

RESERVED

A.F.R.

Court No. - 33

Case :- APPLICATION U/S 482 No. - 11714 of 2023

Applicant :- Sheshnath Singh *alias* Shishu

Opposite Party :- State of U.P. and another

Counsel for Applicant :- Abhishek Pandey, Raghvendra Pratap Singh

Counsel for Opposite Party :- G.A.

Hon'ble J.J. Munir,J.

1. This application under Section 482 Cr.P.C. ('Code' for short) seeks to quash an order dated 16.03.2023, by which the prosecution evidence has been regarded closed and a direction given that the case may come up for recording the statement of the accused under Section 313 of the Code. It is not this order that substantially aggrieves the applicant. The applicant is aggrieved by the non decision of his application dated 21.11.2022, before passing the order impugned. The applicant, in substance, therefore, seeks that before the Court would direct that the prosecution case is over and the accused's statement under Section 313 of the Code recorded, the applicant, who is an accused at the trial, is entitled to a decision on his application, above referred.

2. The applicant is one of the accused facing trial before the learned Additional Sessions Judge, Court No. 4, Ghazipur in S.T. No. 219 of 1987, State vs. Kanhaiya and others (arising out of Case Crime No. 227 of 1986), under Sections 147, 148, 149, 302 IPC, P.S. Dildarnagar, District Ghazipur.

3. According to the applicant, the first information report giving rise to the crime was lodged on 25.09.1986 at 11:30 a.m., while the incident took place on 25.09.1986 earlier in the day at 08:30 a.m. There are three nominated accused in the FIR, to wit, Kanhaiya Singh, Hridaya Narayan Singh and Sheshnath Singh *alias* Shishu, besides two men unnamed. The first information version is that the informant, Satish Kumar, was a resident of Ward No.5, P.S. Dildarnagar, District Ghazipur. In one of his houses, about 7-8 years ago, Brij Narayan Singh of Village Gohda, P.S. Dildar Nagar, District Ghazipur used to live. Brij Narayan was a *Goonda* and a man of criminal propensities. In the neighbourhood, people were scared of him. The informant's father asked Brij Narayan Singh to vacate his house, upon which, the former refused.

4. About 5-6 years antedating the FIR under reference, Brij Narayan Singh was murdered. The informant's father was arraigned in the case relating to Brij Narayan Singh's murder, but upon trial, was acquitted. The informant's house, nevertheless, remained in the occupation of Kanhaiya Singh, Brij Narayan Singh's brother.

5. About 7-8 days prior to the occurrence, the informant's father locked the house aforesaid. Kanhaiya Singh threatened the informant's father over locking the house, telling him that he better open the lock, else he would be done to death. The informant's father did not yield and refused to remove the lock. On 25.09.1986, the informant's father, Murat Sahu and his uncle Madan Lal were proceeding to the District Magistrate's office to complain regarding the threat held out by Kanhaiya Singh and also to buy supplies for their shop. They had proceeded from Dildarnagar to the railway station, reaching

there at 08:30 in the morning and boarded the train. Kanhaiya Singh, Hridaya Narayan Singh, Sheshnath Singh *alias* Shishu and two other men, whom the informant did not know, but said that he could identify them if confronted, entered the railway coach. Kanhaiya Singh, Hridaya Narayan Singh and Sheshnath Singh *alias* Shishu were armed with guns and the two other men, who belonged to Kanhaiya's family, were unarmed. Kanhaiya Singh came forward abusing the informant's father, caught hold of him, dragging him out of the coach. The passengers on board objected. Kanhaiya Singh warned the passengers that if they attempted to resist, they would be shot. This abated all resistance from the passengers, out of fear. In the meanwhile, the train moved. Kanhaiya Singh exhorted his companions to shoot the informant's father, whereupon Seshnath Singh *alias* Shishu shot the victim. All the five men jumped off the train and made good their escape. The informant's father collapsed and after a little while, passed away. Some passengers on board were nominated as witnesses, whose names figure in the FIR. As soon as the applicant came to know that he was nominated in the case, he surrendered in Court three days after the occurrence and released on bail by the learned Sessions Judge of Ghazipur on 19.02.1987.

6. The applicant says that according to the bail order, it is recorded that there were memos issued by the Guard to the Stationmaster, Tarighat and the Stationmaster of Dildarnagar, who, in turn, sent a message of the occurrence to P.S. G.R.P., Dildarnagar. The said message does not mention the name of the deceased or the accused. The dead body of the deceased reached P.S. Dildarnagar at 09.35 a.m., where the FIR was lodged at about 11:30 a.m. by the complainant, Satish Kumar

against the applicant and other members of his family, as the applicant says, on account of animosity. Interestingly, there is much reliance placed on the remarks of the learned Sessions Judge, apparently while granting bail to the effect that the report by the Stationmaster to the G.R.P. should be treated the FIR.

7. The most interesting feature of the case appears to be that a transfer application was made by the informant before this Court being Criminal Misc. Transfer Application No. 810 of 1988, where this Court, *vide* order dated 28.01.1988, admitted the application, issued notice to the other side and stayed the trial. It is on account of the said order that the trial remained pending from the year 1988 to 2022.

8. The proceedings of the trial were resumed under an order of the learned Additional Sessions Judge, Court No. 4, Ghazipur dated 29.10.2022, who proceeded with it relying upon directions of the Supreme Court in **Asian Resurfacing of Road Agency Private Limited and another v. Central Bureau of Investigation, (2018) 16 SCC 299**.

