

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

% Decided on: 23rd September, 2016

+ **CRL.REV.P. 351/2016 & CrI.M.A. 7747/2016**

DINESH PURI

..... Petitioner

Represented by: Ms. Kumud L. Das with Mr.
Kulbhushan Mehta and Mr.
Brijender Singh, Advs.

versus

STATE (GOVT OF NCT OF DELHI)

..... Respondent

Represented by: Mr. Hirein Sharma, APP with
SI Yogesh Raj, PS Prashant
Vihar.
Ms. Srishti Agnihotri, Adv. for
R-2.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. The petitioner was summoned as an accused pursuant to charge sheet filed in case FIR No. 1138/2015 and vide order dated 22nd March, 2016 charge for offences punishable under Sections 354A/354D IPC and Sections 10 and 12 Protection of Children from Sexual Offences (POCSO) Act was framed against him.

2. The grievance of the petitioner is two folds. Firstly, that he filed an application under Section 207 Cr.P.C. however without deciding the said application, the learned Trial Court framed charge as noted above vide order dated 22nd March, 2016 and secondly, vide order dated 11th April, 2016

dismissed the said application granting him liberty to summon the relevant record in his defence at appropriate stage under Section 91 Cr.P.C. The petitioner who is an accused in the above noted FIR relies on the part of charge sheet which notes “During investigation all relevant documents pertaining to internal enquiry conducted in school against accused Dinesh Puri was obtained and annexed with file”.

3. The contention of learned counsel for the petitioner is that once relevant documents relating to the internal enquiry in relation to allegations of sexual harassment conducted by the school were collected by the investigating officer, the petitioner ought to have been provided copies thereof under Section 207 Cr.P.C. and having denied to give those documents the learned Trial Court could not have proceeded to frame the charge as noted above vide order dated 22nd March, 2015 and later dismissed the said application stating that since the documents were not placed with the charge sheet by the investigating officer, the petitioner was not entitled to copy thereof under Section 207 Cr.P.C.

4. During the course of investigation, relevant documents pertaining to internal enquiry conducted by the school against the petitioner were obtained and annexed with the file i.e. police file, however, the same were not filed as part of charge sheet.

5. Section 173(5) Cr.P.C. provides as under:-

“173. Report of police officer on completion of investigation.-

(1) to (4) xx xx xx xx xx

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report –

- (a) *all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;*
- (b) *the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses.”*

6. Further Section 207 Cr.P.C. provides as under-

“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.”

7. As per Section 207 Cr.P.C. upon filing a charge sheet and summoning the accused, the Court is mandatorily required to provide to the accused free of cost copy of the FIR, police report, statements recorded under sub-section (3) of Section 161 of all the persons whom the prosecution proposes to examine as its witnesses, confessions and statements recorded under Section 164 Cr.P.C. and any other documents or relevant extract thereof forwarded to the Magistrate with the police report under sub-Section (5) of Section 173 Cr.P.C. It is thus evident that under Section 207 Cr.P.C. the accused is only entitled to documents which form the part of charge sheet and are relied upon by the investigating agency to prosecute the accused. Since the report of internal enquiry conducted by the school though collected during investigation was not part of the charge sheet, the accused cannot claim the same under Section 207 Cr.P.C. and thus the learned Trial Court rightly rejected the prayer of the petitioner for grant of the report as a deficient document on an application under Section 207 Cr.P.C. vide order dated 11th April, 2016. Thus the challenge of the petitioner to the orders dated 22nd March, 2016 and 11th August, 2016 on the ground that document relied upon by the prosecution was not supplied and hence there was failure of justice deserves to be rejected as the documents sought for i.e. the report of internal enquiry could not be considered at the stage of framing of charge.

8. Supreme Court noting the ambit of Sections 173 and 207 Cr.P.C. and emphasizing on the need of fair trial to the accused entitling him to obtain documents in the decision reported as (2010) 6 SCC 1 Manu Sharma Vs. State (NCT of Delhi) held-

“203. It is pertinent to note here that one of the established canons of just, fair and transparent investigation is the right of defence of an accused. An accused may be entitled to ask for certain documents during the course of enquiry/trial by the court. Let us examine the extent of this right of an accused in light of the statutory provisions and the manner in which the law has developed under the criminal jurisprudence. To understand this concept in its right perspective we must notice the scheme under the provisions of Sections 170 to 173 of the Criminal Procedure Code. All these provisions fall under Chapter XII of the Code which deals with information to the police and their powers to investigate.

