, which prescribed a procedure to be followed in respect of cases of torture or death or grievous hurt against a police officer is fatal. The contention raised before the Hon'ble Supreme Court was that the provisions of the Cr.P.C stood superseded by the provisions of the PSO, and that a failure to adhere to these provisions was consequently fatal to the prosecution. Repelling this submission, the Hon'ble Supreme Court held as under:

"It appears to us that this Standing Order is nothing more

than administrative instructions by the Government of Madras and has not the force of law. It is worth noticing in this connection that in the Madras Police Standing Orders as published by the Government of Madras it is mentioned in the prefatory note that the orders marked with asterisk were issued by the Inspector-General of Police under Section 9 of the Madras District Police Act. The Standing Order 145 is not marked with asterisk and it could be safely held that it was not issued under Section 9 of the Madras District Police Act. The marginal note against the order as printed shows that it was issued by a Government Order of the Home Department dated October 12, 1955. It does not appear that this was done under any statutory authority. There can be no doubt that quite apart from the fact that the Government may and often should issue instructions to its officers, including police officers, such instructions have not however the authority of law. We are not satisfied therefore that the Standing Order 145 had the force of law."

38. Placing reliance on this decision, it was contended by Mr.V.C Janardhanan, learned counsel, that the issue has been concluded that the PSO has no legal force. From a reading of the decision in *Venugopal*'s *case*, we are able to discern that the question of whether PSO 588-A (as it then stood) was not an issue at all before the Hon'ble Supreme Court. It is a time-honoured principle that a case is an authority for what it decides and not what it has not decided. We remind ourselves of the caution sounded by a Constitution Bench of the Hon'ble Supreme Court in ***Padma Sundara Rao v. State of T.N***., (2002) 3 SCC 533.

"9. Courts should not place reliance on decisions

without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington v. British Railways Board [(1972) 2 WLR 537 : 1972 AC 877 (HL) [Sub nom British Railways Board v. Herrington, (1972) 1 All ER 749 (HL)]] . Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

39. We are, therefore, unable to persuade ourselves to hold that the decision in ***Venugopal's case***, would have a bearing in deciding whether PSO 588-A (present PSO 566) is mandatory or directory. That apart, the observation of the three-judge bench in ***State of Andhra Pradesh v Venugopal***, AIR 1963 SC 33 that a Government order under Article 162 may not have the force of law is contrary to the observations made in ***State of A.P. v. Lavu Narendranath*, (1971) 1 SCC 607,** *extracted supra***,** which is a decision of a four-judge bench. We are, therefore, bound by the latter and not the former view.

40.Our attention was then invited to the decision of S.A Kader, J in ***Vellapandy Theaver v State***, 1984 LW (Cri) 257. The police in that case had laid two final reports in a prosecution arising out of the same transaction.

The learned judge observed that PSO 588-A had not been followed by the police, and then adverted to the following observations of P.N Ramaswami, J in ***Thota Ramakrishna* v. *State***, AIR 1954 Mad 442:

> *"It is improper for the police to prosecute at the same time two counter cases in regard to the same occurrence one of which must be false. It is improper also and disrespectful to the court for the Public Prosecutor to conduct both cases in the sessions court knowing that one must be false. Such counter-cases cannot both be prosecuted honestly either by the police or the public prosecutor."*
>
> Kader, J allowed the petition under Section 482 Cr.P.C and quashed the prosecution and issued a direction to file a file report after following the procedure laid down in PSO 588-A.

41. However, in ***V.R Ranganathan v State***, 1985 LW (Cri) 86, T.N Singaravelu, J dissented from the aforesaid view of S.A Kader, J and held as follows:

> *"Firstly, Police Standing Orders is not a statute but only a set of rules framed for the guidance of the Investigating Officers and therefore, a violation of a standing order in the matter of investigation will not constitute an illegality. In other words, a defect or an irregularity in investigation, however serious, has no direct bearing on the competence or the procedure relating to the cognizance of the trial of the offence. While Section 190, Code of Criminal Procedure, 1973, provides a police report resulting from investigation as the material on which cognizance is to be taken, it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court totake cognizance.*

In other words, it cannot be said that taking cognizance of an invalid police report is a nullity. The error, if at all, is only in a proceeding antecedent to a trial and it cannot therefore affect the legality of the cognizance by the trial that follows."