9. The applicant, upon acquisition of knowledge, that proceedings in the trial had commenced, appeared before the Trial Court on 29.10.2022 and 01.11.2022. On 01.11.2022, the testimony of PW-1 Satish Kumar was recorded before the Trial Judge and time was sought by the applicant to cross-examine him. The applicant was trying to collect relevant documents, including copies of the case diary, inquest report, postmortem report and the charge-sheet, but could not succeed in securing these, as the same were reported to be unavailable. The applicant then made an application before the Trial Judge, seeking a direction to the prosecution to provide him copies of the necessary documents, including the case diary, which

would enable him to undertake the prosecution witnesses' cross-examination.

10. The applicant's grievance is that no orders have been made by the Trial Judge on the application dated 21.11.2022, which is still pending. Nevertheless, the testimony of the prosecution witnesses has been heard and recorded in a cursory manner, depriving the applicant of his right to cross-examine them.

11. It is the applicant's case that without following the mandatory provisions of Section 207 of the Code, which obliges the Court to ensure that documents including the case diary, inquest report, the postmortem report and the charge-sheet are provided to the accused free of cost, the trial is proceeding against him. In support of his submission that the conduct of trial in the absence of compliance with Section 207 of the Code is not one held in accordance with law, learned Counsel for the applicant has placed reliance upon a decision of the Supreme Court in **State of Kerala v. Babu and others, AIR 1999 SC 2161**. Allusion would be made to the principle in **Babu (supra)**, and how it bears upon the applicant's case, during the course of this judgment.

12. Learned Counsel for the applicant has further placed reliance upon the guidance of the Supreme Court in **State of NCT of Delhi v. Ravi Kant Sharma and others, (2007) 2 SCC 764**, which, according to the learned Counsel, is an authority that supports his right to have copies of the statement of witnesses and other documents, part of the case diary, supplied to him before the prosecution witnesses were examined.

13. Mr. D.K. Srivastava, learned Additional Government Advocate, on the other hand, submits that the applicant has no

right to ask for a copy of the case diary or the statements recorded by the Police, in view of the provisions of Section 172(2) and 173(3) of the Code, as that right is very limited. He has placed reliance upon the decision of the Supreme Court in **Balakram v. State of Uttarakhand and others, (2017) 7 SCC 668.**

14. Heard Mr. Abhishek Pandey, learned Counsel for the applicant and Mr. D.K. Srivastava, learned Additional Government Advocate on behalf of the State.

15. After hearing learned Counsel for the parties and perusing the record, this Court is minded to think that Mr. Pandey and Mr. Srivastava have advanced their submissions relying on very different provisions of the Code, dealing with the same right of the accused, but with regard to a right to access very different kinds of the record of investigation under the Code.

16. Before the issue is elucidated upon, it would be profitable to refer to authorities that are in point.

17. Balakram (*supra*), upon which Mr. Srivastava has reposed faith, was a case that arose out of an application to submit certain documents before the Trial Judge in a sessions trial on a charge of murder, where the accused proposed to confront a prosecution witness in that case on the basis of those documents. The documents that the accused wanted to bring on record were part of the case diary, maintained by the Police during investigation, under Section 172 of the Code. The witness, who was proposed to be confronted with the documents from the case diary, was the Investigating Officer (PW-15). Copies of the documents in question were secured by the accused by invoking the provisions of the Right to

Information Act, 2005. The application was opposed by the complainant on the ground that fresh documents cannot be allowed to be produced on behalf of the accused at a premature stage - premature in the sense that the stage was one where the prosecution testimony was being heard. It was contended on behalf of the complainant opposing the application that the documents could be produced during the stage when the statements of the accused under Section 313 of the Code were recorded. It was also the complainant's contention that after the statements under Section 313 of the Code were recorded, the accused could produce these documents when it was time to lead defence evidence. The application was rejected by the learned Sessions Judge. Aggrieved, the accused moved the High Court under Section 482 of the Code. The High Court allowed the application under Section 482 of the Code, and this, apparently, made the complainant appeal to their Lordships of the Supreme Court by seeking special leave. The Supreme Court, after referring to the provisions of Section 172 of the Code and Section 145 of the Indian Evidence Act, 1872 ('the Act of 1872' for short) observed :

"9. The aforementioned provisions are to be read conjointly and homogenously. It is evident from sub-section (2) of Section 172 CrPC, that the trial court has unfettered power to call for and examine the entries in the police diaries maintained by the investigating officer. This is a very important safeguard. The legislature has reposed complete trust in the Court which is conducting the inquiry or the trial. If there is any inconsistency or contradiction arising in the evidence, the Court can use the entries made in the diaries for the purposes of contradicting the police officer as provided in sub-section (3) of Section 172 CrPC. It cannot be denied that the Court trying the case is the best guardian of interest of justice. Under sub-section (2) the criminal court may send for diaries and may use

them not as evidence, but to aid it in an inquiry or trial. The information which the Court may get from the entries in such diaries usually will be utilised as foundation for questions to be put to the police witness and the court may, if necessary in its discretion use the entries to contradict the police officer, who made them. But the entries in the police diary are neither substantive nor corroborative evidence, and that they cannot be used against any other witness than against the police officer that too for the limited extent indicated above.

10. Coming to the use of police diary by the accused, sub-section (3) of Section 172 clearly lays down that neither the accused nor his agents shall be entitled to call for such diaries nor he or they may be entitled to see them merely because they are referred to by the Court. But, in case the police officer uses the entries in the diaries to refresh his memory or if the Court uses them for the purpose of contradicting such police officer, then the provisions of Sections 145 and 161, as the case may be, of the Evidence Act would apply. Section 145 of the Evidence Act provides for cross-examination of a witness as to the previous statements made by him in writing or reduced into writing and if it was intended to contradict him in writing, his attention must be called to those portions which are to be used for the purpose of contradiction. Section 161 deals with the adverse party's right as to the writing used to refresh memory. It can, therefore, be seen that, the right of the accused to cross-examine the police officer with reference to the entries in the police diary is very much limited in extent and even that limited scope arises only when the Court uses the entries to contradict the police officer or when the police officer uses it for refreshing his memory.

