

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 19.11.2018	Delivered on 27.11.2018
---------------------------	----------------------------

CORAM:

THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH
CRL.OP.No.26744 of 2018
and
Crl.MP.No.15413 of 2018

1.Haji Mohammed
2.M.Rukkin Basha
3.Mansoor Ali Khan
4.Marjic Ali Khan

... Petitioners

.Vs.

The State rep.by
The Inspector of Police,
Koradacheri Police Station,
Tiruvarur District.

... Respondent

Prayer: Criminal Original Petition filed under Section 482 of Cr.P.C, to call for the records pertaining to set aside the order in Crl.M.P.No.584 of 2018 in S.C.No.52 of 2017, on the file of the District and Sessions Court, Tiruvarur, consequently direct the respondent police to produce the 'General Diary' of the police station covering the period from 11.5.2013 to 11.5.2014 for the purpose of effective cross-examination on the side of defense.

For Petitioners : Mr.K.M.Subramaniam
Mr.N.Palanivel

For Respondent : Mr.C.Raghavan
Government Advocate (Crl.Side)

ORDER

This Criminal Original Petition has been filed, challenging the order passed by the Court below, dismissing the petition filed by the petitioners under Section 91 of Crl.P.C, seeking for the production of the "General Diary" [GD] maintained by the respondent Police.

2.The petitioners are facing trial before the Court below for an offence under Section 302 of IPC. The prosecution had examined all the witnesses on their side and the Investigating Officer was examined on 18.07.2018. At that point of time, the

petitioners filed a petition for a direction to the respondent Police to produce the General Diary covering the period from 11.5.2013 to 11.5.2014. This petition has been dismissed by the Court below solely on the ground that the same cannot be used as an evidence, in view of the Bar under Section 172 of Cr.P.C.

3.The learned counsel for the petitioners would submit that the General Diary was required in order to effectively cross examine the Investigating Officer. The learned counsel would further submit that the bar contained under Section 172 of Cr.P.C is applicable to only a Case Diary and not to a General Diary, and the Court below misdirected itself in dismissing the petition filed by the petitioners. The learned counsel would further submit that denying the petitioners an opportunity to effectively cross examine the Investigating Officer by placing reliance on the General Diary, results in an unfair trial.

4.The learned Government Advocate (Crl.Side) would submit that there is no requirement to produce the General Diary before the Court and the bar contained under Section 72 of Cr.P.C, will equally apply to the General Diary also. The learned counsel would submit that the Investigating Officer can be effectively cross examined with the available materials and there is no requirement for producing the General Diary. The learned counsel would further submit that the petition itself has been filed only with a view to protract the proceedings.

5.This Court has carefully considered the submissions made on either side. The following important questions arise for consideration in this case.

a) Whether an accused person is entitled to seek for the production of a General Diary as an evidence during the course of trial? and

b)Whether the Bar contained under Section 172 of Cr.P.C will apply to the entries made in a General Diary also?

6.It will be relevant to extract the provisions of Section 172 of Cr.P.C.

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.

[(1-A) The statements of witnesses recorded during the course of investigation under Section 161 shall be inserved in the case diary.

(1-B) The diary referred to in sub-section (1) shall be a volume and duly paginated.]

(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.

7. Every Police Officer making an investigation shall enter his proceedings in a Diary, which must be used at the trial or inquiry not as an evidence in the case, but to aid the Court in such inquiry or trial. The case Diary is only a record of the day-to-day investigation of the Investigating Officer to ascertain the statement of circumstances ascertained through the investigation. A Court is within its competence to read a Police Diary as an aid and that can be done to satisfy its conscience in appreciating the legal evidence available on the record but not beyond. The entries in the case Diary are not the evidence, nor can they be used by the accused or the Court, unless the case comes within the scope of Section 172 (3).

8. It will be useful to refer to the judgment of the Hon'ble Supreme Court in *Habeeb Mohammad vs The State Of Hyderabad* reported in [1954 SCC P 51], wherein a three member Bench of the Hon'ble Supreme Court had an occasion to deal with the scope of Section 172 of Cr.P.C in detail. The relevant portion of the judgment is extracted here under.

"Section 162, Criminal Procedure Code, which concerns police diaries and the use that can be made of them, is in these terms:-

" No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record

thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made :

Provided that, when any witness is called for the prosecution in such inquiry or trial 'Whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross- examination."

