

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.M.C. No.2564/2007**

% Date of Decision : 23.4.2008

Dr. Sudhir Kumar Seth Petitioner
Through: Mr. J.C. Seth & Mr. Sanjay
Shandilya, Advocate

versus

State of Delhi & Ors. Respondents
Through: Mr. Pawan Sharma application
for the State
Mr. V.K. Sharma for
Respondent Nos. 2 & 3.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

VIPIN SANGHI, J. (Oral)

1. At the outset learned counsel for the respondent states that the additional affidavit and rejoinder filed by the petitioner have not been received by him. Learned counsel for the petitioner states that he would not rely on any part of the additional affidavit or the rejoinder and the matter may be heard on the basis of the petition and the counter affidavit. Accordingly, I have proceeded to hear the learned counsel at length.

2. The petitioner lodged a complaint with the SHO, P.S.

Kalkaji on 14.5.2004 against respondent Nos.2 & 3 Rajesh Dogra and Rakesh Dogra. The gravamen of the said complaint was that on the said date he had received a threatening and malicious call on his mobile phone from respondent Nos.2 & 3. It was alleged that Respondent Nos.2 & 3 were notorious/professional 'goondas' of the area. He further stated that he is an orthopedic surgeon having his clinic at L-1/8 Kalkaji, New Delhi. He had purchased Flat No.L-1/119A, DDA Colony, Kalkaji, New Delhi from one Shri Ram Hari Sharma on 6.11.2002 by a registered deed. Respondent Nos.2 & 3 were alleged to have visited the petitioner's clinic after about a month of the purchase of the said flat and to have claimed that Shri Ram Hari Sharma wanted to sell the flat through them, but he had sold the flat without paying any commission, which was claimed to be around Rs.1 lakh. It was further alleged that respondent Nos.2 & 3 demanded the said amount of commission from the complainant which he refused to pay, since he had never approached them (i.e. Respondent Nos. 2 & 3) as an agent for the purchase of the flat and it was a direct deal between the complainant and Shri Ram Hari Sharma, the owner of the flat. It was alleged that respondent Nos.2 & 3 threatened and intimidated the complainant that they must get the commission of Rs.1 lakh, otherwise they would kill the complainant and make the flat a graveyard. It was further stated that the complainant proposed to sell the flat and that the said respondent Nos.2 & 3 threatened even the proposed buyers who visited the flat to finalise the bargain. The complaint further states that *"One of them who was keen to purchase the Flat, recorded the threats in his Tape Recorder, the transcript of which is being filed*

shortly for perusal. You may today like to hear the tape recording, as the Goondas threatened to kill me by name and making the said flat a grave yard. It has given me continuous and recurring anxiety as to how to get rid of the said extortionists, who are known 'Don' goondas having connection with the under world Mafia."

3. On the basis of said complaint FIR No.495/2004 under Sections 387/506 PC was registered at P.S. Kalkaji on 31.5.2004 after the petitioner had filed an application under Section 156(3) Cr.P.C. before the learned Metropolitan Magistrate for the said purpose. On 23.1.2004 respondent Nos.2 & 3 were admitted to bail after they had been arrested, with the condition that they shall not try to contact the complainant/petitioner personally or otherwise. The police filed charge sheet against respondent Nos. 2 & 3 under Section 387 & 506 IPC dated 12.1.2005. In the meantime, on 15.9.2005 the petitioner transferred/sold the said flat to one Mrs. Meera Singh. On 5.10.2005. Learned Metropolitan Magistrate framed charges against the respondent Nos.2 & 3 to which they pleaded "not guilty".

4. The petitioner filed a complaint with the SHO, P.S. Kalkaji on 23.1.2007 alleging that both the accused/respondent Nos. 2 & 3 visited the petitioner's clinic on 23.1.2007 and extended a threat through one Mr.Piyush, Mr. Ramashankar and Mr. Sharvan to warn the petitioner not to go for tendering his evidence against the accused in Court on 24.1.2007 at Patiala House. It was further alleged that they conveyed a similar threat to Mrs. Meera Singh to warn the petitioner of dire consequences if he goes on 24.1.2007 to the Court to lead

evidence on behalf of the prosecution.

5. On 25.1.2007 the petitioner moved an application before the learned Metropolitan Magistrate seeking investigation into the complaint dated 23.1.2007 lodged by him as aforesaid. He also stated that upon his visit to the Court on 24.1.2007 it transpired that the tape record containing the heated altercation between the accused persons with regard to the sale of complainant's flat No.L-1/119A, which is specifically referred to in the FIR dated 14.5.2004 (wrongly typed as 4.5.2004 in the application) was not on record of the Court. Consequently, the petitioner also sought that the tape record as mentioned by the complainant in the FIR be also brought on record. He also sought police protection for himself and his family members he alleged that as there was continuous threat from the accused persons perceived by him.