42. Shortly thereafter, in ***Mokkayya Thevar v Amsarajan*** (1986) another learned single judge (David Annoussamy, J) took a different view. Referring to PSO 588-A, the learned judge went on to observe as follows:

> ***"****It is found that these instructions are not followed by the police on the quasi-totality of cases. The learned Public Prosecutor would do well in bringing these instructions to the notice of the Investigation Officer in Tamil language in a clear manner."*

43. A contra view was taken by S.T Ramalingam, J in ***Pandurangam v State***, 1987 LW (Cri) 400. Referring to the decisions of Kader, J in ***Vellapandy Theaver v State***, 1984 LW (Cri) 257 and Singaravelu, J in ***V.R Ranganathan v State***, 1985 LW (Cri) 86, the learned judge went on to observe as follows:

> *"**28.** Coming to the second question raised, according to learned counsel for 'B' party is that C.C. No. 694/85 on the file of the J.F.C.M. Chengalpattu, is liable to be quashed, in as much as the prosecution has not followed the procedure under P.S.O. 588-A or in any event has not followed the procedure prescribed by the decision in Ramakrishnayya v. State, 1954 MWN (Cri) 9. In support of his contention, he also relied on the decision of Kader, J., in Vellapandi Thevar v. State, 1954 LW (Cri) 257. It is no doubt true that the learned Judge in the decision cited later has quashed the proceedings on the ground that the*

Investigating Officer has failed to give a final report in accordance with P.S.O. 588A. The counter complainant in that case was advised to seek remedy before court, if aggrieved by the disposal of the case by the police as pointed out in P.S.O. 588A. In opposition, learned counsel for 'A' party contended that P.S. 0.588A has no statutory force and as such the Investigating Agency is not bound to follow that and, in support of his contention, placed reliance on the decision of Singaravelu, J., in Ranganathan V.R. v. State, 1985 LW (Cri) 86, wherein the learned Judge, who went into the question of statutory force of P.S.O., held that P.S.O., has no statutory force but only a set of rules framed for the guidance of Investigating Officers and that, therefore, violation of the P.S.O., in the matter of Investigation will not constitute an illegality. The learned Judge, while commenting upon the decision of Kader, J., referred to above, observed that he was not in agreement with the reasoning of Kader, J. On going through both these decisions, I find that before Kader J., the statutory force of the P.S.O. was not questioned and it was taken for granted that P.S.O. itself was questioned and the learned Judge held that it has no statutory force and gave cogent reasons for the same. Instead of stating that before Kader, J., the validity of P.S. 03, was not urged. Singaravelu, J., has observed, as if Kader, J., had decided the statutory force of P.S.O. and gave reasons for such a finding. In my view, the following, observation of Singaravelu, J.

"With respect, I am unable to agree with the reasoning of the learned Judge and my reasons are……."

is merely a slip, for the reasons stated above. Further, P.S.O. 588A has been added to P.S.O. 588 by G.O. Ms. No. 182, Home dated 2nd January, 1958. P.S. 0.588A carries asterisk mark and in the prefatory note to Madras Police Standing Orders, Volume 1, 1960, it is stated;

"Orders marked with asterisk are issued by the Inspector-General of Police under S. 9 of the Madras District Police Act, 1859 (XXIV of 1859), with the approval of the

Government."

29. *According to learned counsel for 'A' party, even if P.S. 0.588-A is taken to have statutory force, that will only enable the authority concerned to frame Standing Orders as contemplated under S. 8 of the Madras District Police Act, which enables the Director General of Police to make rules so as to control the police force in the State and it reads as under:*

"The Director General may, from time to time, subject to the approval of the State Government, frame such orders and regulations as he shall deem expedient, relative to the General Government and distribution of the force, the places of residence, the classification, rank and particular service of the members thereof their inspection, the description of arms, accoutrements and other necessaries to be furnished to them; to the collecting and communicating intelligence and information; and all such other orders and regulations relative to the said Police force as the said Director General shall, form time to time, deem expedient for preventing abuse or neglect, and for rendering such force efficient in the discharge of all its duties."

30. *S. 9 of the Tamil Nadu (Madras) District Police Act does not enable the Director General of Police to frame a P.S.O. in the nature of P.S. 0.588A. Hence, I entirely agree with the view expressed by Singaravelu, J. and find that P.S.O. 588A has no statutory force and the non-observance by the Investigating officer to follow this P.S.O. is not an illegality. Since there is no conflicting view between the decisions of Kader and Singaravelu, JJ., for the reasons stated above, I am not referring this aspect to a Division Bench. I am of the view that in case the question of statutory force of P.S.O. had been urged before Kader, J., I am sure that the learned Judge's view would be in agreement with the view expressed by Singaravelu, J. subsequently. Whatever may be the binding nature of the Judgment of Kader, J., I find there is no conflict in the views expressed by the learned Judges, since Kader, J., has*

not gone into to the question of vires of P.S.O. 588-A."

