

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 22.10.2018

Coram:

THE HON'BLE MR.JUSTICE M.DHANDAPANI

Crl.R.C.No.1132 of 2018

and

Crl.M.P.No.13221 of 2018

1.R.Bharathi
2.R.Neelakandan
3.U.Venkatesan ... Petitioners

/versus/

The State rep.by
the Inspector of Police,
Thiruvannamalai Police Station,
Crime No.933 of 2018,
Thiruvannamalai District. .. Respondent

Criminal Revision Case has been filed under Section 397 r/w 401 of Cr.P.C., praying to call for the records relating to the order dated 17.09.2018 made in Crl.M.P.No.457 of 2018 in S.C.No.111 of 2018 passed by the learned Additional Sessions cum Fast Track Mahila Court, Tiruvannamalai and set aside the same by allowing this criminal revision petition.

For Petitioners :Mr.N.Manokaran

For Respondent :Ms.S.Thankira
Government Advocate(Crl.Side)

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O R D E R

This Revision Petition is filed challenging the order dated 17.09.2018 made in Crl.M.P.No.457 of 2018 in S.C.No.111 of 2018 wherein the lower Court has refused to furnish the documents sought for by the petitioners under Section 207 of Cr.P.C.

2. The case of the petitioners, who were arrayed as A1 to A3, is that one Alena, who is a citizen of Russia, visited the temple at Thiruvannamalai. It is alleged that at that time, some of the accused persons misbehaved with the victim girl, thereby caused injuries on her body.

3. During the course of investigation, the first accused Bharathi was arrested and he gave a confession statement, implicating the accused 2 & 3. Accordingly, they were taken to the police station on 16.07.2018 and after enquiry, they were remanded to judicial custody on 19.07.2018. After investigation, the respondent police has filed a final report on 24.07.2018 and the incomplete copies of the final report were given to the petitioners on 27.07.2018. Thereafter, the petitioners have filed a petition under Section 207 Cr.P.C., to furnish nine relied upon documents. Even though the learned Judicial Magistrate No.1 has furnished eight documents, except the document no.1 viz., the statement recorded under section 164, Cr.P.C., and CD for the said video graph of the victim, the learned Judicial Magistrate has directed the petitioners to apply and get it from the learned Sessions Court at the time of trial.

4. After committal proceedings, the lower Court has assigned S.C.No.111 of 2018 and thereafter, the learned Sessions Judge has made-over the case to the Mahila Court.

5. Accordingly, the petitioners appeared and filed a petition in CrI.M.P.No.457 of 2018 under Section 207 of Cr.P.C., to furnish a video copy of the CD, which was recorded in camera by the learned Judicial Magistrate. However, the same was dismissed, against which, this Criminal Revision Case has been filed by the petitioner.

6. The prosecution has filed a counter inter alia contending that the statement of victim was recorded under Section 164 of Cr.P.C., before the Judicial Magistrate, Arni during the course of her treatment at General Hospital, Tiruvannamali. Thereafter, the petitioners had approached the police station for furnishing C.D. copy and the same was opposed by the police and after hearing, the learned Additional Sessions cum Fast Track Mahila Court, Tiruvannamalai has dismissed the case on 17.09.2018 on the ground that if the CD is supplied, the accused may misuse the same. However, the learned Magistrate has granted permission to peruse the statement recorded through video and to take note of it.

7. The learned counsel appearing for the petitioners would submit that as per Section 207 Cr.P.C., the respondent police has to furnish the relied upon documents to the accused persons, which is mandatory for the petitioners to disprove the prosecution case and establish their innocence.

8. In support of his submission, the learned counsel for the petitioners relied on the decision of the Hon'ble Supreme Court in V.K.Sasikala v. State Represented by Superintendent of Police reported in (2012) 9 Supreme Court

Cases 771, wherein the relevant portions reads as under:

18. In a recent pronouncement in Siddharth Vashisht @ Manu Sharma V. State (NCT of Delhi) (supra) to which one of us (Sathasivam, J) was a party, the role of a public prosecutor and his duties of disclosure have received a wide and in-depth consideration of this Court. This Court has held that though the primary duty of a Public Prosecutor is to ensure that an accused is punished, his duties extend to ensuring fairness in the proceedings and also to ensure that all relevant facts and circumstances are brought to the notice of the Court for a just determination of the truth so that due justice prevails. The fairness of the investigative process so as to maintain the citizens rights under Articles 19 and 21 and also the active role of the court in a criminal trial have been exhaustively dealt with by this Court. Finally, it was held that it is the responsibility of the investigating agency as well as that of the courts to ensure that every investigation is fair and does not erode the freedom of an individual except in accordance with law. It was also held that one of the established facets of a just, fair and transparent investigation is the right of an accused to ask for all such documents that he may be entitled to under the scheme contemplated by the Code of Criminal Procedure. The said scheme was duly considered by this Court in different paragraphs of the report.