11. In other words, in case if the Court does not use such entries for the purpose of contradicting the police officer or if the police officer does not use the same for refreshing his memory, then the question of the accused getting any right to use entries even to that limited extent does not arise. The accused persons cannot force the police officer to refresh his memory during his examination in the Court by referring to the entries in the police diary.

13. Be that as it may, as mentioned supra, right of the accused to cross-examine the police officer with reference to the entries in the police diary is very much limited in extent and

even that limited scope arises only when the Court uses such entries to contradict the police officer or when the police officer uses it for refreshing his memory and that again is subject to the provisions of Sections 145 and 161 of the Evidence Act. Thus, a witness may be cross-examined as to his previous statements made by him as contemplated under Section 145 of the Evidence Act if such previous statements are brought on record, in accordance with law, before the Court and if the contingencies as contemplated under Section 172(3) CrPC are fulfilled. Section 145 of the Evidence Act does not either extend or control the provisions of Section 172 CrPC. We may hasten to add here itself that there is no scope in Section 172 CrPC to enable the Court, the prosecution or the accused to use the police diary for the purpose of contradicting any witness other than the police officer who made it.

15. The police diary is only a record of day-to-day investigation made by the investigating officer. Neither the accused nor his agent is entitled to call for such case diary and also are not entitled to see them during the course of inquiry or trial. The unfettered power conferred by the statute under Section 172(2) CrPC on the court to examine the entries of the police diary would not allow the accused to claim similar unfettered right to inspect the case diary.

17. From the aforementioned, it is clear that the denial of right to the accused to inspect the case diary cannot be characterised as unreasonable or arbitrary. The confidentiality is always kept in the matter of investigation and it is not desirable to make available the police diary to the accused on his demand.

18. Since we are not called upon to decide the question as to whether the copy of the case diary or a portion thereof can be provided to the accused under the provisions of the Right to Information Act, we are not deciding the said question in the matter on hand. In *Sidharth v. State of Bihar* [*Sidharth v. State of Bihar*, (2005) 12 SCC 545 : (2006) 1 SCC (Cri) 175 : AIR 2005 SC 4352] , the entire case diary maintained by the police was made available to the accused by the trial court. In that context certain observations were made by this Court which read thus : (SCC p. 561, para 27)

"27. ... But if the entire case diary is made available to the accused, it may cause serious

prejudice to others and even affect the safety and security of those who may have given statements to the police. The confidentiality is always kept in the matter of criminal investigation and it is not desirable to make available the entire case diary to the accused. In the instant case, we have noticed that the entire case diary was given to the accused and the investigating officer was extensively cross-examined on many facts which were not very much relevant for the purpose of the case. The learned Sessions Judge should have been careful in seeing that the trial of the case was conducted in accordance with the provisions of CrPC."

19. Since in the matter on hand, neither the police officer has refreshed his memory with reference to entries in the police diary nor has the trial court used the entries in the diary for the purposes of contradicting the police officer (PW 15), it is not open for the accused to produce certain pages of police diary obtained by him under the provisions of the Right to Information Act for the purpose of contradicting the police officer."

18. The question about the right of the accused or the power of the Court to utilize the entries in the case diary for the purpose of testing the veracity of the police witnesses arose in **Shamshul Kanwar v. State of U.P., (1995) 4 SCC 430**. The issue in that case arose in the context of the particulars of entries made in the G.D. Entry, Ex. Ka-124 which was referred to, with the accused saying that the G.D. Entry should carry more details, and the absence of the names of the accused there and the witnesses rendered the presence of the witnesses doubtful. It was in the context of what details of the occurrence should be mentioned in the G.D. that the Court examined the question of how and in what manner and to what extent entries in the case diary, envisaged under Section 172 of the Code, can be utilized by the Court and the accused, and subject to what conditions used to contradict, confront or test the veracity of a police witness. After referring to the provisions

of Section 172 of the Code, their Lordships of the Supreme Court held in **Shamshul Kanwar** (*supra*):

"10.

This section firstly lays down that every police officer making an investigation should maintain a diary of his investigation. It is well-known that each State has its own police regulations or otherwise known as police standing orders and some of them provide as to the manner in which such diaries are to be maintained. These diaries are called case diaries or special diaries. The section itself indicates as to the nature of the entries that have to be made and what is intended to be recorded is what the police officer did, the places where he went and the places which he visited etc. and in general it should contain a statement of the circumstances ascertained through his investigation. Sub-section (2) is to the effect that a criminal court may send for the diaries and may use them not as evidence but only to aid in such inquiry or trial. The aid which the court can receive from the entries in such a diary usually is confined to utilising the information given therein as foundation for questions to be put to the witnesses particularly the police witnesses and the court may, if necessary, in its discretion use the entries to contradict the police officer who made them. Coming to their use by the accused, sub-section (3) clearly lays down that neither the accused nor his agents shall be entitled to call for such diaries nor he or they may be entitled to see them merely because they are referred to by the courts. But in case the police officer uses the entries to refresh his memory or if the court uses them for the purpose of contradicting such police officer then provisions of Section 161 or Section 145, as the case may be, of the Evidence Act would apply. Section 145 of the Evidence Act provides for cross-examination of a witness as to the previous statements made by him in writing or reduced into writing and if it is intended to contradict him by the writing, his attention must be called to those parts of it which are to be used for the purpose of contradiction. Section 161 deals with the adverse party's rights as to the production, inspection and cross-examination when a document is used to refresh the memory of the witness. It can therefore be seen that the right of accused to cross-examine the police officer with reference to the entries in the general diary is very much limited in extent and even that limited scope arises only when the