We regret our inability to agree with S.T Ramalingam, J. In the first place as we have already pointed out PSO 588-A was introduced by way of an executive order under Article 162 and not by way of a subordinate legislation through the route of Section 9 of the Madras District Police Act, 1859. The learned judge, it appears, has relied upon the observations made by the Hon'ble Supreme Court in *State of Andhra Pradesh v Venugopal*, AIR 1963 SC 33, as regards the presence or absence of an asterisk mark overlooking the fact that PSO 553- A (later PSO 588-A and presently PSO 566) was introduced vide GO Ms 182, dated 23.01.1958, in exercise of executive power under Article 162 and not by way of a delegated legislation through the route of Section 9 of the Madras District Police Act. This, in our considered opinion, is a fundamental error. That apart, even the present PSO 566, identifies the aforesaid GO as the source of power for the police. An executive order was necessary as there was no provision in the Cr.P.C or under any law or subordinate legislation dealing with a case and counter. Consequently, as we have pointed out earlier, an executive order was necessary to fill up the gap till such time a law was enacted to govern the field. If we are to go by the logic adopted in ***V.R Ranganathan v State***, 1985 LW (Cri) 86, PSO 566 should be held ultra vires because its power is not

traceable to any statutory provision. But this would be ignoring the constitutional power of the State Government to issue executive orders under Article 162 in areas which are not covered by enacted law or subordinate legislation. We, therefore, respectfully find ourselves unable to agree with the reasons assigned in ***V.R Ranganathan v State***, 1985 LW (Cri) 86 to hold that the PSO had no force of law.

44.The saga of conflicting decisions continued in ***Somu v State***, 1990 LW (Cri) 45 where David Annoussamy, J held that the police are enjoined to follow PSO 588-A while investigating a case and case in counter. The learned judge has also laid down three courses open to IO for proper and fair investigation of a case and case in counter. The relevant extracts run thus:

> *"**7.** The second point which needs reconsideration is that the Order enjoins the investigating officer to charge the case, where the accused were the aggressors. Here also the aggression may be of various kinds. The transaction may stand by wordy quarrel, then come some minor acts of violence, then stronger acts of violence without any weapon, then weapons of more or less dangerous nature come into play. All occurrences are not of the same type and the sequence of events vary considerably. So at what stage the real aggression started is sometimes difficult to determine.*
>
> ***8.** Therefore, it should be open to the investigating officer to adopt a third course also, viz., charging both parties, arraying them as "A" party and "B" Party each*

of the offences committed by them and unfolding before the court the whole sequence of events as they happened. Then it will be easy for the court to fix the exact responsibility of each one of them for his acts. No doubt in such a case it would be open to the parties to resort to compounding when it is permissible or to plead self-defence whenever it is justified. If impartial investigation has been made and if the investigating officer has come to his truth and indicted each party according to his overt acts, there may not be great difficulty for having the truth unfolded before the court, because the accused in one case will be the prosecution witness in the other one and, therefore, subjected to cross-examination. So three courses should be open to the investigating Officer:

(1) If there is clear aggression by one party, positive report under S. 173 can be filed against that party and negative report may be filed against the other,

(2) If both parties have been in aggressive mood, without possibility to determine the aggressor and if the sequence of events is clear and offences have been committed by each of the party without any justification, to file positive reports under S. 173 against both the parties.

(3) If none of the above two courses is possible to file negative reports in respect of both the cases.

***9.** This is a matter to be considered in depth. At any rate, the present provisions of Section. 588-A are deficient to some extent and a proper solution has to be arrived at so that each one is indicted and punished for the act he has committed and for which he has no excuse."*

45.In ***Sakkarai Ramasamy v. Alangara Muni Murugan*** (1990) LW (Cri) 151, a Division Bench of this Court held that the instructions contained in PSO 588-A must be scrupulously followed. In ***Krishnamoorthi v State,***

(1989) 1 MLJ Cri 240, another Division Bench of this Court reiterated the necessity of following the directions contained in PSO 588-A. After referring to the PSO the Division Bench observed as under:

> *"It is clear from the abovesaid order what is the duty of the Investigating Officer when there is a case and a countercase. It is found that these instructions are not followed by the police on the quasi-totality of cases. The learned Public Prosecutor would do well in bringing these instructions to the notice of the Investigation Officer in Tamil language in a clear manner, so that the investigating machinery is not making a perfunctory investigation when faced with the investigation of a case and a counter-case."*