19. The views expressed would certainly be useful for reiteration in the context of the facts of the present case: (Manu Sharma case, SCC pp,84-86 paras 216-21)

"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.

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.

218. The liberty of an accused cannot be interfered with except under due process of law. The expression due process of law shall deem to include fairness in trial. The court (sic Code) gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution (prosecution and the Prosecutor) to make fair disclosure. The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in court or not. That document should essentially be furnished to the accused and even in the cases where during investigation a document is bona fide obtained by the investigating

agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused.

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.

221. It will be difficult for the Court to say that the accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. A document which has been obtained bona fide and has bearing on the case of the prosecution and in the opinion of the Public Prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused. Then that document should be disclosed to the accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would affect administration of criminal justice and the defence of the accused

prejudicially.

(emphasis supplied)

(Manu Sharma v. State(NCT of Delhi)

20. The declaration of the law in Sidhartha Vashisht (supra) may have touched upon the outer fringe of the issues arising in the present case. However, the positive advancement that has been achieved cannot, in our view, be allowed to take a roundabout turn and the march has only to be carried forward. If the claim of the appellant is viewed in context and perspective outlined above, according to us, a perception of possible prejudice, if the documents or at least an inspection thereof is denied, looms large. The absence of any claim on the part of the accused to the said documents at any earlier point of time cannot have the effect of foreclosing such a right of the accused. Absence of such a claim, till the time when raised, can be understood and explained in several reasonable and acceptable ways. Suffice it would be to say that individual notion of prejudice, difficulty or handicap in putting forward a defence would vary from person to person and there can be no uniform yardstick to measure such perceptions. If the present appellant has perceived certain difficulties in answering or explaining some part of the evidence brought by the prosecution on the basis of specific documents and seeks to ascertain if the allegedly incriminating documents can be better explained by reference to some other documents which are in the courts custody, an opportunity must be given to the accused to satisfy herself in this regard. It is not for the prosecution or for the Court to comprehend the prejudice that is likely to be caused to the accused. The perception of prejudice is for the accused to develop and if the same is founded on a reasonable basis it is the duty of the Court as well as the prosecution to ensure that the accused should not be made to labour under any such perception and the same must be put to rest at the earliest. Such a view, according to us, is an inalienable attribute of the process of a fair trial that Article 21 guarantees to every accused.

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 Cr.P.C. And would travel beyond the confines of the strict language of the provisions of the Cr.P.C. 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 in 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 belately. This is how the scales of justice in our Criminal Jurisprudence have to be balanced."

9. Further, the learned counsel relied upon the judgment of the Hon'ble Supreme Court reported in Tarun Tyagi v. Central Bureau of Investigation [(2017) 4 SCC 490], wherein the Hon'ble Supreme Court has held as follows:

"10. It is clear from the above that the CBI had seized some hard disks marked Q-2, 9 and 20 from the premises of the appellant which contained the source code of the data recovery software. Defence of the appellant is that this source code was exclusively prepared by him and was his property. On the other hand, case of the prosecution is that the recovered CDs are in fact same or similar to the software stolen in 2005. In a case like this, at the time of trial, the attempt on the part of the prosecution would be to show that the seized material, which contains the source code, is the property of the complainant. On the other hand, the

appellant will try to demonstrate otherwise and his attempt would be to show that the source code contained in those CDs is different from the source code of the complainant and the seized material contained the source code developed by the appellant. It is but obvious that in order to prove his defence, the copies of the seized CDs need to be supplied to the appellant. The right to get these copies is statutorily recognised under Section 207 of the Code, which is the hallmark of a fair trial that every document relied upon by the prosecution has to be supplied to the defence/accused at the time of supply of the chargesheet to enable such an accused to demonstrate that no case is made out against him and also to enable him to prepare his cross-examination and defence strategy. There is no quarrel up to this point even by the prosecution. The only apprehension of the prosecution is that if the documents are supplied at this stage, the appellant may misuse the same.

11. The aforesaid apprehension of the prosecution is based on the opinion of Government Examiner (Expert) who has opined that if the cloned copy of the hard disk was required, then the same could be prepared by the laboratory on supply of new hard disk of 500 GB but such cloned copy could not be write protected. Cambridge Dictionary defines "write protect" in the following manner:

"to protect the data on a computer disk so that it cannot be changed or removed by a user"

12. Likewise, Collins Dictionary defines the term "write protected" as under:

13. In view of this opinion of the Expert, it needs to be ensured that the appellant, when given the cloned copy of the hard disk, is not able to erase or change or remove the same. If that can be achieved by putting some safeguards, it would be the ideal situation inasmuch as provisions of Section 207 of the Code which ensure

fair trial by giving due opportunity to the accused to defend himself shall be fulfilled and the apprehension of the prosecution would also be taken care of."