court uses the entries to contradict the police officer or when the police officer uses it for refreshing his memory and that again is subject to the limitations of Sections 145 and 161 of the Evidence Act and for that limited purpose only the accused in the discretion of the court may be permitted to peruse the particular entry and in case if the court does not use such entries for the purpose of contradicting the police officer or if the police officer does not use the same for refreshing his memory, then the question of accused getting any right to use the entries even to that limited extent does not arise. The accused person is not entitled to require a police officer to refresh his memory during his examination in court by referring to the diary. At the most the accused can on a reasonable basis seek the court to look into the diary and do the needful within the limits of Section 172 CrPC. However, the court is not bound to compel the police witness to look at the diary in order to refresh his memory nor the accused is entitled to insist that he should do so. If there is such a refusal what inference should be drawn depends on the facts and circumstances of each case. Section 172 does not deal with any recording of statements made by witnesses and what is intended to be recorded is what the police officer did namely the places where he went, the people he visited and what he saw etc. It is Section 161 CrPC which provides for recording of such statements. Assuming that there is failure to keep a diary as required by Section 172 CrPC, the same cannot have the effect of making the evidence of such police officer inadmissible and what inference should be drawn in such a situation depends upon the facts of each case. It is well-settled that the entries of the police diary are neither substantive nor corroborating evidence and they cannot be used by or against any other witness than the police officer and can only be used to the limited extent indicated above. The above-stated principles are reiterated in many decisions rendered by the courts.

18. With regard to the nature of the entries to be made in the diary as required under Section 172 CrPC and the limited permissible use by the court or by the accused indicated therein have been the subject-matter of decisions of a number of High Courts over the years. It may not be necessary to refer to them. However, we have noticed that there is vagueness as to the nature of the diary contemplated under this section. In some States the diary referred to in Section 172 CrPC is known as 'special diary' or 'case diary'

and in some other States like Andhra Pradesh, J & K and Kerala there is a provision in the Police Acts that a "general diary" is to be maintained in the police station thereby indicating it to be different from the case diary. In some States there are police standing orders to the effect that the diary contemplated under Section 172 CrPC can be of two parts; the first one relating to the steps taken during the course of investigation by the police officer with particular reference to time at which the police received the information and the further steps taken during the investigation like visiting the places etc. and the second part contains statement of the circumstances ascertained during the investigation which obviously relate to the statements recorded by the officer in terms of Section 161 CrPC and other relevant materials gathered during the investigation. The copies of the second part which mainly contains the statements of the witnesses as a matter of course are supplied to the accused persons.

20. Therefore it is clear that the diary referred to in Section 172 and which the court may call for and which can be used to the limited extent mentioned therein obviously refers to the first part and to the copies of which the accused is not entitled to and the entries of which can be used to the limited extent by the court as well as by the accused as contained in Section 172 CrPC. If by virtue of such police standing orders, the second part also forms, compendiously, part of the diary as a whole and if that also is before the court, the use of the entries in such second part which contains the statements of the witnesses recorded, would be of different nature. In some States for instance Uttar Pradesh there are regulations regarding the maintenance of general and case diaries. Section 161 CrPC provides for examination of witnesses by police. It further lays down that the police officer during investigation may examine the witnesses and may reduce into writing any statement made to him in the course of such examination and if he does so he shall "make a separate and true record" of the statement of each such person. Section 162 lays down that no such statement made by any person to a police officer shall if reduced to writing be signed "nor shall any such statement or any record thereof whether in a 'police diary' or otherwise" be used for any purpose at any inquiry or trial save as provided under that section. The words "police diary or otherwise" used in this section have perhaps been the basis for dividing the

diary into two parts. Section 167, an important provision, deals with the procedure when investigation is not completed within 24 hours and provides for production of the accused before a magistrate for seeking remand. This provision also lays down that the officer-in-charge of a police station or the police officer making the investigation "shall forthwith transmit to the nearest judicial magistrate a copy of the entries in the diary hereinafter prescribed relating to the case" and at the same time forward the accused to such magistrate. Likewise sub-section (2-a) of Section 167 which provides for production of the accused before an executive magistrate lays down that the copy of the entry in the diary 'hereinafter' prescribed relating to the case shall be transmitted while forwarding the accused. The object underlying is that the magistrate before remanding the accused to custody should satisfy himself that there is a prima facie case for doing so after a perusal of the copies of the entries "in the diary". We are referring to this aspect only to point out that some vagueness or confusion is there in respect of the meaning of the word 'diary' used in Section 172 and other sections of CrPC and we suggest that a legislative change is necessary providing for framing of appropriate and uniform regulations regarding the maintenance of the diaries by the police for the purpose contemplated by Section 172 CrPC vis-à-vis the other sections referred to above.

21. We are constrained to go into this aspect in an elaborate manner as even today we are coming across a number of cases where there has been a patent misuse of the case diaries to be maintained as per Section 172 CrPC. The Full Court in *Mannu* case [ILR (1897) 19 All 390 : 17 AWN 174] observed, as long back as 1897, as under:

"It is within the experience of every Judge of this Court that much misconception exists in these Provinces as to the use which can be made by a court or by an accused person or his agents of the diaries which are kept by police officers under Section 172 of the Code of Criminal Procedure, and which in these Provinces are known as special diaries. It is within our judicial knowledge that some Sessions Judges and some Magistrates have decided criminal cases by conviction or by acquittal of the accused on statements which are found in the special diary relating to the case...."

To the same effect are the observations by Privy Council in *Dal Singh case* [AIR 1917 PC 25] . But as pointed out by this Court in *Malkiat Singh case* [(1991) 4 SCC 341 : 1991 SCC (Cri) 976] that the courts even in recent times are not keeping in view the true scope of Section 172 and the use to which the diaries should be put to."