46.This Division Bench judgment was followed by Janarthanam, J in ***M. Krishnaraj v. State*, 1992 LW (Cri) 206,** who held that PSO 588-A had sanctified into a rule of law to be followed by the police while investigating a case and case in counter. In ***Dandapani v State***, 2001 2 MWN Cri 271, C. Nagappan, J (as he then was) followed the decision in ***Krishnaraj's case***, supra, and quashed a final report, *inter alia*, citing non-compliance with PSO 588-A. In ***Venthamuthu Anthony Raj v State***, 2011 SCC Online Mad 2530, a Division Bench of M. Jaichandren and S. Nagamuthu, JJ reiterated the obligation of the police to follow PSO 588-A. It was held:

> *"14. In our considered opinion, there is a very serious flaw in the case of the prosecution. It is needless to point out that under 588(A) of the Police Standing Orders,*

it is the duty cast upon the investigating officer to investigate into the complaint in the counter case as well, to gather materials including the wound certificates of the accused and to produce them all in the Court. It is a well settled legal position that as and when there is a counter complaint preferred by an accused in respect of the very same occurrence, to be fair and impartial on his part, the investigating officer should register the said complaint, investigate into the allegations made therein and then to submit a report either accepting or rejecting the allegations made by the accused party. But, in this case, P.W.12 has completely suppressed the complaint given by A4 and A6, though he had chosen to forward these accused to the hospital for treatment. P.W.14 on his part, has not collected the medical records pertaining to A4 and A6 and produced the same before the Court. As a result, this Court is not in a position to know the nature of the injuries sustained by A4 and A6. Apart from that, he has also not made any investigation into the injury sustained by the accused 4 and 6. In our considered opinion, this will go a wrong way to show that the Investigating Officer has failed to investigate into the counter case and to come out with the truth of the occurrence. Thus, in our considered opinion, the true version is not before the Court.

47.A contrary line of decisions begins with the decision of T.S Arunachalam, J in ***V. Karthikeyan v. State*, 1992 Cri LJ 2948.** The learned judge preferred to follow the view of S.T Ramalingam, J in ***V.R Ranganathan v State***, 1985 LW (Cri) 86 and went on to observe as under:

"Administrative instructions in P.S.O. 588-A issued on the basis of the decision of P.N. Ramaswami, J. in Ramakrishnayya's case, commend observance, but merely because the provisions of the order have not been

followed in a particular case by the Investigating Agency, that would not constitute illegality to quash the prosecutions launched."

Unfortunately, the earlier decisions of the Division Bench in ***Sakkarai Ramasamy v Alangara Muni Murugan*** (1990) LW (Cri) 151, and ***Krishnamoorthi v State,*** (1989) 1 MLJ Cri 240 were not brought to the notice of Arunachalam, J. The decision of Arunachalam, J in ***V. Karthikeyan v. State*, 1992 Cri LJ 2948** has been followed by a Division Bench of S. Nagamuthu and V.S Ravi, JJ in ***R. Velladurai v State***, 2016 1 LW (Cri) 516 holding that the instructions contained in PSO 588-A were only directory and that it was not illegality to file a final report in both the case and case in counter. Even the Division Bench in ***R. Velladurai v State***, 2016 1 LW (Cri) 516, did not notice the earlier Division Bench decisions in ***Sakkarai Ramasamy v Alangara Muni Murugan*** (1990) LW (Cri) 151, and ***Krishnamoorthi v State,*** (1989) 1 MLJ Cri 240.

48.We have carefully considered the various views expounded in the aforesaid decisions. We must not lose sight of the fact that the directions in ***Thota Ramakrishna* v. *State***, AIR 1954 Mad 442, which was later

incorporated into PSO 588-A and presently PSO 566 have been evolved for a very salutary purpose viz., that proceedings before the Court must not be reduced to a farce with the prosecution filing two final reports containing diametrically opposite versions of the same incident. To quote the words of Ramaswami, J:

> *"In other words, in these cases and counter cases, five parties are placed in an embarrasing position as evident from the liberal extracts which I have made above. Firstly, we have to consider the position of the investigating police who have put forward before the court two diametrically opposite versions of the same transaction as truthful versions. Secondly, we have the Public Prosecutor who has to conduct both the cases running with the hare and hunting with the hounds thereby bringing his own honourable office into disrepute. Thirdly, the assessors and the jurors if the same assessors and jurors are empanelled for both. Fourthly, the embarrassment of the Judge who has to hear both versions and allow himself to come to independent conclusions in both cases without the evidence in one prejudicing his mind in regard to the other. Fifthly, we have the accused who has to double his role as a prosecution witness in one and an accused in the other."*

Filing of a final report in two cases arising from two inconsistent versions of the same incident can, as pointed out above, result in a grave miscarriage of justice. The object of the PSO is to avoid such situations in a case and case in counter arising out of the same transaction. We are in complete agreement with the opinion of Ramaswami, J that such a procedure would be

detrimental to the Court and the prosecutor not to mention the accused persons. After all a fair trial contemplated under Article 21 of the Constitution also includes a fair, just and reasonable procedure. We are, therefore, of the considered view that the directions in PSO 566 are binding on the police, and are required to be mandatorily followed while dealing with a case and case in counter. The decisions to the contrary cited *supra*, will stand overruled.

