

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO. 4400 OF 2017

Pratim @ Peter Mukherjea
In Mumbai Central Prison
Occ: 62 years, Occ: Business,
res. at 18 & 19, Marlow Bldg.,
62-B, Sir Pockhanwala Road,
Worli, Mumbai 400 034
presently lodged at
Arthur Road Jail

..Petitioner

v/s.

1. Union of India
Through CBI, Sc-I,
New Delhi.

2. The State of Maharashtra ..Respondents

Mr. Shrikant Shevale with Mr. Anup Pande and Ms. Neha Shah i/b.
Mr. Amit P. Ghag for the Petitioner.

Mr. Anil Singh, Addl. Solicitor General with Mr. Sandesh Patil and Ms.
Geetika Gandhi for the CBI.

Mr. Y.M.Nakhwa APP for the Respondent No.2 State.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.
RESERVED FOR JUDGMENT ON : 22nd NOVEMBER, 2017
JUDGMENT PRONOUNCED ON : 19th JANUARY, 2018.**

JUDGMENT .

1. The petitioner herein, who is an accused No.8 in Special Case No.9 of 2016 has challenged the correctness of the order dated 20.9.2017 whereby the learned Special Judge (CBI), Mumbai dismissed the application under Section 91 of Cr.P.C.

2. The brief facts necessary to decide this petition are as under:-

On 21.8.2015 PSI Ganesh Dalvi and PI Dinesh Kadam attached to Khar Police Station, who were on patrolling duty found Shyamvar Rai with suspicious movements. They intercepted said Shyamvar Rai on suspicion. On taking personal search of said Shamvar Rai they recovered one pistol, three live cartridges and some other articles. The recovery of the said weapon and cartridges led to registration of L.A.C.No 34 of 2015 under Section 3 r/w. 25 of the Arms Act against said Shyamwar Rai.

3. In the course of investigation of LAC 34 of 2015 said Shamvar Rai made certain disclosure statement which led to registration of another crime No.406 of 2015 for the offences punishable under Section 120, 364, 20 and 203 of IPC against said Shyamvar Rai,

Indrani Mukharjee and Sanjeev Khanna for abducting and committing murder of Sheena Bora. The investigation of the crime was subsequently transferred to CBI, and the said FIR was re-registered as Case No. RC. 12(s)/2015.CBI/SC-I/N/New Delhi. A chargesheet dated 19.11.2015 was filed on the basis of further investigation conducted by CBI against the said three accused persons before the Addl. Chief Metropolitan Magistrate, 3rd Court, Esplanade. Upon Committal the said case was numbered as CBI Special Case No.117 of 2015. Further investigation was conducted under Section 173(8) of Cr.P.C., and the petitioner was arrested and a supplementary chargesheet was filed against him for the said offence. The said case came to be numbered as Special Case No.9 of 2016. Said Shyamvar Rai was treated as an approver.

4. The prosecution commenced its evidence by examining PW1 Ganesh Dalvi. While PW1 Ganesh Dalvi, was under cross examination, the petitioner filed an application under Section 91 of the Cr.P.C. for issuing summons to the concerned police officer for producing the personal diary, weekly diaries and case diaries maintained by PW1- Ganesh Dalvi and PI Dinesh Kadam in LAC

No.34 of 2015 registered at Khar Police Station. The learned Special Judge had rejected the said application by an order dated 20th July, 2017, which order was challenged before this Court in Writ Petition No. 3203 of 2017. By Order dated 4th September, 2017, the said writ petition came to be allowed. The Order dated 20th July, 2017 was quashed and set aside and the learned Special Judge was directed to consider the said application under Section 91 (Exh.-149) after hearing the parties in accordance with law. Pursuant to the said order, the learned Special Judge heard the parties and by the impugned order dated 20th September, 2017 dismissed the application filed by the petitioner under Section 91 of the Cr.P.C. The petitioner has challenged the said order in this petition.