(emphasis by Court)

19. The question, again, engaged the attention of the Supreme Court in **State of Kerala v. Babu and others, (1999) 4 SCC 621**. The facts and the proceedings, in the context of which the three questions that arose for consideration before the Court, can best be recapitulated in the words of their Lordships, as these figure in the opening part of the report in **Babu (*supra*)**:

"1. In a pending sessions case, on behalf of the accused persons, applications were made to summon the case diary of a case registered as Crime No. 81 of 1991 for confronting a witness with his previous statement as found in the said case diary and to recall the said PW 5. The learned Sessions Judge allowed the said applications which came to be challenged in criminal petitions filed before the High Court of Kerala by the State as well as the brother of the deceased. These petitions came to be dismissed by an order of the High Court dated 17-8-1993. Both the Sessions Court and the High Court held that there is no bar in law to summon the case diary of a case even other than the one which is being tried, for the purpose of contradicting the evidence of the prosecution witnesses. In this appeal by special leave, the State of Kerala has raised the following questions of law:

(a) Whether the statement of a witness recorded under Section 161 of the CrPC in one particular crime could be used against that witness in any other trial, enquiry or proceedings by the accused.

(b) Whether the learned Sessions Judge can call for the police diaries of a case which is not under enquiry or trial before him and permit it to be used by the accused for contradicting a witness examined in another case under trial before him.

(c) Whether Section 162 of the CrPC permits the use of statement recorded under Section 161 of the CrPC in any other proceeding other than the enquiry or trial in respect of the offence for which the investigation was conducted."

20. It must be remarked that the context in **Babu** was slightly different, because it was about the permissibility of use of statements recorded under Section 161 of the Code in a different crime than the one that was subject matter of trial before the Court. Nevertheless, the Court examined the question in the context of the right of the accused to make use of a witness's previous statements recorded during the course of investigation for the purpose of impeaching his veracity during trial. Their Lordships in **Babu** observed :

"8. Therefore, on a reading of Section 162 of the Code bearing in mind the object of the said section and Section 145 of the Evidence Act, it is clear that an accused in a criminal trial has the right to make use of the previous statements of a witness including the statements recorded by the investigating agency during the course of an investigation for the purpose of establishing a contradiction in the evidence of a witness or to discredit the witness. The question then arises, how does the accused confront the previous statement made by a witness in the course of an investigation to establish the contradiction in the evidence given by the witness in the trial? So far as the statements made during the course of investigation of the case being tried is concerned, there is no difficulty because an accused is entitled under Section 207 of the Code for the supply of free copies of the documents referred to in the said section which includes the previous statement recorded under sub-section (3) of Section 161 of the Code. The accused does not have such a right as a matter of course in regard to other previous statements; more so, in regard to the statements recorded by the investigating agency under Section 161 in a case other than the one that is being tried by the court. Therefore, in the instant case, the accused made an application for summoning the case diary of Crime No. 81 of 1991 invoking the provisions of Section 172 of the Code. But the State contends that this section does not apply to summoning the case diary of cases other than

the one that is being tried. Therefore, we will now examine the contention of the State with reference to Section 172 of the Code which reads thus:

"172. *Diary of proceedings in investigation.*—

(1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any criminal court may send for the police diaries of a case under enquiry or trial in such court, and may use such diaries, not as evidence in the case, but to aid it in such enquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the court; but, if they are used by the police officer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply."

9. Sub-section (1) of the above section mandates that every police officer making an investigation shall maintain a case diary of that case in which among other entries, he shall maintain the statements of the witnesses examined by him during the course of his investigation. Sub-section (2) of the same section empowers a criminal court to send for such police diaries of a case under enquiry or trial in such court, (emphasis supplied) and permits the use of such diaries, not as evidence in the case, but to aid it in such an enquiry or trial. The words used in sub-section (2) of Section 172, more particularly "police diaries of a case under enquiry or trial in such court," indicate it is only that police diary in which the investigating officer concerned had made entries of his investigation and which pertains to the case being tried by the court alone can be sent for. Sub-section (3) of Section 172 further imposes restrictions in the manner in which such diaries can be used by the court. It also specifically bars the right of an accused or his agent to call for such diaries.

Thus, on a plain language of this section, it is clear that this section cannot be used for the purpose of summoning a case diary which does not pertain to the investigation of the case which is being tried by the court. It also stands to reason because so far as the accused is concerned in the case in which he is being tried, he would have been supplied with all the documents referred to under Section 207 of the Code. Therefore, the question of he using the entries in the case diary would not arise. Section 172 is specifically meant for the contingencies when the court finds it necessary to look into the case diary for the purpose of finding an aid in the trial or for the purpose of assisting the police officer to refresh his memory. Therefore, Section 172 does not contemplate summoning of the case diary for the purpose of assisting the accused to have a look at the previous statements of the witness for using it for his benefit, as contemplated in Section 162 of the Code. The trial court and the High Court in this case proceeded on the footing that there is no bar under the Code to summon the case diary relating to the cases other than the one that is being tried. Hence, they placed reliance on Section 172 of the Code. We are unable to subscribe to that part of the finding of the courts below that the source of power to summon the case diary of a case other than the one that is being tried, emanates from Section 172 of the Code. The respondents have sought to place reliance on a Division Bench judgment of the High Court of Calcutta in the case of *Ahmed Mia v. Emperor* [AIR 1944 Cal 243 : 46 Cri LJ 28] wherein the High Court observed thus: (AIR Headnote)

"Section 172 relates to the police diary made in respect of a case under enquiry or trial by the court which calls for it and therefore does not in terms apply where the diary relates not to the case which was actually being tried by the court but to the counter-case, but the principles set out in the section apply. There is no provision in the Criminal Procedure Code which would prevent the court from looking into the diary of the counter-case, or from using the diary in the counter-case in the way laid down in Section 172(2)."

