

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 1638 OF 2016**

Sanjeev Khanna @ Sanju	...	Petitioner
vs.		
Central Bureau of Investigation (Special Crime-1/CBI/New Delhi) & Anr....		Respondents

Mr. Hrishikesh Mundargi a/w Mr. Subir Sankan i/b. S.R.Mithare, Advocate
for the petitioner.
Ms. P.H.Kantharia for CBI.
Mr. A.R.Patil, APP, for the State.
Mr. K.K.Singh, Deputy S.P. CBI/LSL-I New Delhi present.

CORAM: SMT. SADHANA S.JADHAV, J.
DATE : 30th June, 2016.

P.C.

Heard. Rule. Rule made returnable forthwith with the consent of the parties.

2. The petitioner herein happens to be an accused in CBI Special Case No.117 of 2015.

3. Perused the affidavit in reply filed by respondent No.1. The petitioner herein was arrested in Crime No.406 of 2015 registered at Khar Police Station on 25.8.2015. The present petitioner was arrested on

26.8.2015. That the petitioner is being tried for the offences punishable under Sections 120B, 364, 328, 302, 201, 202, 203 of Indian Penal Code and Section 3 read with Section 25 of the Indian Arms Act as well as Sections 420, 468 and 471 of Indian Penal Code. The investigation was completed and charge-sheet was filed on 19.11.2015. A copy of the said charge-sheet was given to the accused.

4. It is pertinent to note that a statement under Section 164 of Cr.P.C. of the co-accused was recorded on 6.11.2015. It is further pertinent to note that despite the fact that the confessional statement of the co-accused was recorded on 6.11.2015, copy of the same was not given either to the petitioner or to the co-accused, although charge-sheet was filed on 19.11.2015.

5. The learned counsel for respondent No.1 submits that the investigating agency had no knowledge of the contents of the statement recorded under Section 164 of Cr.P.C. That was in a sealed envelope and did not find place in the compilation of the charge-sheet and hence was not marked in the Index as well. It is specifically contended that the sealed envelope containing statement under Section 164 of Cr.P.C. was given to

the Court directly by the investigating agency. Section 207 of Cr.P.C. contemplates as follows :-

“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.”

6. It is further pertinent to note that the accused-petitioner had filed an application under Section 439 of Cr.P.C. on 13.1.2016. It is informed to the Court that the said application is still pending. It is further clarified that the sealed envelope containing the confessional statement of the co-accused was given to the Special Court on the date of committal i.e. on 20.11.2015.

7. The procedure adopted by the investigating agency cannot be justified in any manner. It is further pertinent to note that the learned Magistrate had granted permission under Section 173(8) of Cr.P.C. and further investigation was carried out pursuant to the said permission. That the supplementary charge-sheet was filed on 16.2.2016. The envelope containing confessional statement, also did not form a part of the supplementary charge-sheet. In fact, there is no reason for the investigating

agency or the Court seized with the matter to withhold the statement under Section 164 of Cr.P.C. as the prosecution would be relying upon the said statement which is recorded on oath at the time of trial. Every accused would have a right to be apprised of every material on the basis of which he is to face serious charges like Sections 120B, 364, 328, 302, 201, 202, 203 of Indian Penal Code and Section 3 read with Section 25 of the Indian Arms Act as well as Sections 420, 468 and 471 of Indian Penal Code. A statutory right is accrued upon the accused to have material on the basis of which he is to be prosecuted. In fact, it is the prosecution of an accused and not persecution of an accused person and, therefore the Legislature has mandated by virtue of Section 207(iv) that the Court 'shall' give a copy of the confessions and statements, if any, recorded under Section 164 of Cr.P.C.

8. The learned counsel for respondent No.1 also submits, upon instructions, that the investigating agency does not wish to withhold the said statement, but it would be given at a proper stage. Upon a query made by this Court, the learned counsel, upon instructions, submits that the statement would be given to the accused at the time of commencement of the trial i.e. at the stage of framing of charge.

9. At the stage of framing of charge, the accused is called upon to admit or deny the charges levelled against him. It is a statutory right. In fact, Sections 226 and 227 of Cr.P.C. contemplates as follows :

“226. Opening case for prosecution-When the Accused appears or is brought before the Court in pursuance of a commitment of the case under section 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused.”

“227. Discharge. If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing”.

10. In the given circumstances, the evidence in the form of a confessional statement of a co-accused which can be used under Section 30 of the Indian Evidence Act, is a vital piece of evidence. An indefeasible right is accrued upon the accused to receive the copies of statements/confessions recorded under Section 164 of Cr.P.C. The co-

accused had prayed for a copy of the said confessional statement and the same was denied to him by the Special Judge, CBI, vide order dated 15.4.2016 and hence this Writ Petition.

11. Surprisingly, the learned Special Court has observed:“Further presently the prosecution is also not relying upon (aforesaid) statement recorded under Section 164 of Cr.P.C.” In fact, the prosecution has not opened the case. The prosecution would not be able to open the case without placing all the material before the Court. Therefore, it would not be proper for the learned Special Judge to observe that the prosecution is not relying upon the said statement and it is in these circumstances and for the reasons stated above, the Writ Petition deserves to be allowed.

ORDER

- (i) Writ Petition is allowed.
- (ii) The order dated 15.4.2016 passed by the Special Judge (CBI)/Addl. Sessions Judge, Gr.Bombay is set aside.
- (iii) The learned Sessions Judge is hereby directed to give a copy of the statement of the co-accused recorded under Section 164 of Cr.P.C. on 6.11.2015 to all the accused persons. It shall be made a part of the charge-

sheet filed by the investigating agency. The learned Special Judge is hereby directed to give the copy immediately on receipt of this order.

12. Copy of the affidavit is taken on record and marked “X” for the purpose of identification.

13. Rule is made absolute. Writ Petition stands disposed of.

(SMT.SADHANA S.JADHAV, J.)