

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

Criminal Writ Petition No.623/2018
(Rajesh Mukundsingh Thakur and ors. .vs. The State of Maharashtra
through PSO PS Pulgaon, Wardha.)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders.

Mr. D.R. Bhoyar, Advocate for Petitioners.
Mrs. Geeta Tiwari, APP for Respondent .

CORAM : Manish Pitale, J.
DATED : August 09, 2018.

By this writ petition, the petitioners (original accused) have challenged order dated 28.03.2018 passed by the Court of Judicial Magistrate First Class, Pulgaon (trial Court), whereby an application moved by the investigating officer for sending muddemal property consisting of mobile phones and memory card for forensic examination, has been allowed. The principal grievance of the petitioners is that the said property was seized on 14.09.2012 when the petitioners were arrested and that after about more than five years, such an application for sending the property for forensic examination could not have been entertained by the trial Court, particularly when one panch witness had been already examined and part of the examination-in-chief of the complainant was already over.

2. The background facts, leading up to filing of the said application by the investigating officer before the trial Court are that on 14.09.2012 a first information

report (FIR) was registered in Police Station, Pulgaon, district Wardha, against the petitioners for having committed offences under Section 67-A of the Information Technology Act, 2005 and Sections 509 and 292 of the Indian Penal Code (IPC). The grievance of the complainant was that the accused had circulated video clips of the complainant and thereby they had committed the said offences. The petitioners were arrested on the same day i.e. 14.09.2012 and the investigating officer seized properties, including the aforesaid muddemal property consisting of mobile phones and memory card. The said property remained in the custody of the Court and no further steps were taken in that regard.

3. On 15.02.2017, an application was moved by the A.P.P. before the trial Court for obtaining opinion of examiner of electronic evidence pertaining to the said mobile phones and memory card. But, later the said application was withdrawn.

4. Thereafter on 09.01.2018 an application was moved by the investigating officer before the trial Court seeking permission to send the said mobile phones and memory card for forensic examination. This application was marked as Exh.85. It was stated in the said application that due to inadvertance, although the said mobile phones and memory card were seized, but they could not be sent for forensic examination to the laboratory.

5. This application was opposed on behalf of the petitioners on the ground that prejudice would be caused to them if the same was allowed and that when evidence of a panch witness was already recorded and part of examination-in-chief of the complainant was over, it was too late in the day for the investigating officer to move the said application. It was contended that lacunae were sought to be filled in by the investigating officer by moving the said application.

6. By the impugned order dated 28.03.2018, the trial Court found that such an application could be moved by the investigating officer under Section 173(8) of the Cr.P.C. to send the said mobile phones and memory card for forensic examination to the laboratory. The trial Court identified Section 173(8) of the Cr.P.C. as the relevant provision for exercise of such powers. On this basis, the trial Court allowed the application.

7. Mr. D.R. Bhoyar, learned counsel appearing for the petitioners, submitted that the trial Court was not justified in allowing the said application at such belated stage and that it would amount to permitting the prosecution to fill in lacunae and further that grave prejudice was caused to the petitioners when the application filed by the investigating officer stood allowed at a belated stage. It was contended that when part of the examination-in-chief of the complainant herself was over, the investigating officer could not have been permitted to move such an application and the trial Court was not justified in passing the impugned order in

the facts and circumstances of the present case. This could not be said to be a situation for further investigation by the investigating officer.

8. On the other hand, Mrs. Geeta Tiwari, learned Additional Public Prosecutor appearing on behalf of the respondent, submitted that the trial Court was justified in allowing the application of the investigating officer and that under Section 173(8) of the Cr.P.C., there was wide power for carrying out further investigation and that sending the aforesaid mobile phones and memory card for forensic examination in the present case, could certainly be permitted under the said provision. Reliance was placed on judgment of the Hon'ble Supreme Court in the case of **Central Bureau of investigation .vs. R.S.Pai - (2002) 5 Supreme Court Cases 82.**

9. Heard counsels for the parties. The facts of the present case do show that the said application at Exh.85 moved by the investigating officer on 09.01.2018 was more than five years after the FIR dated 14.09.2012 was registered against the petitioners in the present case and the property including the mobile phones and memory card were seized. The said mobile phones and memory card could have been sent for forensic examination even before filing of the charge sheet, but steps were not taken in that regard by the investigating officer. The question, therefore, that arises for consideration is whether the trial Court was justified in permitting the investigating officer to send the said mobile phones and memory card for forensic

examination after passage of long period of time and when one panch witness was already examined and the chief examination of the complainant was partly over.