49.The next question is whether a failure to adhere to PSO 566, i*pso facto*, vitiate the prosecution? It is well-settled that any defect in the investigation does not automatically vitiate trial unless a miscarriage of justice is shown (vide *H.N Rishbud v State*, AIR 1955 SC 196). In some cases where a procedural defect is shown at the earliest point of time, it would be possible for the superior court to remedy the situation by setting aside the final reports and issuing directions for proper investigation and filing of the final report. However, where the case is at an advanced stage a plea of non-compliance of PSO 566 cannot be acceded to automatically unless a miscarriage of justice is demonstrated. Whether miscarriage of justice has occurred or not will depend on facts which must be assessed from case to case, and we need say no more on this aspect at this stage except

observing that the directions contained in paragraph 35, would ensure that such cases would be few and far between.

Question No. 4

50.The fourth question referred to us is the procedure that must be followed by the Court in trying cases where the prosecution files a final report under Section 173(2) Cr.P.C in both cases. This would be a Type II case of case and counter where the IO is unable to find out the real aggressor or where both parties have committed independent offences in the course of the same incident. In such cases, as we have pointed out earlier the filing of two final reports would be permissible. It could also include a case where one version has ended up in a final report and the other rival version is being dealt with as a complaint before the Magistrate.

51. Our attention has been drawn to a short order of the Hon'ble Supreme Court in ***Nathi Lal v State of U.P*** (1990 Supp SCC 145), wherein it was held as under:

> *"We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both the cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve*

the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross-case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other."

However, it is not discernible from this decision whether the case before the Hon'ble Supreme Court was a cross-case arising out of two final reports or was a case of a final report and a complaint arising out of a protest petition. The question was directly addressed in ***Sudhir v. State of M.P.*, (2001) 2 SCC 688,** where the Hon'ble Supreme Court reiterated the above procedure in ***Nathi Lal v State of U.P*** (1990 Supp SCC 145), as being applicable where two final reports were field in respect of the same transaction.

52.The Hon'ble Supreme Court in ***Sudhir's case***, has approved the decision of a Division Bench of this Court in ***Goriparthi Krishtamma, In re***, 1929 MWN 881, and ***Krishna Pannadi* v. *Emperor***, AIR 1930 Mad 190.

These decisions were rendered at a time when trials were held under the Code of Criminal Procedure, 1898 with the aid of juries in the Presidency towns and with the assistance of assessors in the mofussil areas. In cross cases, the Judge was required to try both cases simultaneously one after another with the aid of different assessors. ***In Re: Mounaguruswami Naicker***, AIR 1933 Mad 367 (FB), a Full Bench of this Court laid down the following guidelines for the trial of counter cases:

> *"What must be made clear is: (1) that the trial must be separate i.e., before different assessors and separate judgments delivered (2) that the conclusions in each case must be founded on, and only on, the evidence in each case and (3) that if the Judge considers himself unable to detach himself from extraneous considerations a transfer may be necessary to deliver the Judge from this embarrassment."*

53. This rule was reiterated in ***Thota Ramakrishnayya v. State*****, 1954 MWN (Cri) 9 : (1953) 2 Mad LJ 425,** wherein it was observed:

> *"Where there is a fight between two rival factions which gives rise to the complaint and counter-complaint it is a generally recognised rule that both the case should be tried by same judge in quick succession though with different assessors and jurors; the first case should be tried to a conclusion and the verdict of the jury or the opinion of the assessors be taken. The Judge should however postpone the judgment in that case till he has heard the second case to a conclusion and he should then pronounce judgments separately in each case. He is bound*

to confine his judgment in each case to the evidence let in that particular case and is not at liberty to use the evidence in one case for the purpose of the judgment in the other case and to allow his findings in one case to be influenced in any manner to the prejudice of the accused by the views which he may have formed in the other case"

54. Thus, the consistent position was that the case should be tried simultaneously by the same judge but with a different jury/assessors. Jury trials and trials with the aid of assessors were abolished by the Code of Criminal Procedure, 1973. The question is whether the same procedure should be followed in trials under the Cr.P.C 1973? One of the primary reasons for the rule that a case and counter case should be tried in quick succession by the same judge is to avoid conflicting judgments, which is a distinct possibility if we are to direct that a case and case in counter be tried by two different Courts. The mere fact that trial with the aid of juries and assessors has now been abolished, need not necessarily compel us to abandon the time-tested rule governing these types of cases, particularly in the absence of other viable alternatives. Assigning these cases to two different Courts may lead to conflict and would be a remedy worse than the disease.