6. Notice was issued on this application to which reply was filed by the police. In the reply it was stated that the ASI had made sufficient enquiries from nearby people including one Piyush working at the clinic of the petitioner and Smt. Meera Singh who stated that the respondent Nos.2 & 3 took the photographs of the unauthorised construction in the front portion of the petitioner's clinic to send a complaint to the MCD for taking action, and respondent Nos.2 & 3 had not given any threat to the life of the petitioner and no such incident was found to have taken place. It was further stated that in case of any complaint, appropriate action will be initiated and the petitioner would be provided with adequate security. With regard to the tape record

not being on record as a part of the charge sheet, and the prayer made by the petitioner in that behalf, there was nothing said in its reply by the prosecution.

7. This application was disposed of by the learned Metropolitan Magistrate on 28.6.2007 on the ground that the allegations made in the application of the complainant were not supported by the reply filed by the police and that he did not find any ground in the application of the complainant for granting any relief. The petitioner has filed the present petition under Section 482 Cr.P.C. read with Section 195(A) IPC to impugn the aforesaid order passed by the learned Metropolitan Magistrate and also for an order that the tape record (cassette) containing criminal threats issued by the accused, which are mentioned in the FIR are taken on Court record and for a direction that the SHO, P.S. Kalkaji should provide police protection to the complainant, and/or to cancel the bail of the accused since they have breached the conditions of bail.

8. The submission of Mr. Seth is that a perusal of the FIR shows that the tape recorded conversation of the accused with the prospective buyer was available and offered to the police at the time of lodging of the complaint. In spite of that the police chose not to list the same as a document relied upon by it at the time of filing of the charge sheet. The submission is that the petitioner is a busy orthopedic surgeon and when he went to the Court to lead his evidence it transpired that this material evidence had not even been placed before the Court by the police. He submits that in these circumstances, the

present was a fit case for exercise of jurisdiction by the learned Metropolitan Magistrate under Section 91 Cr.P.C. to allow the production of the tape recorded conversation and to order further investigation. He also submits that the police is also empowered to further investigate into this aspect by virtue of Section 173(8) Cr.P.C.

9. He has also relied upon the three decisions of the Supreme Court in **R.M. Malkani vs. State of Maharashtra** AIR 1973 SC 157, **Kari Chaudhary v. Most. Sita Devi & Ors.** AIR 2002 SC 441, and **Central Bureau of Investigation v. R.S. Pai & Anr.**, 2002 Crl.L.J. 2029. These decisions are discussed a little later. He further argues that the reply filed by the police was in fact not even served upon him and the impugned order dated 28.6.2007 was passed without consideration of the relevant aspects. Even in their reply, the police was completely silent about the tape recording not being filed along with the charge sheet, and the reply pertained only to the aspect of the extension of threats to the petitioner on 23.1.2007 by the accused so as to prevent him from leading evidence on behalf of the prosecution in the case, and to the aspect of violation of the condition of bail by Respondent Nos. 2 & 3.

10. In reply Mr. Sharma, learned public prosecutor submits that in this case the charge sheet had been prepared on 12.1.2005. The petitioner took no action for over three years and the application was filed to bring on record the tape recording only on 25.1.2007. He submits that the application is highly belated and on this ground the same should not be entertained. He further submits that from the case

diaries it appears that the petitioner did not produce the tape recording on the ground that the same was not available with him, since it had been made by a friend of his.

11. Learned counsel for respondent Nos. 2 & 3 has also vehemently opposed this petition. He also submits that the matter has remained pending after the filing of charge sheet for two years before the trial court, and this application has been moved highly belatedly. He also submits that that the application had been moved as a counter blast, and with a view to put pressure on the accused. He submits that the accused had filed a civil writ petition before this Court for the removal of unauthorised construction by the petitioner in his flat bearing No.L-1/8A, Kalkaji as well as by the purchaser of flat No.L-1/119-A, Mrs. Meera Singh. In that writ petition orders have been passed directing the MCD to verify the construction in the property of the petitioner and Mrs. Meera Singh and to demolish the same if the same is found to be unauthorised under the Rules. He also submits that the petitioner and Mrs. Meera Singh were responsible for an attack on the accused as a result whereof they suffered injuries which led to registration of FIR No.1115/2007 with P.S. Kalkaji under Section 325/34 IPC. His submission is that this petition is actuated by mala fides. He also submits that Mrs. Meera Singh had filed a petition for registration of FIR on account of the alleged threat for extortion given by the accused, which was dismissed leaving the complainant to exercise other legal remedy, if required. Immediately thereafter the petitioner had filed an application for cancellation of bail granted to the accused which is pending disposal before the learned Metropolitan Magistrate.