11. The High Court in the impugned judgment proceeded on the basis that a statement recorded by an investigating officer in any case which was under investigation, being a statement made under Section 161 of the Code, the same can be used for the limited purpose provided under Section 162 of

the Code read with Section 145 of the Evidence Act. There can be no quarrel with this approach of the High Court in regard to the use of the previous statements of a witness made in the course of another investigation being used in the course of another criminal trial. This is because as seen from the observations of this Court in the case of *Tahsildar Singh* [AIR 1959 SC 1012] the very object of enactment of Section 161 of the Code and Section 145 of the Evidence Act is to create a right in the accused to make use of the previous statements of the witnesses for the purpose of contradiction and for impeaching the merit of the witness. This right has not been taken away by Section 172 of the Code and, as noticed above, there is no prohibition in regard to this right of the accused either under the Code or under the Evidence Act. But the question for consideration is, how does the accused exercise this right with reference to a previous statement of a witness made in another case which is recorded by the investigating officer in that case under the provisions of Section 161 of the Code? In our opinion, this right certainly does not flow under Section 172 of the Code nor is the accused entitled to these previous statements under Section 207 of the Code. But, this does not mean that the accused is denied of his limited benefit of using the said previous statements recorded during the course of another investigation. The answer to this question, in our considered view, lies in Section 91(1) of the Code which reads thus:

"91. *Summons to produce document or other thing.*—(1) Whenever any court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, enquiry, trial or other proceeding under this Code by or before such court or officer, such court may issue a summons, or such officer a written order, to 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.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed—

(a) to affect Sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority."

12. The language of Section 91 is much wider than the language of Section 172 and by no stretch of imagination it could be contended that the case diary maintained under Section 172 of the Code is not a document as contemplated under Section 91(1) of the Code. If that be so and if the court comes to the conclusion that the production of such a document is necessary or desirable then, in our opinion, the court is entitled to summon the case diary of another case under Section 91 of the Code de hors the provisions of Section 172 of the Code for the purpose of using the statements made in the said diary, for contradicting a witness. When a case diary, as stated above, is summoned under Section 91(1) of the Code then the restrictions imposed under sub-sections (2) and (3) of Section 172 would not apply to the use of such case diary but we hasten to add that while using a previous statement recorded in the said case diary, the court should bear in mind the restrictions imposed under Section 162 of the Code and Section 145 of the Evidence Act because what is sought to be used from the case diary so produced are the previous statements recorded under Section 161 of the Code."

21. The question involved here again fell for consideration in **Ravi Kant Sharma** (*supra*). As would appear from the report of the decision in **Ravi Kant Sharma**, some directions were issued by the Delhi High Court, directing provision of the gists of interrogation by the Police as statements under Section 161(3) of the Code. It appears that these gists of interrogation were recorded in summary form. If the gists of the interrogation of the accused done by the Investigating Officer, that were his own remarks in the case diary, qualified for statements under Section 161 of the Code, not referable to Section 172 thereof,

was the issue that their Lordships of the Supreme Court considered and held :

"11. Under Section 161 CrPC the police officer may reduce into writing any statement made to him in the course of examination under that provision and if he does so he shall make separate and true record of the statement of each such person whose statement he records. The provision in other words authorises the police officer to reduce into writing any statement made by a witness. In a given case the investigating officer may record circumstances ascertained during investigation in the case diary in terms of Section 172 CrPC. It is only when the investigating officer decides to record the statement of witnesses under Section 161 CrPC that he becomes obliged to make a true record of the statement which obviously will not include the interpretation of the investigating officer of the statements or the gists of statement. At this stage it will be necessary to take note of sub-section (b) of Section 173 CrPC which authorises the police officer to claim a sort of privilege in respect of any statement recorded under Section 161 CrPC after giving reasons as to why such statement may not be provided to the accused. Such privilege can only be claimed in respect of statement recorded under Section 161 CrPC and not in respect of what the officer records in the case diary i.e. the gist of the statement under Section 172 CrPC. It will also be necessary to take note of Section 207 CrPC. The Magistrate has to, in terms of that provision, provide to the accused, free of cost, copies of statements recorded under Section 161(3) subject to the exceptions in terms of Section 173(6). A categorical statement has been made by the learned counsel for the appellant that the gist of the statement has not been produced by the prosecution to prove the guilt of the accused and the gists of the statements were not recorded in terms of Section 161 CrPC and the accused has no right to ask for the gists of such statements if recorded under Section 172.

12. At this juncture it would be necessary to take note of sub-section (3) of Section 172 which provides that neither the accused nor his agents shall be entitled to call for such diaries meaning diary of proceedings in investigation nor shall he or they be entitled to see them merely because they are referred to by the court.

13. As rightly submitted by learned counsel for the appellant, in different States case diaries

are maintained in different ways. Some States have a composite case diary which includes the statements recorded under Section 161 CrPC as well as the observations of the investigating officer under Section 172 CrPC. This Court, therefore, in *Shamshul Kanwar case* [(1995) 4 SCC 430 : 1995 SCC (Cri) 753] held that the statements under Section 161 need to be separated from observations which are recorded under Section 172 in order to make available the statement under Section 161(3) to the accused. The position is entirely different here. Certain observations made by this Court in two recent cases also need to be noted. In *Sunita Devi v. State of Bihar* [(2005) 1 SCC 608 : 2005 SCC (Cri) 435] it was observed at para 27 as follows : (SCC p. 617)