55.That apart, merely because a counter case is before the same judge, the same cannot give room for any apprehension that the accused would not have a fair trial. In fact, in ***Thota Ramakrishnayya v. State*, AIR 1954 Mad 442,** Ramaswami, J had pointed out this possibility and observed as under:

> *"The principle maintained universally by all High Courts is that the accused has no reasonable ground for apprehension that he will not have a fair trial merely because the judge in an ancillary proceeding arising out of a counter-case has expressed certain views upon the evidence in that case as to which of the two versions is correct. The basis of the ruling is that Judges are presumed to be upright men who will approach each case from the point of view of that case alone and not permit their minds to be affected in any way by anything that has gone before that case. It cannot be believed that Judges are so easily d that because one incidental part of the case before them has been decided in a previous case, they will shut their eyes entirely to anything that may be alleged in favour of the accused in a subsequent trial: Amrit Mandal v. Emperor [(1916) A.I.R. Pat. 33: 18 Cr. L J. 95 (96)]".*

56.In ***Ekambaram v. Sundaramurthy and State*, 1988 LW (Cri) 127,** David Annoussamy, J had laid down the following procedure for trial of a case and case in counter:

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"In some rare cases where he finds himself to be in such a predicament, what he should do is, to try those cases separately, but immediately one after the other. When the first case is over, he should not pronounce judgment till the trial of the other case is completed. He cannot legally use the evidence of one case in the other case if it is not on record in the other case. But, if any relevant evidence comes to his notice in one case, which may be used in the other, he has the power to bring it on record in the proper

manner in the other case also. The Magistrate can, at any time of the proceeding till the judgment is delivered, gather further evidence in the case. The Court has vast powers to this effect under Section 311 of the Code of Criminal Procedure and Section 165 of the Indian Evidence Act. In that way, one case will not be artificially isolated from the other and thus lead to injustice. The Court can come to the right conclusion in taking all the facts and circumstances of the transaction. The judgments should be pronounced in both the cases at the same time."

57. We are in approval of the above observations of the learned judge.

We only wish to add that where the Court finds some relevant evidence in one case which could be used in the other case, the Court can bring it on record in the other case subject of course to the right of the opposite party to test the same in cross-examination. We agree with Annoussamy, J that such a course would prevent the two cases from being *artificially isolated from the other and thus lead to injustice.* We also find nothing in them that is at variance with the directions in ***Nathi Lal v State of U.P*** (1990 Supp SCC 145) and ***Sudhir v. State of M.P.*, (2001) 2 SCC 688.**

GUIDELINES

58. To avoid any further ambiguity we have thought it fit to consolidate and lay down the legal position for the benefit of all the stakeholders. We summarize the following guidelines:

What Constitutes a Case and Case in Counter

A case and case in counter means two conflicting versions of the same incident. This expression does not take within its fold the occurrence of two incidents in quick succession. For example, A attacks B and causes his

death. Even before A could reach his village after killing B, B's sons retaliate and grievously injuries A. This is not a case and case in counter though the attack by A may be the motive for the attack by the sons of B. This is posited on the principle that no man can take law into his own hands and the right of private defence does not extend to retaliation. Hence, two FIRs must be registered, one against A for causing the death of B and another against the sons of B for causing grievous hurt to A.

A.For the investigation

(i) <u>At the stage of registration of the FIR</u>

i. There is no legal bar in registering two FIR's in a case and a counter case arising out of rival versions of the same incident. Where rival versions are preferred an FIR may be registered for the rival complaints and the investigation officer is required to thoroughly investigate both rival versions by keeping in mind PSO 566 which reads as follows:

> *"566. Investigation to be impartial – (1) Investigating officers are warned against prematurely committing themselves to any*

view of the facts for, or against a person. The aim of an investigating officer should be to find out the truth, and, to achieve this purpose, it is necessary to preserve an open mind throughout the Inquiry.

"(2)Charge-sheets in cases and counter cases.- In a complaint and counter complaint obviously arising out of the same transaction, the investigating officer should enquire into both of them and adopt one or the other of the two courses viz., (1) to charge the case where the accused were the aggressors or (2) to refer both the cases if he should find them untrue. He should place before the court a definite case which he asks it to accept. The investigating officer in such cases should not accept into one complaint and examine only witnesses who support it and give no explanation at all for the injuries caused to the other side. It is his duty to exhibit the counter-complaint in the court and also to prove medical certificates of persons wounded on the opposite side. The truth in these cases is invariably not in strict conformity with either complaint and it is quite necessary that all the facts are placed before the court to enable it to arrive at the truth and just decision.