Learned counsel for respondent Nos. 2 & 3 further submits that the trial has already begun and evidence of various witnesses has been recorded. The accused have already disclosed their defence. At this stage, to permit further investigation or to bring on record other evidence would prejudice their case. He also submits that the possibility of the alleged tape recording being tempered with on account of its surfacing after three years is also present. He, therefore, submits that the present petition should be dismissed and no relief should be granted in this matter.

12. In rejoinder learned counsel for the petitioner submits that the tape recorded conversation of the accused with the prospective purchaser is a highly material and relevant piece of evidence which has even been made a mention of in the police complaint which forms the basis of the FIR. There is no reason for the petitioner not to have produced the same before the police at the stage of investigation. He submits that no notice under Section 160 or 91 Cr.P.C. was ever issued requiring him to produce the said evidence. He states that the stand of the police is not that the tape recording has not been produced by the complainant, despite he being required to produce the same.

13. Once the petitioner had specifically referred to and made a mention of the tape recorded conversation in his complaint and had even offered to play the same before the police for their hearing, it was the duty of the police, during the course of their investigation, to have procured and examined the same, and if found to be relevant to have filed the same along with the charge sheet. The failure of the

Police to carry out proper investigation in an efficient manner should not lead miscarriage of justice. It is, inter alia, to deal with such like situations that the police is authorised to carry out further investigations under Section 173(8) Cr.P.C. This is, obviously, subject to the rights available to the accused, which should not be allowed to be prejudiced. In **Ram Lal Narang v. State (Delhi Administration)** (1979) 2 SCC 322 the Supreme Court, relying upon its earlier decision in **H.N. Rishbud v. State of Delhi** (1955) 1 SCR 1150, recognised the proposition that further investigation is not altogether ruled out merely because cognizance of the case has been taken by the Court; defective investigation coming to light during the course of a trial may be cured by a further investigation, if circumstances permit it.

14. In **Ramchander v. The State of Haryana** AIR 1981 SC 1036, the Supreme Court observed as follows:

“The adversary system of trial being what it is there is an unfortunate tendency for a Judge presiding over a trial to assume a role of a referee on an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If Criminal Court is to be an effective instrument in dispensing justice, the presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. But this he must do, without unduly trespassing upon the functions of the public prosecutor and the defence counsel without any hint of partnership and without appearing to frighten or bully witnesses. Any question put by the Judge must be so as not to frighten, coerce, confuse or intimidate the witnesses.”

15. In **Ramesh Chandra Agarwal v. State of M.P.** 2004

Crl.L.J. 721 the accused/husband & in-laws were being tried for the offence of abatement to suicide and ill treatment for demand of dowry. The mother of the deceased to whom the deceased used to disclose the factum of ill treatment was not examined. Letters written by the deceased prior to her death to her parents which were seized were not produced before the Court. The Court expressed its anguish at the role of the prosecution and observe as follows:

“11. In the present case, there is no dispute that letters alleged to have been written by the deceased were seized during the course of investigation and its seizure memo has been filed and exhibited. During the course of arguments before this Court, this Court has also put a very specific question to learned Dy.A.G. Shri Desai and A.G.P. Shri Pant that whether any letter/memo was sent for sending these letters to handwriting expert for examination and seeking report, written by Investigating Officer or concerned S.P., is available. They have submitted that such letter is available in the case diary and also filed with the charge-sheet. In view of this, these letters are very important which can help the trial Court for just decisions of the case because these letters were alleged to have been written by the deceased prior to her death. If these letters are found to be written in the handwriting of deceased, then, its contents may go in favour or against the accused and same will give immense assistance for digging out the truth by the Court. But the Court has left the case at the mercy of the A.G.P. and acted merely as an umpire instead of using its power u/Ss.91, 311, Cr.P.C. and u/S.165, Evidence Act and especially when such kind of passiveness of the Court during the course of trial has been condemned by this Court in judgments of Imran Khan (1995 Cri L J 17) (supra) and Raju alias Rajendra Prasad (2002 Cri L J 2367) (supra).”

More recently, in **Zahira Habibulla H. Sheikh and another v. State of Gujrat** 2004 Crl.L.J. 2050, the Supreme Court ruled as follows:

“46. The Courts have to take a participatory role in a

trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Courts cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts prosecuting agency showing indifference or adopting an attitude of total aloofness.

While dealing with the powers and duty of the Court under Section 165 of the Evidence Act and Section 311 of the Cr.P.C., in para 47 the Supreme Court observed as follows:

“47. In Mohan Lal v. Union of India (1991 Supp (1) SCC 271) this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the words such as ‘any Court’ ‘at any stage’, or ‘any enquiry or trial or other proceedings’ ‘any person’ and ‘any such person’ clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - ‘essential’, to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or

the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.”