"27. The supervision notes can in no count be called. They are not a part of the papers which are supplied to the accused. Moreover, the informant is not entitled to the copy of the supervision notes. The supervision notes are recorded by the supervising officer. The documents in terms of Sections 207 and 208 are supplied to make the accused aware of the materials which are sought to be utilised against him. The object is to enable the accused to defend himself properly. The idea behind the supply of copies is to put him on notice of what he has to meet at the trial. The effect of non-supply of copies has been considered by this Court in *Noor Khan v. State of Rajasthan* [AIR 1964 SC 286 : (1964) 1 Cri LJ 167] and *Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble* [(2003) 7 SCC 749 : 2003 SCC (Cri) 1918] . It was held that non-supply is not necessarily prejudicial to the accused. The court has to give a definite finding about the prejudice or otherwise. The supervision notes cannot be utilised by the prosecution as a piece of material or evidence against the accused. At the same time the accused cannot make any reference to them for any purpose. If any reference is made before any court to the supervision notes, as has been noted above, they are not to be taken note of by the court concerned. As many instances have come to light when the parties, as in the present case, make reference to the supervision notes, the inevitable conclusion is that they have unauthorised access to the official records. We, therefore, direct the Chief Secretary of each State and Union Territory and the Director Generals of Police concerned to ensure that the supervision notes are not made available to any

person and to ensure that confidentiality of the supervision notes is protected. If it comes to light that any official is involved in enabling any person to get the same, appropriate action should be taken against such official. Due care and caution should be taken to see that while supplying police papers supervision notes are not given."

15. The direction of the High Court as contained in the impugned order is not a definite one. It only refers to *Shamshul Kanwar case* [(1995) 4 SCC 430 : 1995 SCC (Cri) 753] and concludes that if the "gists" can be regarded as statements under Section 161 CrPC although in summary form they would have to be made over to the accused. It does not factually find out that as to whether the gists can be regarded as statements in view of the position of law stated above. It did not take note of the specific stand of the appellant about separate maintenance of case diaries."

22. It would be noticed that in this case, the application dated 21.11.2022 moved by the applicant has not been decided before hearing the prosecution's testimony, which has been closed by the impugned order dated 16.03.2023, posting the trial for recording the statements under Section 313 of the Code. The application dated 21.11.2022 carries the following material facts and prayer :

"लेकिन मुकदमा वादी द्वारा दी गयी तहरीर के आधार पर अभियोजन साक्षी / मुकदमा वादी का बयान हुआ तथा बचाव पक्ष द्वारा प्रतिपरीक्षा की गयी आज उपरोक्त सत्र परीक्षण साक्ष्य हेतु नियत है तथा अभियोजन साक्षी के रूप में साक्षियों को परिक्षित होना है ऐसी स्थिति में बिना केस डायरी के मुख्य परीक्षा होना सम्भव नहीं है और प्रार्थी के पास भी उपरोक्त प्रकरण की केस डायरी उपलब्ध नहीं है । ऐसी स्थिति में अभियोजन साक्षी नं०-3 के मुख्य परीक्षा के पूर्व प्रार्थी के अधिवक्ता को भी उपरोक्त प्रकरण की केस डायरी में अंकित गवाहों का बयान का अवलोकन किया जाना आवश्यक है।

अतः प्रार्थना है कि सहायक जिला शासकीय अधिवक्ता फौजदारी महोदय को आदेशित करने की कृपा करे कि वे जिला शासकीय अधिवक्ता फौजदारी अथवा सम्बन्धित थाने से उपरोक्त प्रकरण की केस डायरी न्यायालय में गवाही के समय उपलब्ध करावे।"

23. This is a case where there has been no compliance with the provisions of Section 207 of the Code and the documents

postulated under the aforesaid provision of the Code have never been supplied to the applicant. There are assertions to this effect in paragraph Nos.14, 15, and, particularly, paragraph No.18 of the affidavit filed in support of the application. In Paragraph Nos.11, 13 and 14 of the counter affidavit, while answering the assertions in the relative paragraphs above mentioned, it is not disputed for a fact that there has been non-compliance with the provisions of Section 207 of the Code. For a fact, therefore, there is no cavil that the statements recorded by the Police during investigation under Section 161 of the Code have not been provided to the applicant, an accused at the trial. The provisions of Section 207 of the Code read:

"207. Supply to the accused of copy of police report and other documents.—In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:—

(i) the police report;

(ii) the first information report recorded under Section 154;

(iii) the statements recorded under sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of Section 173;

(iv) the confessions and statements, if any, recorded under Section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such

portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

24. From a conjoint reading of the provisions of Sections 207, 173 and 172 of the Code and the way these have been interpreted by high authority, it is evident that the accused has a right to receive all statements recorded under Section 161(3) of the Code by the Investigating Officer, except those regarding which there is a note made by the Police, requesting the Magistrate to exclude from the copies to be granted to the accused, stating his reasons founded on interest of justice or public interest, or still more, their non-relevance to the subject matter. Here, there is no case about any statement recorded under Section 161(3) being requested by the Police to be excluded from the copies granted to the accused in compliance with the provisions of Section 207 of the Code. As the Authorities already considered hold, there is a seminal distinction between those entries made in the case diary by the Investigating Officer that are based on his own observations on one hand, and the statements of witnesses recorded during investigation under Section 161 of the Code, on the other. The prohibition upon the accused or his agents calling for such diaries have been held by the Supreme Court to apply to that part of the diary, where the Investigating Officer may have recorded his own observations, impressions or the gist of investigation. It does not apply to the statements of witnesses that are reduced to writing, under Section 161(3) of the Code, during investigation. This distinction has been elucidated by their Lordships in **Shamshul Kanwar** and followed in **Ravi**

Kant Sharma. In **Shamshul Kanwar**, their Lordships spoke of two parts of the case diary, with the first relating to steps taken during the course of investigation, and, the second, carrying statements of witnesses examined during investigation that bear reference to statements reduced to writing under Section 161(3) of the Code.