5. Heard Mr. Shrikant Shevade, the learned Counsel for the petitioner. He contends that as per the police manual as well as standing order No.100 issued by the Government of Maharashtra, the police are required to maintain a personal diary in a prescribed format. He contends that the notings/entries made in the diaries maintained under the standing order No.100 constitute previous

statements . Relying upon the decision in the ***State of Kerala v. Babu & Ors. (1999) 4 SCC 621***, he contends that the case diary in respect of the previous crime can be called for and the entire being previous statements can be used to contradict the concerned Officer.

6. Countering these submission, Mr. Anil Singh, the learned Addl. Solicitor General for the Respondent No.1-CBI has submitted that the prosecution has furnished copies of all the statements, including that of Shyamvar Rai to the petitioner. He contends that the application under Section 91 is not for making available any statement but is for production of the personal and weekly diary. He contends that the entries in the such diaries cannot be equated with the statement or the “previous statement”. Relying upon the decision of the Apex Court in ***Mukund Lal vs. Union of India (UOI) and Anr. AIR 1989 SC 144*** he contends that the accused is not entitled to call for such diaries.

7. I have perused the records and considered the submissions of the learned Counsel for the petitioner and the learned Addl. Solicitor

General for the CBI.

8. In the *State of Kerala v. Babu & Ors. (1999) 4 SCC 621*, questions before the Apex Court were:

(a) Whether the statement of a witness recorded under Section 161 of the Cr.P.C. in one particular crime could be used against the 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 Cr.P.C. permits the use of statement recorded under Section 161 of the Cr.P.C. in any other proceeding other than the inquiry or trial in respect of the offence for which the investigation was conducted.

9. The Apex Court whilst answering the said questions considered the scope of Sections 161, 162 and 172 of Cr.P.C. and Section 145 of Evidence Act. Referring to Section 145 of the Evidence Act, the Apex Court observed that :

5. A perusal of this Section shows that this Section permits the cross-examination of the witness in any trial, with reference to his previous statement, to establish a contradiction and the manner in which such

contradictions can be established. Section 155 of the the Evidence Act provides that the previous statement of a witness can be made use of during the cross-examination of that witness for the purpose of impeaching the credit of the witness. Thus, it is seen it is the right of a party in a trial to use the previous statements of a witness either for the purpose of establishing a contradiction in his evidence or for the purpose of impeaching the credit of the witness. This right given to a party in a trial under Section 145 of the Evidence Act is somewhat controlled in criminal trials by the provisions made in the Code.

6. Section 161 of the Code provides that the police officer investigating a case is entitled to examine any person and reduce the statement of such person in writing. This statement recorded by a police officer under Section 161 even though is a previous statement for the purpose of Section 145 of the Evidence Act, such statement can be used for the purpose of establishing a contradiction or impeaching the credit of the witness only in the manner provided for in Section 162 of the Code. The use of the previous statement recorded under Section 161 of the Code is controlled by Section 162 of the Code.
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*7. Therefore, it is seen even in a criminal trial the previous statement of a witness can be used by the accused for the limited purpose mentioned in Section 162 of the Code as provided for in Section 145 of the Evidence Act.*xxx

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.81/91 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 Section 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 inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry 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, 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 inquiry 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 inquiry or trial. The words used in sub-section (2) of Section 172, more particularly police diaries of a case under inquiry or trial in such Court, indicates it is only that police diary in which the concerned investigating officer 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 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.

....

10. There can be no quarrel in regard to the fact that there is no prohibition in the Criminal Procedure Code against any court from looking into the diary of a counter case or from using the diary of a counter case in the trial of another case. But this does not mean that the right of the court to summon the case diary of another case is derived from Section 172 of the Code or by the application of principles of Section 172 because *ex facie* Section 172 of the Code does not help the accused in making use of a case diary. xxx

11. ... 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 :

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 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 dairy so produced, are the previous statements recorded under Section 161 of the Code.