Section 172 provides that 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 if in such inquiry or trial. It seems to us that the-learned Judge was in error in making use of the police diaries at all in his judgment and in seeking confirmation of his opinion on the question of appreciation of evidence from statements contained in those diaries. The only proper use he could make of these diaries was the one allowed by section 172, Criminal Procedure Code, i.e., during the trial he could get assistance from them by suggesting means of further elucidating points which needed clearing up and which might be material for the purpose of doing justice between the State and the accused. This he did not do because the diaries were not before him. -It was pointed out in Rex v. Mannu(1) by a full court that a special diary may be used by the court to assist in an inquiry or trial by suggesting means of further elucidating points which need clearing up and which are material for the purpose of doing justice between the Crown and the accused but not as containing entries which can by themselves be taken to be evidence of any date, fact or statement

therein contained. The police officer who made the diary may be furnished with it but not any other witness. The Judge made improper use of the diary by referring to it in his judgment and by saying that he intently perused it and the statements of witnesses taken in court were not inconsistent with those that were made by the witnesses before the police officer. It is difficult to say to what extent the perusal of the case diaries at that stage influenced the mind of the judge in the decision of the case. It may well be that that perusal strengthened the view of the judge on the evidence against the appellant and operated to his prejudice. If there was any case in which it was necessary to derive assistance from the case diary during the trial it was this case and the investigating officer who appeared in the witness box instead of giving unsatisfactory answers to 2I.L.R. 19 All, 390. the questions put to him might well have given accurate answers by refreshing his memory from those diaries and cleared up the lacunae that appear in the prosecution case".

9. One more important judgment that can be relied upon is the judgment of the Hon'ble Supreme Court in *Shamshul Kanwar .Vs. State of U.P.* reported in [1995 4 SCC 430]. The relevant portions of the judgment is extracted hereunder.

10. Section 172 Cr.P.C. reads as under:

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 the 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 (1 of 1872) shall apply."

This Section firstly lays down that every police officer making an investigation should maintain a diary of his investigation. It is well-known that each State has its own police regulations or otherwise known as police standing orders and some of them provide as to the manner in which such diaries are to be maintained. These diaries are called case diaries or special diaries. The Section itself indicates as to the nature of the entries that have to be made and what is intended to be recorded is what the police officer did, the places where he went and the places which he visited etc. and in general it should contain a statement of the circumstances ascertained through his investigation. Sub-section (2) is to the effect that a criminal court may send for the diaries and may use them not as evidence but only to aid in such inquiry or trial. The aid which the court can receive from the entries in such a diary usually is confined to utilising the information given therein as foundation for questions to be put to the witnesses particularly the police witnesses and the court may, if necessary, in its discretion use the entries to contradict the police officer who made them. Coming to their use by the accused, sub-section (3) clearly lays down that neither the accused nor his agents shall be entitled to call for such diaries nor he or they may be entitled to see them merely because they are referred to by the courts. But in case the police officer uses the entries to refresh his memory or if the court uses them for the purpose of contradicting such police officer then provisions of Section 161 or Section 145, as the case may be, of the Evidence Act would apply. Section 145 of the Evidence Act provides for cross-examination of a witness as to the previous statements made by him in

writing or reduced into writing and if it is intended to contradict him by the writing, his attention must be called to those parts of it which are to be used for the purpose of contradiction. Section 161 deals with the adverse party's rights as to the production, inspection and cross-examination when a document is used to refresh the memory of the witness. It can therefore be seen that the right of accused to cross-examine the police officer with reference to the entries in the General Diary is very much limited in extent and even that limited scope arises only when the court uses the entries to contradict the police officer or when the police officer uses it for refreshing his memory and that again is subject to the limitations of Sections 145 and 161 of the Evidence Act and for that limited purpose only the accused in the discretion of the court may be permitted to peruse the particular entry and in case if the court does not use such entries for the purpose of contradicting the police officer or if the police officer does not use the same for refreshing his memory, then the question of accused getting any right to use the entries even to that limited extent does not arise. The accused person is not entitled to require a police officer to refresh his memory during his examination in court by referring to the diary. At the most the accused can on a reasonable basis seek the court to look into the diary and do the needful within the limits of Section 172 Cr.P.C. However, the court is not bound to compel the police witness to look at the diary in order to refresh his memory nor the accused is entitle to insist that he should do so. If there is such a refusal what inference should be drawn depends on the facts and circumstances of each case. Section 172 does not deal with any recording of statements made by witnesses and what is intended to be recorded is what the police officer did namely the places where he went, the people he visited and what he saw etc. It is Section 161 Cr.P.C. which provides for recording of such statements. Assuming that there is failure to keep a diary as required by Section 172 Cr.P.C., the same cannot have the effect of making the evidence of such police officer inadmissible and what inference should be

drawn in such a situation depends upon the facts of each case. It is well-settled that the entries of the police diary are neither substantive nor corroborating evidence and they cannot be used by or against any other witness than the police officer and can only be used to the limited extent indicated above. The above stated principles are reiterated in many decisions rendered by the courts.

