

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRR No. 410 of 2017**

- Aakesh Kumar Sinha S/o Netra Kumar Sinha Aged About 40 Years R/o Bundeli, Police Station- Tendukona, Mahasamund, District Mahasamund, Chhattisgarh.

----Applicant**Versus**

- State of Chhattisgarh Through Station House Officer, Police Station- Tendukona, Mahasamund, District Mahasamund, Chhattisgarh.

---- Respondent

For Applicant	:	Ms. Fouzia Mirza, Advocate
For Respondent-State	:	Shri Suryakant Mishra, PL for the State

Hon'ble Shri Justice Goutam Bhaduri**C A V Order****(Reserved on 26.07.2017)****(Delivered on 21.08.2017)**

1. The instant revision is against the order dated 15.03.2017, passed by the Additional Sessions Judge (FTC), Mahasamund, whereby an application filed by the applicant under Section 91 of the Cr.P.C. to call for the statement of the father of the prosecutrix and other statement of police officers, which was not part of the charge-sheet, was dismissed.

2. As per the case of the prosecution, on an FIR lodged on 20.08.2016 for an incident happened on 07.08.2016 an offence was registered against the applicant and others under Section 376 (d) read with Section 34 of the IPC. After the case was committed to the Sessions Judge, charge was framed and the

trial proceeded. During the course of trial, the evidence of the investigating officer namely Shashikala Uikey (PW-19) was recorded. In her cross-examination she had stated that during the investigation she has recorded statement of few of police officers and father of the prosecutrix namely Johan Das, but the same was not filed along with the charge-sheet. Therefore, an application was filed under Section 91 of the Cr.P.C. by the accused to call for the same. Learned Court below rejected the said application by holding that under Section 173 sub-section 6 of the Cr.P.C., since the said statement was not relevant to the subject matter of the proceedings as such cannot be called for. Against the said order the present revision is filed.

3. Learned counsel for the applicant would submit that during cross-examination it was revealed in the statement of the Investigating Officer at para 30 & 36 that during the investigation the statement of the few of the police officers and that of father of the prosecutrix Johan Das were recorded but the same is not enclosed and that would be necessary to support the defence of the applicant. Therefore, it was prayed that those should have been ordered for production before the Court. Learned counsel referred to the case law cited in 1997 (2) MPLJ 220 and would submit that the document if it supports the accused cannot be withheld and the accused should have access to the same. It was contended that for these reasons the order dated 15.03.2017 be set aside and the application under Section 91 of the Cr.P.C. which was filed by the accused be allowed.

4. Learned State counsel opposes the same and would submit

that the documents so required were not relevant to the facts as such they are not required to be produced before the Court. He would further submit that the order passed by the court below is well merited which do not call for any interference.

5. Perused the statement of the Investigating Officer Shashikala Uikey, she appears to have been examined as PW-19. At para 30 of her cross-examination it is stated that during investigation she had gone to Bundeli Police Station and has recorded statements of police personnels. Further at para 36 she had stated that during investigation statement of Johan Das S/o Bala Das was recorded, however, the said statement is not part of the charge-sheet, but are the part of the case-diary. She has further stated that according to her wisdom, the statement of Johan Das was not relevant as such she has not enclosed the same and has also stated that during investigation Johan Das has stated that the prosecutrix has not disclosed anything with respect to the incident. The case-diary would show that during investigation statement of few of the police officers of police station Bundeli as also the statement of the father of the victim Johan Das were recorded. Prima facie it appears that the said statements are not part of the charge-sheet which was filed before the Court and primary inference would show either they support the accused or do not disclose anything about the incident.

6. In the background of the facts of the present case Sections 91 & 173 of the Cr.P.C. would be relevant, which are quoted herein below:-

Section 91 of Cr.P.C.

“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) 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.

Section 173 of Cr.P.C.

173. Report of police officer on completion of investigation.-(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(1A) xxx xxx xxx

(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170.

(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under section 376, 376A, 376B, 376C.

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation,

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(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) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that 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 and append a note requesting the Magistrate to exclude that part from the copies to

be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub- section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub- section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub- sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2).