(3) If the Investigating Officer finds that the choice of either course is difficult, viz., to charge one of the two cases or to throw out both, he should seek the opinion of the Public Prosecutor of the district and act accordingly. A final report should be sent in respect of the case referred as mistake of law and the complainant or the counter-complainant, as the case may be, should be advised about the disposal by a notice in Form No.90 and to seek remedy before the specified Magistrate,

if he is aggrieved by the disposal of the case by the Police."

ii. If the IO registers a case based on only one version, and refuses to register a case on the rival version, the rival complainant may approach the superior police officer and thereafter the Magistrate under Section 173(4) read with Section 175(3) BNSS 2023.

iii. The aggrieved rival complainant may also file a complaint before the jurisdictional Magistrate for proceeding further under Chapter XVI of the BNSS, 2023. Where the Magistrate decides to postpone issue of process and directs investigation, the case and case in counter must be investigated by the same IO.

(b) <u>At the stage of completion of investigation</u>

On completion of investigation, the investigation officer may adopt any one of the below course of action :

i. Where the rival versions of the same incident are inconsistent with each other ie., if one is true the other must be false, the investigation officer is duty-bound to come forward with a definitive case and cannot file final reports under Section 193 BNSS 2023 in both cases (PSO 566).

ii. If the investigation officer after investigation finds that one version is true and the other is false he shall file a final report in the former case and refer the latter case as a mistake of fact/law. While filing the final report the IO must specifically state the gist of the counter case and the result of the investigation in that case. He shall also ensure that the FIR and the materials collected in the counter case are annexed to the final report and forwarded to the Jurisdictional Magistrate who can take cognizance of the offence.

iii. Where the investigation officer finds from the investigation that the divergent versions of the same incident are not absolutely inconsistent with each other but however finds that one party is an aggressor and the other party has acted in self-defence, he should ordinarily file a final report only against the aggressor.

iv. The party whose complaint is found to be false or is found to be the aggressor by the IO resulting in the case being referred as a mistake of fact, shall serve RCS notice to the complainant. The complainant/victim may file a protest petition and proceed further in a manner known to law.

v. Where after a thorough investigation he is unable to find the real aggressor or where both parties are aggressors and have exceeded

the bounds of the law and committed independent offences against each other, he may file a final report in each of the cases. For the sake of clarity, we repeat that these are cases which are not inconsistent with each other. They are no doubt rival versions of the same incident but are cases where both parties are found to have acted lawlessly or committed acts of aggression. It is not necessary for the IO to obtain an opinion from the Public Prosecutor before filing two final reports in such cases. However, the IO must assign proper reasons indicating the factual reasons for filing two final reports in such cases.

vi. In case and counter cases arising out of factious rioting, communal and political clashes etc., the IO will scrupulously follow PSO 703(i) and investigate the case thoroughly. It is the duty of the IO to investigate and identify the real aggressor keeping in mind the directions contained in the said PSO. The filing of two final reports in such cases must be confined to cases where both parties are found to have acted lawlessly and committed acts of aggression.

vii. The aforesaid directions shall be adhered to scrupulously and failure to follow the aforesaid directions will expose the concerned investigation officer to departmental action.

viii. At this juncture we must also point out that the use of the term "charge sheet" at various places in the PSO does not appear to be in consonance with the provisions of the erstwhile Cr.P.C or the present BNSS 2023. After the completion of investigation, the police are required to file a final report under Section 173 Cr.P.C and presently under Section 193 BNSS 2023. Neither the Cr.P.C nor the BNSS use the term "charge sheet". PSO 573 reads as follows:

> *"573. Charge sheet to be accompanied by memorandum giving names and addresses of witnesses — (1) When a charge sheet in Form No. 78 is sent to Court, a separate memorandum giving the names and addresses of the witnesses cited and specifying clearly the points each witness is called to prove should be sent to the Magistrate."*

We think it necessary to draw the attention of the police department to the following observations made by this Court in ***D. Vedagari In re****, (1985 LW (Cri) 243),* which have been approved by a Division Bench of this Court in ***Sakkarai Ramasamy v Alangari Muni***, **1990 LW (Cri) 151.**