11.As early as 1897 the Full Court of the Allahabad High Court in Queen Empress v. Mannu, ILR Allahabad Vol XIX 390 examined the scope of Section 172 Cr.P.C. and the meaning of the police diaries and Edge, CJ. who spoke for the Court held thus:

"Section 172 of the Code of Criminal Procedure provides for the two events, on the happening of either of which the accused or his agent is entitled to see the special diary: and it enacts that, except on the happening on one of those events, "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." In my opinion the plain meaning of section 172 is that the special diary, no matter what it may contain, is absolutely privileged, unless it is used to enable the Police officer who made, it to refresh his memory or is used for the purpose of contradicting him." (emphasis supplied) Coming to the entries that are to be made and the "aid" which the courts can have, it was further observed:

"A properly kept special diary would afford such information, and such information would enable the Magistrate or Judge to determine whether persons referred to in the special diary, but not sent up as witnesses by the Police, should be summoned to give evidence in the interests of the prosecution or of the accused. It must be always remembered that it is the duty of the Magistrate or of the Judge before whom a criminal case is, to ascertain if possible on which side the truth is, and to decide accordingly."

12.This view of the Full Bench has been

approved by the Privy Council in Dal Singh v. King Emperor, AIR (1917) PC 25. The Privy Council while disapproving the use to which the entries were put to, held thus :

"In other words, they treated what was thus entered, as evidence which could be used at all events for the purpose of discrediting these witnesses. In then Lordships' opinion, this was plainly wrong. It was inconsistent with the provisions of section 172 of the Criminal Code. To use the diary for the purpose they did was to contravene the rule laid down in Queen Empress v. Mannu, (1897) 19 All 390 where a full court pointed out that such a diary may be used to assist the Court which tries the case by suggesting means of further concluding points which need clearing up, and which are material for the purpose of doing justice between the Crown and the Accused, but not as containing entries which can by themselves be taken to be evidence of any date, fact or statement contained in the diary. The police officer who made the entry may be confronted with it but not any other witness."

13. In Pulukuri Kottaya v. King Emperor, AIR (1947) PC 67 it was laid down that breach of Section 172 does not amount to any illegality and the same does not vitiate the trial. In Niranjana Singh and Others v. State of Uttar Pradesh, AIR (1957) SC 142 it was urged that there was a failure to comply with para 109 of Chapter 11 of U.P. Police Regulation which lays down that when the investigation is closed for the day a copy of the case diary should be sent to the superior police officers and such failure amounted to infraction of rule of law. A Bench of three Judges of this Court considered this aspect and following the ratio in Pulukuri Kottaya's case held as under:

"The Criminal Procedure Code in laying down the omissions or irregularities which either vitiate the proceedings or not does not anywhere specifically say that a mistake committed by a police officer during the course of the investigation can be said to be an illegality or irregularity. Investigation is certainly not an inquiry or trial before

the court and the fact that there is no specific provision either way in Chapter XLV with respect to omissions or mistakes committed during the course of investigation except with regard to the holding of an inquest is, in our opinion, a sufficient indication that the legislature did not contemplate any irregularity in investigation as of sufficient importance to vitiate or otherwise form any infirmity in the inquiry or trial."

14. In *Habeeb Mohd. .v. State of Hyderabad*, it was held thus:

"Section 172 provides that 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. It seems to us that the learned Judge was in error in making use of the police diaries at all in his judgment and in seeking confirmation of his opinion on the question of appreciation of evidence from statements contained in those diaries. The only proper use he could make of these diaries was the one allowed by section 172, Criminal Procedure Code, i.e., during the trial he could get assistance from them by suggesting means of further elucidating points which needed clearing up and which might be material for the purpose of doing justice between the State and the accused."