204. The power of the police to investigate freely and fairly is well recognised and codified in law. In terms of Section 170, the investigating officer when satisfied that sufficient evidence or reasonable grounds exist he shall forward the accused under custody to a Magistrate along with such weapons or articles which may be necessary to be produced before the court. Section 172 of the Code has a meaningful bearing on the entire investigation by a police officer. It is mandatory for him to maintain a diary under this chapter where he shall enter the day-by-day proceedings in the investigation carried out by him. He is expected to mention time of events and his departure, reporting back and closing of the investigation, the place/places he visited and the statements he recorded during investigation. The statement of the witness is recorded during the investigation under Section 161 shall be inserted in that diary.

205. A criminal court is empowered under Section 172(2) to send for the diaries and they could be used by the court but not as evidence in the case but to aid it in such inquiry or trial. However, sub-section (3) of the same section provides that neither the accused nor his agents shall be entitled to call for such diaries, nor they are entitled to see them but it is only where the police officer who makes them to refresh his memory or the court uses them for the purposes of contradicting such police officers in terms of Section 172 then Section 161 or Section 145 provisions of the Evidence Act would apply.

206. Section 173 commands the investigating agency to complete the investigation expeditiously without unnecessary delay and when such an investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of offence on a police report the details in the form as may be prescribed by the State Government and provide the information required under this section.

207. The provisions of Section 173(5) contemplate and make it obligatory upon the investigating officer where the provisions of Section 170 apply to forward to the Magistrate along with his report, all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation in terms of Section 170(2) of the Code. During investigation the statement recorded under Section 161 of all the persons whom the prosecution proposes to examine as witnesses shall also be sent to the Magistrate. Some element of discretion is vested with the police officer under Section 173(6): where he is of the opinion that any such statement is not relevant to the subject-matter of the proceedings or its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement requesting a Magistrate (sic to exclude) that part from the copies to be granted to the accused and stating his reason for making such a request. Sub-section (7) of the same section is indicative of another discretion given to the police officer under law that where he finds it convenient, he may furnish the copy of documents referred to in sub-section (5) of the section.

216. Under Section 170, the documents during investigation are required to be forwarded to the Magistrate, while in terms of Section 173(5) all documents or relevant extracts and the statement recorded under Section 161 have to be forwarded to the Magistrate. The investigating officer is entitled to collect all the material, which in his wisdom is required for proving the guilt of the offender. He can record statement in terms of Section 161 and his power to investigate the matter is a very wide one, which is regulated by the provisions of the Code. The statement recorded

under Section 161 is not evidence per se under Section 162 of the Code. The right of the accused to receive the documents/statements submitted before the court is absolute and it must be adhered to by the prosecution and the court must ensure supply of documents/statements to the accused in accordance with law. Under the proviso to Section 162(1) the accused has a statutory right of confronting the witnesses with the statements recorded under Section 161 of the Code thus indivisible.

219. The role and obligation of the Prosecutor particularly in relation to disclosure cannot be equated under our law to that prevalent under the English system as aforesaid. But at the same time, the demand for a fair trial cannot be ignored. It may be of different consequences where a document which has been obtained suspiciously, fraudulently or by causing undue advantage to the accused during investigation such document could be denied in the discretion of the Prosecutor to the accused whether the prosecution relies or not upon such documents, however in other cases the obligation to disclose would be more certain. As already noticed the provisions of Section 207 have a material bearing on this subject and make an interesting reading. This provision not only require or mandate that the court without delay and free of cost should furnish to the accused copies of the police report, first information report, statements, confessional statements of the persons recorded under Section 161 whom the prosecution wishes to examine as witnesses, of course, excluding any part of a statement or document as contemplated under Section 173(6) of the Code, any other document or relevant extract thereof which has been submitted to the Magistrate by the police under sub-section (5) of Section 173. In contradistinction to the provisions of Section 173, where the legislature has used the expression "documents on which the prosecution relies" are not used under Section 207 of the Code. Therefore, the provisions of Section 207 of the Code will have to be given liberal and relevant meaning so as to achieve its object. Not only this, the documents submitted to the Magistrate along with the report under Section 173(5) would deem to include the documents which have to be sent to the Magistrate during the course of investigation as per the requirement of Section 170(2) of the Code.

220. The right of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report under Section 173(2) as per orders of the court. But certain rights of the accused flow both from the codified law as well as from equitable concepts of the constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the court under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely.”

9. In the decision reported as (2012) 9 SCC 771 V.K. Sasikala Vs. State the Supreme Court held-

13. Without dilating on the said aspect of the matter what has to be taken note of now are the provisions of the Code that deal with a situation/stage after completion of the investigation of a case. In this regard the provisions of Section 173(5) may be specifically noted. The said provision makes it incumbent on the investigating agency to forward/transmit to the court concerned all documents/statements, etc. on which the prosecution proposes to rely in the course of the trial. Section 173(5), however, is subject to the provisions of Section 173(6) which confers a power on the investigating officer to request the court concerned to exclude any part of the statement or documents forwarded under Section 173(5) from the copies to be granted to the accused.