10. In this regard, in the judgment in the case of **C.B.I. .vs. R.S. Pai** (supra) on which the reliance is placed by the learned APP, the Hon'ble Supreme Court decided a similar question, as to whether prosecution can produce additional documents which are gathered during investigation after submitting charge sheet under Section 173 of the Cr.P.C. The Supreme Court analysed the aforesaid provisions, particularly sub-sections 4,5 and 8 thereof and the following conclusion was arrived at:-

“7. From the aforesaid sub-sections, it is apparent that normally, the Investigating Officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or charge-sheet, it is always open to the Investigating Officer to produce the same with the permission of the Court. In our view, considering the preliminary stage of prosecution and the context in which Police Officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which prosecution proposes to rely, the word 'shall' used in sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during the investigation upon

which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Analogous provision under [Section 173\(4\)](#) of the Code of Criminal Procedure, 1898 was considered by this Court in [Narayan Rao v. The State of Andhra Pradesh](#) [(1958) SCR 283 at 293] and it was held that the word 'shall' occurring in sub-section 4 of Section 173 and sub-section 3 of Section 207A is not mandatory but only directory. Further, the scheme of sub-section (8) of [Section 173](#) also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to investigation. In such cases, there can not be any prejudice to the accused. Hence, the impugned order passed by the Special Court cannot be sustained."

11. The aforesaid position of law makes it clear that the documents or material collected during investigation can be permitted to be produced during the course of trial, even if it was not submitted along with the charge sheet. In the present case, in the application at Exh.85, it has been stated by the investigating officer that although the said property i.e. mobile phones and memory card were seized during investigation, due to inadvertance of the then investigating officer, the same could not be sent for forensic analysis. Applying the ratio of the above quoted

judgment of the Hon'ble Supreme Court, it becomes clear that in the present case it cannot be said that the trial Court committed an error by allowing the application at Exh.85 by the impugned order.

12. The learned counsel appearing for the petitioners has very fairly pointed out a recent judgment of the Hon'ble Supreme Court in the case of **Amrutbhai Shambhubhai Patel .vs. Sumanbhai Kantibhai Patil and ors. - (2017) 4 Supreme Court Cases 177**, dealing with the power of the investigating officer under Section 173(8) of the Cr.P.C. The relevant portion of the said judgment reads as follows:-

“49. On an overall survey of the pronouncements of this Court on the scope and purport of [Section 173\(8\)](#) of the Code and the consistent trend of explication thereof, we are thus disposed to hold that though the investigating agency concerned has been invested with the power to undertake further investigation desirably after informing the Court thereof, before which it had submitted its report and obtaining its approval, no such power is available therefor to the learned Magistrate after cognizance has been taken on the basis of the earlier report, process has been issued and accused has entered appearance in response thereto. At that stage, neither the learned Magistrate suo motu nor on an application filed by the complainant/informant direct further investigation. Such a course would be open only on the request of the investigating agency and

that too, in circumstances warranting further investigation on the detection of material evidence only to secure fair investigation and trial, the life purpose of the adjudication in hand.

50. The unamended and the amended sub-Section (8) of [Section 173](#) of the Code if read in juxtaposition, would overwhelmingly attest that by the latter, the investigating agency/officer alone has been authorized to conduct further investigation without limiting the stage of the proceedings relatable thereto. This power qua the investigating agency/officer is thus legislatively intended to be available at any stage of the proceedings. The recommendation of the Law Commission in its 41st Report which manifesting heralded the amendment, significantly had limited its proposal to the empowerment of the investigating agency alone.”

13. The aforesaid position of law further demonstrates that the investigating officer/agency, has the power at any stage of trial, to place before the Court such material that would assist the investigating agency to put forward its case. In this situation, the argument of prejudice would not come to the rescue of the petitioners. Accordingly, the writ petition is found to be without merit and it is dismissed.

14. But, the facts of the present case do show that while the FIR was registered on 14.09.2012, the trial has

only just begun. The said application Exh.85 was moved after more than five years on 09.01.2018, as a result of which, now the said mobile phones and memory card will be sent for forensic examination to the laboratory. The pendency of trial for a long period of time and delay in its disposal is certainly causing prejudice to the petitioners. Hence, while dismissing this writ petition, it is directed that the concerned Forensic Laboratory shall submit report pertaining to the said mobile phones and memory card within six weeks to the trial Court from the date the said property is received in pursuance of the impugned order. It shall be ensured that the mobile phones and the memory card are sent to the concerned laboratory at the earliest and in any case within a period of two weeks from today. Looking to the fact that the trial has been already delayed in this matter for quite some time, it is directed that the trial Court shall complete the trial and pass its judgment within a period of eight months from today.

JUDGE

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Digitally signed
by Rajendra
Gajananrao
Halwai
Date: 2018.08.10
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