16. I have gone through the lower court record which has been summoned. I find that the evidence of 3 prosecution witnesses has been recorded. PW-1 is head constable Arjun Giri, PW-2 is Hari Ram Sharma, erstwhile owner of Flat No.L-1/119A from whom the petitioner had purchased the said flat and PW-3 is head constable Rajiv Yadav. No other evidence has been led till date. Neither of these witnesses have any concern with the tape recorded conversation which is attributed to the accused and is alleged to have taken place between them and the prospective buyer. Consequently, it cannot be said that substantial evidence has been recorded in the case. Therefore, in my view no prejudice would be caused to the accused on account of production of the tape recording at this stage.

17. Section 173(8) Cr.P.C. empowers further investigation and collection of evidence oral or documentary by the police, even after the filing of a charge sheet. Similarly Section 91 Cr.P.C. empowers the Court to require the production of evidence for the purpose of investigation, enquiry or trial or other proceeding under the Code by the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

18. In **Kari Chaudhary** (supra) the Supreme Court has held that to quash the proceedings merely on the ground that final report had been laid in first FIR, to say the least, is too technical. The ultimate object of every investigation is to find out whether the offences alleged have been committed and, if so, who have committed the same. Even otherwise, the investigating agency is not precluded from further investigation in respect of an offence even after forwarding a report under sub-section (2) of Section 173 Cr.P.C. on a previous occasion. This is clear from Section 173(8) of the Code. In **R.S. Pai & Anr.** (supra) the Supreme Court has held that normally the investigating officer is required to produce all the relevant documents at the time of submitting the charge sheet. At the same time, there is no specific prohibition, and it cannot be held that additional documents cannot be produced subsequently, and if a mistake is committed in not producing the relevant documents at the time of submitting the report or charge-sheet, it is always open to the Investigating Officer to produce the same with the permission the Court.

19. Considering the preliminary stage of prosecution and the context in which Police officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which prosecution proposes to rely, the word 'shall' used in sub-section (5) of Section 173 (which stipulates that the police officer "shall" forward to the Magistrate along with the report all documents or relevant extracts and statements recorded under Section 161 on which the prosecution proposes to rely and whom the prosecution proposes to examine as its witnesses cannot be interpreted as mandatory, but is directory. Normally, the

documents gathered during the investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Further, the scheme of sub-section (8) of S.173 Cr.P.C. also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to investigation. In such cases, there cannot be any prejudice to the accused.

20. The fact that tape recorded conversation is admissible evidence, provided that the conversation is relevant to the matter in issue and there is proof of identification of the voice and accuracy of the conversation and the possibility of erasing the tape record is eliminated, cannot be doubted in view of the decision of the Supreme Court in ***R.M. Malkani*** (supra). The relevance of the tape recorded conversation attributed to the accused pertaining to the complainant and his property cannot be over emphasised. If duly proved on record as being that between the accused and a prospective buyer of the petitioner, its contents would enable the Court to unearth the truth one way or another.

21. I am also not impressed by the argument of learned counsel for respondent Nos. 2 & 3 that application filed by the petitioner for bringing on record the tape recorded conversation was a result of

mala fides and was a result of the filing of criminal complaint by the accused against the petitioner and Mrs. Meera Singh. As aforesaid, the application has been moved by the petitioner before the trial court on 25.1.2007. The complaint to the MCD with regard to the alleged illegal construction carried out by the petitioner and Mrs. Meera Singh is stated to be of 10.10.2007, i.e. nearly 9 months later. Therefore, the application had already been filed before the trial court even before any action had been taken by the accused to the prejudice of the petitioner or Mrs.Meera Singh. It cannot, therefore, be said that the said application was filed mala fide. Moreover, even if a prejudice is assumed to exist in the mind of the petitioner, as claimed by the accused, that to my mind is not a factor to be considered at this stage of production of the additional evidence or the carrying out of further investigation. So far as submission of learned counsel for respondent Nos. 2 & 3 with regard to the possibility of the tape recorded conversation attributed to the accused having been tempered is concerned, in my view that cannot be a reason not to permit the same to be brought on record. Obviously it will be for the prosecution to establish the veracity and authenticity of the same. I am therefore inclined to allow the prayer made by the petitioner in this behalf.

22. So far as the prayer with regard to the grant of police protection to the petitioner is concerned, in my view the petitioner should be granted sufficient protection so that he is able to lead his evidence without any fear or apprehension to his life or property. In the interest of justice I allow this prayer as well and direct the SHO of police station Kalkaji to provide adequate protection to the petitioner

till the time his evidence is recorded in the case before the trial court, provided, the petitioner fully cooperated and does not take undue adjournments for recording his evidence. The petitioner shall deposit the tape recording with the SHO, police station Kalkaji by 24.4.2008, who shall carry out further investigation in the matter.

23. Trial court record be sent back immediately. Petition stands disposed of. Dasti.

April 23, 2008

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VIPIN SANGHI
Judge