14. The court having jurisdiction to deal with the matter, on receipt of the report and the accompanying documents under Section 173, is next required to decide as to whether cognizance of the offence alleged is to be taken in which event summons for the appearance of the accused before the court is to be issued. On such appearance, under Section 207 CrPC, the court concerned is

required to furnish to the accused copies of the following documents:

- 1. The police report;*
- 2. The first information report recorded under Section 154;*
- 3. 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;*
- 4. The confessions and statements, if any, recorded under Section 164;*
- 5. Any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173.”*

10. In the decision reported as (2013) 9 SCC 276 Manjeet Singh Khera Vs. State of Maharashtra the Supreme Court noting its earlier decision in V.K. Sasikala (supra) did not answer specifically as to whether the prosecution should supply those documents which are not forwarded with the charge sheet when the accused person demands them as the said issue did not arise and held –

“8. The Court also noticed that seizure of large number of documents in the course of investigation of a criminal case is a common feature. After completion of the process of investigation and before submission of the report to the court under Section 173 CrPC, a fair amount of application of mind on the part of the investigating agency is inbuilt in the process. These documents would fall in two categories: one, which supports the prosecution case and other which supports the accused. At this stage, duty is cast on the investigating officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. However, many times it so happens that the investigating officer ignores the part of seized documents which favour the accused and forwards to the court only those

documents which support the prosecution. If such a situation is pointed out by the accused and those documents which were supporting the accused and have not been forwarded and are not on the record of the court, whether the prosecution would have to supply those documents when the accused person demands them? The Court did not answer this question specifically stating that the said question did not arise in the said case. In that case, the documents were forwarded to the court under Section 173(5) CrPC but were not relied upon by the prosecution and the accused wanted copies/inspection of those documents. This Court held that it was incumbent upon the trial court to supply the copies of these documents to the accused as that entitlement was a facet of just, fair and transparent investigation/trial and constituted an inalienable attribute of the process of a fair trial which Article 21 of the Constitution guarantees to every accused. We would like to reproduce the following portion of the said judgment discussing this aspect: (V.K. Sasikala case [V.K. Sasikala v. State, (2012) 9 SCC 771 : (2013) 1 SCC (Cri) 1010] , SCC p. 788, para 21)

“21. The issue that has emerged before us is, therefore, somewhat larger than what has been projected by the State and what has been dealt with by the High Court. The question arising would no longer be one of compliance or non-compliance with the provisions of Section 207 CrPC and would travel beyond the confines of the strict language of the provisions of CrPC and touch upon the larger doctrine of a free and fair trial that has been painstakingly built up by the courts on a purposive interpretation of Article 21 of the Constitution. It is not the stage of making of the request; the efflux of time that has occurred or the prior conduct of the accused that is material. What is of significance is if in a given situation the accused comes to the court contending that some papers forwarded to the court by the investigating agency have not been exhibited by the prosecution as the same favours the accused the court must concede a right to the accused to have an access to the said documents, if so claimed. This, according to us, is the core issue in the case which must be answered affirmatively. In this regard, we would like to be specific in saying that we find it difficult to

agree with the view taken by the High Court that the accused must be made to await the conclusion of the trial to test the plea of prejudice that he may have raised. Such a plea must be answered at the earliest and certainly before the conclusion of the trial, even though it may be raised by the accused belatedly. This is how the scales of justice in our criminal jurisprudence have to be balanced.”

11. In the present case the issue that arises is whether the accused is entitled to receive a document collected during the course of investigation but not relied upon by the investigating agency and not forming the part of the documents with the chargesheet.

12. Fair trial is a *sine qua non* for proper administration of justice and thus documents which favour the accused though collected but on the volition of the investigating agency not relied upon, are required to be given to the accused though not under Section 207 Cr.P.C. but under Section 91, 233 and 243 Cr.P.C. The accused is entitled to receive these documents not only at the time of leading defence evidence but also while confronting prosecution witnesses. As noted above, in the present case though the report of internal enquiry was collected during the course of investigation but not filed with the charge sheet thus, the same cannot be given under Section 207 Cr.P.C. however the petitioner is entitled to the said document under Sections 91, 233 and 243 Cr.P.C. Sections 233 and 243 Cr.P.C. provide that the Court shall issue process compelling attendance of a witness or production of any document or thing unless the Court finds that the application has been made for the purpose of vexation or delay or for defeating the ends of justice. Though the power under Sections 233 and 243 Cr.P.C. can be exercised only when the accused enters his defence, however no such limitation is

prescribed under Section 91 Cr.P.C. which mandates the Court to direct production of any document or thing necessary or desirable for the purposes of investigation, inquiry, trial or other proceedings under the Code.