10. For the very same proposition, reliance was placed in the case of G.Arun @ Arunkumar v. State rep.by the Inspector of Police, Crime Branch CID, Namakkal, Crime No.310 of 2010 (Pallipalayam P.S.), Namakkal District reported in [2017(3) MWN (Cr.)477] , wherein the relevant portions reads as under:

"3. Section 207 of Cr.P.C., entitles the accused for a copy of the document forwarded to the Magistrate along with the police report. As such, the prayer seeking for copies of the Compact Disc is maintainable, the submission made by the learned counsel for the petitioner.

4. Under Section 65(b) of the Indian Evidence Act, which was inserted by the Act 21 of 2000, admissibility of electronic record was inserted. Section 65(b) of the Indian Evidence Act reads as follows:

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

5. On a bare reading of the aforesaid section, it can be seen that any information in the form of electronic record, which is the copy in optical or magnetic media produced by computer is deemed to be a document. In other words, the Compact Disc is also deemed to be a document as per Section 65(b) and as such, there is no justification on the part of the learned Sessions Judge to return the petitioners application on the ground that the Compact Disc is intended to be marked as material object.

6. The learned counsel for the petitioner has relied upon the judgment in the case of Tarun Tyagi Vs. Central Bureau of Investigation reported in AIR 2017 SC 1136 and submitted that the petitioner is entitled to have a copy of the Compact Disc under Section 207. The relevant portion of the said order reads as follows:

"It is but obvious that in order to prove his defence, the copies of the seized CDs need to be supplied to the appellant. The right

to get these copies is statutorily recognized under section 207 of the Code, which is the hallmark of a fair trial that every document relied upon by the prosecution has to be supplied to the defense/accused at the time of supply of the charge-sheet to enable such an accused to demonstrate that no case is made out against him and also to enable him to prepare his cross-examination and defense strategy. There is no quarrel up to this point even by the prosecution. The only apprehension of the prosecution is that if the document are supplied at this stage, the appellant may misuse the same.

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"to protect the data on a computer disk so that it cannot be changed or removed by a user."

Likewise, Collins Dictionary defines the term 'write protected' as under:

"(of a computer disk) having been protected from accidental writing or erasure."

In view of this opinion of the Expert, it needs to be ensured that the appellant. When given the cloned copy of the hard disk, is not able to erase or change or remove the same, If that can be achieved by putting some safeguards, it would be the ideal situation in as much as provisions of section 207 of the Code which ensure fair trial by giving due opportunity to the accused to defend himself shall be fulfilled and the apprehension of the prosecution would also be taken care of."

11. In view of the above decisions, the learned Government Advocate (crl.side) did not dispute the fact that the petitioners are entitled for receiving CD copy of the victim which was refused by the Court below. However, in the present case, the victim is a foreign national and when she visited Tiruvannamalai to worship the god, the victim girl was molested by the accused persons.

Therefore, if the CD copy is furnished, there is every possibility for the accused to threaten the victim and hence, he vehemently opposed to allow the petition.

12. The learned counsel appearing for the petitioners submitted that since the petitioners are inside the jail, there is no possibility at all for misusing the video. However, the petitioners undertakes not to misuse the CD copy.

13. The very same issue discussed by the Hon'ble Supreme Court in Tarun Tyagi v. Central Bureau of Investigation reported in [(2017) 4 SCC 490] particularly, para 10 is answered in favour of the accused. So, in view of the above categorical decisions, this Court has no other option to allow the petition by following the decisions of the Hon'ble Supreme Court and considering the undertaking given by the petitioners, this petitioners are entitled to receive CD copy of the victim girl.

14. Accordingly, this Court is inclined to allow the petition with a direction to the respondent police to furnish CD copy of the victim girl as sought for by the petitioners as per Section 207 of Cr.P.C. The petitioners are entitled to receive the CD copy. However, this Court makes it clear that the CD copy furnished by the respondent police should not be misused by the accused through any other social media and it is only for the purpose of using it at the time of trial.

15. With the above terms, this Criminal Revision Case is allowed. Consequently, connected Miscellaneous Petition is also closed.

Sd/-

Assistant Registrar (CS IX)

//True Copy//

Sub Assistant Registrar

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To

The Additional Sessions cum Fast Track Mahila Court, Tiruvannamalai.

2.the Inspector of Police,
Thiruvannamalai Police Station,
Crime No.933 of 2018,
Thiruvannamalai District.

+1cc to Mr.N.Manokaran , Advocate SR.No. 71860

Cr1.R.C.No.1132 of 2018

and

Cr1.M.P.No.13221 of 2018

ASK(15/11/2018)