13. In this view of the matter, in our opinion, a case diary of another case, not pertaining to the trial in hand can be summoned if the court trying the case considers that production of such a case diary is necessary or desirable for

the purpose of trial, under Section 91 of the Code.”

10. It is thus well settled that the accused can use the statement of a witness recorded under Section 161 of Cr.P.C. in one particular crime to contradict or impeach his credibility in another crime subject to restrictions under Section 162 of the Code and 145 of the Evidence Act. If the Court comes to the conclusion that the production of such statement is necessary, the Court in exercise of powers under Section 91(1) Cr.P.C. can summon production of the diary of another case for the purpose of using the statement made in the said diary for the purpose of using the statement in the diary to contradict the witness.

11. In the instant case, Mr. Kaushal Kishore Singh, Deputy Superintendent of Police/ Investigating Officer, CBI has filed his affidavit wherein he has stated that all previous statements of the witnesses including the statement of the approver Shamvar Rai in LAC No. 34 of 2015 as well as in the present crime have been called for by the CBI Court and the same are available in the Court records.

It is also stated across the bar that the copies of these statements are already furnished to the petitioner. There does not appear to be any dispute over this fact, as a perusal of the application under Section 91 of Cr.P.C. reveals that the petitioner has not sought to summon the statement of any witness recorded in a case diary of any other crime for the purpose of contradicting the witness or impeaching his credibility. The judgment in State of Kerala (*supra*) would not be applicable in view of these distinguishing facts.

12. It is to be noted that the petitioner had sought production of the entire daily and weekly diary maintained by PSI Ganesh Dalvi and PI Dinesh Kadam on the ground that the entries made by the police officers in these diaries constitute their previous statements and that the same can be used to confront and contradict the said police officers. It is stated that production of said diaries is necessary and desirable as the prosecution is relying on the evidence of these police officers to prove the genesis of occurrence. It is stated that failure to produce these diaries will cause great prejudice to the petitioner as he will not be able to cross examine PW1 Ganesh

Dalvi, PI Dinesh Kadam and other related witnesses on the material aspect.

13. It may be mentioned that the personal diaries maintained by police personnel do not pertain to any particular crime, but is a day to day record of the movement and the duties performed by the Police Officer. Such diary contains all the details such as the nature of the duty, time of commencement and completion of the duty, particulars of the CR or LA Cases, no of persons arrested and properties seized in the course of the day etc. The weekly diary is a summary of the duties performed during the week. It contains summary of the cases investigated, raids conducted, arrests effected, preventive action taken etc during the week.

14. The entries in the personal or weekly diary are not statements recorded under Section 161 Cr.PC Similarly, every such entry cannot be construed as a "Previous Statement" which can be used to confront and contradict the witnesses. It is also pertinent to note that the petitioner has made an omnibus prayer seeking production

of the diaries to enable him to contradict the witness with any specific entry or entries recorded by the witness in the said daily and weekly diaries. This is nothing, but an attempt to make a roving scrutiny of the entries in the diary and then decide the line of cross examination. Suffice it to say that the accused does not enjoy such privilege and this is not the ratio laid down in State of Kerala (Supra). Permitting the petitioner to inspect the diary or making such diary available to the petitioner or the accused in general will impair the working of the police. As held by the Apex Court in ***Siddharth & Ors. Vs. State of Bihar (2005) 12 SCC 545*** “*The police officer who is conducting the investigation may come across a series of information which cannot be divulged to the accused. He is bound to record such facts in the case diary. But if the entire case diary is made available to the accused, it may cause serious prejudice to other and even effect the safety and security of those who may have given statement 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.*”

15. Considering the above facts and circumstances, in my considered view, the petitioner has no indefeasible right to demand production daily diary or weekly diary. The learned Special Judge was therefore perfectly justified in rejecting the application under Section 91(1) of Cr.P.C. The impugned order does not suffer from any infirmity. I do not find any reason to interfere with the order.

16. In view of the above, the petition has not merits and is accordingly dismissed.

(ANUJA PRABHUDESSAI, J.)