25. It may also be noticed that these two distinct parts of the case diary, one relating to statements reduced to writing under Section 161(3) of the Code, and the other, relating to the facts and observations of the Investigating Officer, were found to be differently provided for in different States of the country. In fact, the employment of the expression 'diary' in Section 172 of the Code was opined to have sum vagueness or confusion about it in **Shamshul Kanwar**. The remarks of their Lordships in the said decision carry a suggestion about some legislative change by framing appropriate uniform regulation relating to maintenance of these diaries contemplated under Section 172 of the Code. It would be apposite to note that Section 172 of the Code, since the decisions in **Shamshul Kanwar**, **Ravi Kant Sharma** and **Babu** as well, on a slightly different aspect, has undergone amendment *vide* Act No.5 of 2009 w.e.f. 13.12.2009. Sub-Sections (1-A) and (1-B) of Section 172 of the Code have been added and the amended provisions read :

"172. Diary of proceedings in investigation.-(1)
x x x x

(1-A) The statements of witnesses recorded during the course of investigation under Section 161 shall be inserted in the case diary.

(1-B) The diary referred to in sub-section (1) shall be a volume and duly paginated."

26. It would be noticed that sub-Section (1-A) provides that statement(s) of witness(es) recorded during the course of

investigation under Section 161 of the Code shall be inserted in the case diary. This legislative change perhaps takes note of the 'diary' under Section 172 of the Code being in two parts, as observed by the Supreme Court - one relating to steps taken by the Investigating Officer during investigation, which may also carry his own notes and impressions, and the other, carrying statements of persons acquainted with the facts of the case, recorded during investigation under Section 161(3) of the Code. There is, thus, a statutory acknowledgement of the statements of witnesses existing as a separate part of the diary. The prohibition carried in sub-Section (3) of Section 172 of the Code, which does not permit the accused or his agent to call for the case diary, in the considered opinion of this Court, would have no bearing upon the right of the accused to receive copies of statements recorded under Section 161, which he enjoys as a right under Section 207 of the Code. The only limitation on that right is the one mentioned in Section 207(3) read with Section 173(6) of the Code. The prohibition in sub-Section (3) of Section 172 of the Code relates to parts of the case diary that record other matters, other than statements under Section 163(3).

27. Likewise, the applicant would also have a right to receive all other documents mentioned under Section 207 of the Code, even if these were included in the case diary or the diary as postulated in Section 172 of the Code. If the submissions of Mr. Srivastava were accepted, it would lead to an abnegation of the accused's right under Section 207 of the Code. The expression 'diary' postulated in Section 172 and to which part of the 'diary' or the case diary, the embargo on the right of the accused to call for it would attach, can harmoniously be construed with the right of the accused under Section 207 of the Code to receive

statements recorded under Section 161(3) by confining the restriction envisaged under sub-Section (3) of Section 172 to that part of the case diary, which contain other details of investigation, other than statements recoded under Section 161 of the Code. This, otherwise too, is the clear legislative intent, which, in this Court's opinion, has been made more explicit with the introduction of sub-Section (1-A) in Section 172 of the Code.

28. The principle in **Balakram** harped upon much by Mr. Srivastava does, in no way, detract from the view that this Court takes. In that case, the question about the right of the accused to receive statements under Section 161 of the Code never arose. Rather, the issue in **Balakram** arose out of refusal of an application by the Trial Court to accept on record some pages of the case diary secured by the accused under the Right to Information Act, 2005 at a stage when the prosecution testimony was being heard. The complainant opposed it saying that the documents that were sought to be produced by the accused could be done at the stage when he led defence evidence. It was in this context that the sacrosanctity of the case diary under Section 172 of the Code was pronounced upon by their Lordships of the Supreme Court, noting that the accused had no right to call for the diary. It could be done for a very limited purpose in the two contingencies envisaged under sub-Section (3) of Section 172 of the Code, and that too, for the limited purpose envisaged under Section 161 or 145 of the Act of 1872. The principle in **Balakram**, therefore, has no bearing on the issue that is involved here.

29. In this conspectus of the law and the state of proceedings in the trial, this Court is of opinion that it was imperative for the

learned Sessions Judge to have disposed of the applicant's application dated 21.11.2022 before closing the prosecution evidence. The applicant is entitled to copies of the statements recorded under Section 161, so that he has the liberty of cross-examining the prosecution witnesses in the exercise of his right, and, in the manner specified, under Section 145 and 161 of the Act of 1872. The impugned order closing the prosecution evidence without provision of copies of the statements under Section 161, forecloses the applicant's valuable rights under Sections 145 and 161 of the Act of 1872, that may prejudice him seriously in his defence.

30. For the said reasons, the impugned order cannot be sustained and the Trial Judge deserves to be appropriately directed in the matter in order to secure the ends of justice.

31. Before parting with the matter, this Court places on record our appreciation for the very fair and able assistance rendered in this case by Mr. D.K. Srivastava, learned Additional Government Advocate.

32. In this result, this application **succeeds** and shall stand **allowed**. The impugned order dated 16.03.2023 is hereby **quashed**. Before proceeding further in the matter, the learned Trial Judge shall decide the applicant's application dated 21.11.2022 within the period of 15 days of receipt of a copy of this order, after hearing learned Counsel for parties and bearing in mind the guidance in this judgment. If the applicant is found entitled to provision of copies of the statements under Section 161 of the Code, which he has not yet been furnished and seeks to cross-examine any of the prosecution witness(es), the witness(es) concerned, shall be recalled for the purpose and

opportunity to cross-examine given. The trial shall be expedited and concluded early.

Order Date :- November 28, 2023
Anoop/ Deepak

(J.J. Munir, J.)