> *"It is also found that the report filed by the investigating officer is formally not correct. In the first place it is styled as a 'Charge-sheet'. The act of charging a person of a criminal offence is a very important and a serious one. No officer can arrogate to himself such a power. Only those vested therewith*

can exercise it. In a criminal proceedings, it is only the court which has got power to charge any person. It can do so as per Ss. 239 and 240 Cr.P.C. only after considering the police report, the document sent with, and after giving (he prosecution and the accused an opportunity of being heard and if it is of opinion that there is ground for presuming that the accused has committed offence. The Cr.P.C. indicates clearly in S. 173 that the role of investigating officer is confined to filing a report stating whether any offence appears to have been committed or not. It appears that the word 'charge-sheet' has been borrowed from the Madras Police Standing Orders, From-67 (Sic) 87, a form evolved presumably prior to the Cr.P.C. and the same can no longer be used in the teeth of the clear provisions of the Code. It is high time that the terminology indicated by the Code in S. 175(Sic) 173 is adopted in order to avoid any complications and to comply with the spirit and letter of the Code."

We expect the executive to take note of the aforesaid position and effect necessary amendments to the PSO to bring it in consonance with the directions issued above.

B. For the Courts

(a) Pre-Cognizance stage :

i. While entertaining an application under Section 173(4) BNSS 2023, the Magistrate shall ensure whether the complainant had

approached the superior police officers as set out therein.

ii. If the Magistrate is satisfied that the complainant had approached the superior police officer as set out in Section 173(4) BNSS 2023, he may proceed to take the application on file and deal with the same under Section 175(3) BNSS 2023.

iii. Where a final report is filed in one case and a closure report in the other case, the Magistrate will follow the procedure in ***Bhagwant Singh v. Commr. of Police, (1985) 2 SCC 537.*** Till a decision in the protest petition is arrived, the inquiry or the trial in the pending case where the final report has been filed shall be kept in abeyance.

iv. Where two final reports are filed in a case and counter case, it is the duty of the Magistrate to scrutinize the final reports carefully. If it is found that the final reports put forward inconsistent rival versions of the same incident (ie., if one version is true the other must necessarily be false), or where it is found that the IO has filed two final reports mechanically without properly investigating and finding out the true aggressor the Magistrate shall return the final reports and direct the IO to come up with a definitive case.

v. In rare cases, where such final reports are not screened out at the level of the Magistrate, and cognizance has been inadvertently taken, such orders

may be challenged under Section 528 BNSS 2023 in which case the orders of cognizance may be set aside, depending upon the stage of the cases, with a consequential direction to follow PSO 566.

(b) Post Cognizance and Trial in a case and case in counter**:**

i. If the Magistrate finds that the two final reports are rival versions of the same incident, but both parties are found to have engaged in acts of aggression etc., he may take cognizance of both final reports. In such cases, the Magistrate shall follow the procedure prescribed in ***Ekambaram v. Sundaramurthy and State*****, 1988 LW (Cri) 127,** which we have extracted in paragraph 56, *supra*.

ii. If one case is exclusively triable by a Court of Session and the other case is triable by a Magistrate, the Magistrate shall commit both the case and counter case to the Court of Session for trial as prescribed by Section 362 BNSS 2023 (Section 323 Cr.P.C), who shall thereafter proceed in accordance with the directions contained in paragraph 56 supra.

ANSWERS TO THE QUESTIONS REFERRED

59. In the light of the above discussion, the following are our answers to the questions referred to us *vide* order dated 21.03.2024:

a. The police are required to mandatorily follow the procedure prescribed in PSO 566 while investigating a case and case in counter ie., rival versions of the same incident.

b. The consequences of non-compliance with PSO 566 would depend upon the stage at which such an objection is raised. It is the duty of the Magistrate to screen out final reports which are filed in inconsistent rival versions of the same incident ie., where one rival version is true the other must be necessarily false, by returning with a direction to follow PSO 566. Where the Magistrate inadvertently takes cognizance, the error may be set right by the High Court under Section 528 BNSS, 2023 if the same is raised at an early stage. If, however, the trial in such cases is allowed to go on and has reached an advanced stage, a plea of non-compliance with the PSO will not ipso facto vitiate trial unless and until a demonstrable case of prejudice or miscarriage is made out.

c. The police will take note of and scrupulously follow the guidelines set out in paragraph 58-A, supra.

d. Trial of a case and counter case shall be held simultaneously before the same Court and the guidelines set out in paragraph 58-B, supra, shall be followed.

60. The reference is answered on the aforesaid terms. The individual cases will now be placed before the appropriate Bench for disposal in accordance with law.

[Dr. G.J., J.] [M.N.K., J.] [N.A.V., J.]

08.08.2024

Index : Yes
Speaking Order
Neutral citation : Yes
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Dr. G.JAYACHANDRAN., J

M. NIRMAL KUMAR., J

N. ANAND VENKATESH.,J

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08.08.2024

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