7. In the facts of a case when the enquiry was made by the Police and the witnesses did not speak against the commission of crime and however any other contradictory statements if were made which clamps no allegations on accused then in order to find out the truth, the accused shall be entitled to confront those statements to the witnesses. In a case law reported in 2001 (2) CGLJ 216 – Santosh Vs. State of Chhattisgarh the similar proposition had come up for consideration wherein this Court has observed as under:

“14. In the matter of *State of Kerala Vs. Babu (1999) Vol.4 SCC 621*, a prayer was made by the accused that in some other case during the course of the investigation a witness had made a particular statement and as his statement was running contrary to the statement on the basis of which the applicant accused was facing trial, such statement recorded during the course of another investigation can be requisitioned. The Supreme Court observed in the said matter that any previous statement recorded during the course of any enquiry, investigation or trial would be termed as a previous statement, and can always be used for contradicting the witness or to prove the omissions amounting to contradictions. The Supreme

Court observed that on a reading of section 162 of the Code and 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 (emphasis supplied) including the statement 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 Supreme Court further observed that in a case where the statements are before the Court then there would be no difficulty because an accused is entitled under Section 207 of the Code for the supply of free copies of documents referred in the said section which includes the previous statement recorded sub-section (3) of Section 161 of the code, but 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 statement recorded by the investigating agency under Section 161 in a case other than the one that is being tried by the Court.

15. If the accused has a right to summon the statements recorded during the course of another investigation then in a case like present he would not stand on a worse footing. The accused is certainly entitled to make a submission to the Court that each and every previous statement of the witness must be filed along with the charge sheet irrespective of the fact that such statements support or do not support the prosecution allegations.”

8. If the power is given to the prosecution agency to file documents to their choice to which they placed reliance, it would give an authority to the police or prosecution agency to mend the facts and law to their own wish by concealment. Then if such practice is encouraged in a given case, the prosecution may suppress important relevant documents and may not allow to surface the facts which support the accused. The investigating agency or the prosecution agency which are part and parcel of the State are not the decision maker and the accused is a person who is charged with the offence is held to be innocent till the guilt is proved which is to be adjudged by the Court. The State

agencies are under bounden duty to place documents which are in their possession and submit the same in compliance of section 173 Cr.P.C., It is for the Court to adjudicate after taking into consideration the cases.

9. More over, the investigating agency and the prosecution both are part and parcel of the State and the action of the State is legally required to be fair, just and reasonable. If the State withholds any material fact or evidence which accrues in favour the accused, such withholding cannot be fair and would be in violation of Article 14 of the Constitution. More so a procedure which permits the with-holding of evidence which is in favour of accused cannot be termed as fair and reasonable and such procedure would be in violation of Article 21 of the Constitution of India. Withholding any evidence without any justification would amount to shelving of facts away from the Court. The prosecution, therefore, is required to place the whole truth before the Court and it cannot be allowed to keep the things in dark before the Court. Above all, the Court is also duty bound to discover the truth of case. The courts are empowered to discover the truth. In case the court is of the opinion that the application u/s 91 of the Code is genuine and has not been moved with such motive, then the Court must exercise its jurisdiction and direct the production of document including the case diary. The Criminal Court should keep in mind that justice should not only be done, but must appear to be done.

10. 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. During the investigation the statement recorded u/s 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 interest of justice and is inexpedient in the public interest, he shall indicate that part of the statement requesting a Magistrate that part from the copies to exclude to grant 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.

11. The Supreme Court in ***Manu Sharma Vs. State (NCT of Delhi)* (2010) 6 SCC 1** has held in paras 217 & 220 thus :

“217. Further section 91 empowers the court to summon production of any document or thing which the court considers necessary or desirable for the purposes of any investigation, inquiry, trial or another proceeding under the provisions of the Code. Where Section 91 read with Section 243 says that if the accused is called upon to enter his defence and produce his evidence there he has also been given the right to apply to the court for issuance of process for compelling the attendance of any witness for the purpose of examination, cross examination or the production of any document or other thing for which the court has to pass a

reasoned order.

220. The right of the accused with regard to disclosure of document 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.”

12. Applying the aforesaid principle when it has come to fore certain statements were recorded though they might have not supported the case of the prosecution but if finds support to the defense, the same cannot be withhold. Neither it was informed to the Magistrate as to why such documents are required to be excluded nor any reason has been assigned, therefore, in view of the aforesaid principles laid down, the statements recorded during the investigation cannot be withhold. Accordingly, in the facts of the case the application under Section 91 of the Cr.P.C. deserves to be allowed. In the result, the order dated 15.03.2017 is set aside, the application under Section 91 Cr.P.C. filed by the accused/applicant is allowed. The trial Court shall proceed accordingly in further adjudication of the trial.

Sd/-
Goutam Bhaduri
Judge