13. Dealing with the scope of Section 91 Cr.P.C. the Supreme Court in its decision reported as AIR 2000 sc 2335 Om Prakash Sharma Vs Central Bureau of Investigation, Delhi held that the language of the Section itself indicates the width of the powers to be unlimited but the in-built limitation inherent therein takes its colour and shape from the stage or point of time of its exercise, commensurately with the nature of proceedings as also the compulsions of necessity and desirability, to fulfill the task or achieve the object. The Court further noted that at the stage of framing of charge, the accused could produce any reliable material which might totally affect even the very sustainability of the case, a refusal to even look into the materials so produced may result in injustice, apart from averting an exercise in futility at the expenses of valuable judicial/public time. The three Judge Bench of the Supreme Court in the decision reported as (2005) 1 SCC 568 State of Orissa Vs. Debendra Nath Padhi though agreed with the scope and ambit of Section 91 of Cr.P.C. as envisaged in Om Prakash Sharma (supra) however disagreed that the accused had a right to produce any material at the stage of framing of charge. Reiterating the law laid down under Section 91 Cr.P.C. the Supreme Court in Debendra Nath Padhi (supra) held-

“24. On behalf of the accused a contention about production of documents relying upon Section 91 of the Code has also been made. Section 91 of the Code reads as under:

“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, inquiry, 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)-(3)

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25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is “necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code”. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227, what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by court and under a written order an officer in charge of a police station can also direct production thereof. Section 91 does not

confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof.

14. The issue whether a document of impeccable character can be produced by the accused at the stage of framing of charge was later considered by the Supreme Court in the decision reported as (2008) 14 SCC 1 Rukmini Narvekar Vs. Vijaya Satardekar & Ors. wherein the Court held that while it is true that ordinarily defence material cannot be looked into by the Court while framing of the charge in view of Debendra Nath Padhi's case, there may be some very rare and exceptional cases where some defence material when shown to the trial court would convincingly demonstrate that the prosecution version was totally absurd or preposterous, and in such very rare cases the defence material can be looked into by the court at the time of framing of the charges or taking cognizance. It was held that it cannot be said to be an absolute proposition that under no circumstances can the court look into the material produced by the defence at the stage of framing of the charge, though this should be done in very rare cases i.e. where the defence produces some material which convincingly demonstrates that the whole prosecution case is totally absurd or totally concocted.

15. Thus the law on Section 91 Cr.P.C. is clear that the Court or officer in charge of a police station shall exercise the power to ensure production of any document or other things “necessary or desirable” for the purpose of any investigation, inquiry, trial or other proceedings under the Code. Further the necessity and desirability of production of the document has to be seen also keeping in mind the stage at which the power is required to be exercised.

However, it would be contrary to the frame work of Cr.P.C. and Indian Evidence Act that a document which favours the accused is only required to be produced at the stage when he leads defence evidence. It is trite law that the accused can probabalize his defence even by cross-examining the witnesses by confronting them with documents which impeach their creditworthiness. Thus, in all cases it cannot be held that a document which is in favour of the accused will be supplied only at the stage of defence evidence. If the nature of the document is such that the accused can confront the prosecution witnesses/complainant witnesses with the said document, he would be within his right to claim those documents under Section 91 Cr.P.C. even when prosecution evidence is being led for a fair and just trial as mandated by Article 21 of the Constitution of India.

16. In the present case, the petitioner seeks document which is a report of internal enquiry wherein statement of witnesses were recorded. The petitioner would have a right to cross-examine the witnesses by confronting them with their previous statements so recorded. Thus, the limitation imposed by the learned Trial Court by order dated 11th April, 2016 that the documents sought by the petitioner can only be obtained at the stage of defence is incorrect as the said documents can also be used for confronting the prosecution witnesses in case the same include previous statements of the witnesses to be examined. Thus finding no error in the order dated 22nd March, 2016 framing charge for offences punishable under Sections 354A/354D IPC and 10/12 POCSO Act and the order dated 11th April, 2016 rejecting the application of the petitioner filed under Section 207 Cr.P.C., it is directed that if an application under Section 91 Cr.P.C. is filed considering the necessity and desirability of the documents and the stage of trial which

could also include confronting the witnesses with their earlier statement, the Court will allow the same by directing production of the said documents to the petitioner.

17. With these directions, the petition and application are disposed of.

(MUKTA GUPTA)
JUDGE

SEPTEMBER 23, 2016
‘v mittal’