15. In *Khatri and Others (IV) v. State of Bihar and Others*, [1981] 2 SCC 493 it was held thus:

The criminal court holding an inquiry or trial of a case is therefore empowered by sub-section (2) of Section 172 to send for the police diary of the case and the criminal court can use such diary, not as evidence in the case, but to aid it in such inquiry or trial. But, by reason of sub-section (3) of Section 172, merely because the case diary is referred to by the criminal court, neither the accused nor his agents are entitled to call for such diary nor are they entitled to see it. If however the case diary is used by the police officer who has made it to refresh his memory or if the criminal court uses it for

the purpose of contradicting such police officer in the inquiry or trial, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act would apply and the accused would be entitled to see the particular entry in the case diary which has been referred to for either of these purposes and so much of the diary as in the opinion of the court is necessary to a full understanding of the particular entry so used. It will thus be seen that the bar against production and use of case diary enacted in Section 172 is intended to operate only in an inquiry or trial for an offence and even this bar is a limited bar, because in an inquiry or trial, the bar does not operate if the case diary is used by the police officer for refreshing his memory or the criminal court uses it for the purpose of contradicting such police officer." (emphasis supplied)

16. In *Mukand Lal .v. Union of India*, it was observed that the court is empowered to call for relevant case diary if there is any inconsistency or contradiction arising in the context of the case diary and the court can use the entries for the purpose of contradicting the police officer as provided in Sub-section (3) of Section 172 Cr.P.C. Likewise in *State of Bihar and Another v. P.P. Sharma, IAS and Another*, [1992] Supp 1 SCC 222 it was observed thus:

"The only duty cast on the investigation is to maintain a diary of his investigation, which is known as "Case Diary" under Section 172 of the Code. The entries in the case diary are not evidence nor can they be used by the accused or the Court unless the case comes under Section 172(3) of the Code. The court is entitled for perusal to enable it to find out if the investigation has been conducted on the right lines so that appropriate directions, if need be, be given and may also provide materials showing the necessity to summon witnesses not mentioned in the list supplied by the prosecution or to bring on record other relevant material which in the opinion of the court will help it to arrive at a proper decision in terms of Section 172(3) of the Code. The primary duty of the police, thus is to collect and sift the evidence of the

commission of the offence to find whether the accused committed the offence or has reason to believe to have committed the offence and the evidence available is sufficient to prove the offence and to submit his report to the competent Magistrate to take cognizance of the offence."

17. Now coming to the rights of the accused regarding the use of diaries, this Court in Malkiat Singh and Others v. State of Punjab, [1991] 4 SCC 341 reiterating the view taken in Mannu's case and in Khatri's case (supra) regarding the scope of section 172 (3) also observed thus:

"The evidence on record clearly shows that the defence has freely used the entries in the case diary as evidence and marked some portions of the diary for contradictions or omissions in the prosecution case. This is clearly in negation of and in the teeth of Section 172(3) of the Code.

It is manifest from its bare reading without subjecting to detailed and critical analysis that the case diary is only a record of day to day investigation of the investigating officer to ascertain the statement of circumstances ascertained through the investigation. Under sub-section (2) the court is entitled at the trial or enquiry to use the diary not as evidence in the case, but as aid to it in the inquiry or trial. Neither the accused, nor his agent, by operation of sub-section (3), shall be entitled to call for the diary, nor shall he be entitled to use it as evidence merely because the court referred to it. Only right given thereunder is that if the police officer who made the entries in the diary uses it to refresh his memory or if the court uses it for the purpose of contradicting such witness, by operation of Section 161 of the Code and Section 145 of the Evidence Act, it shall be used for the purpose of contradiction the witness, i.e. Investigation Officer or to explain it in re-examination by the prosecution, with permission of the court. It is, therefore, clear that unless the investigating officer or the court uses it either to refresh the memory or contradicting the investigating officer as previous

statement under Section 161 that too after drawing his attention thereto as is enjoined under Section 145 of the Evidence Act, the entries cannot be used by the accused as evidence. Neither PW 5 nor PW6, nor the court used the case diary. Therefore, the free use thereof for contradicting the prosecution evidence is obviously illegal and it is inadmissible in evidence. Thereby the defence cannot place reliance thereon. But even if we were to consider the same as admissible that part of the evidence does not impinge upon the prosecution evidence. (emphasis supplied)

18. With regard to the nature of the entries to be made in the diary as required under Section 172 Cr.P.C. and the limited permissible use by the court or by the accused indicated therein have been the subject matter of decisions of a number of High Courts over the years. It may not be necessary to refer to them. However, we have noticed that there is vagueness as to the nature of the diary contemplated under this Section. In some States the diary referred to in Section 172 Cr.P.C. is known as "special diary" or "case diary" and in some other States like Andhra Pradesh, J & K and Kerala there is a provision in the Police Acts that a "general diary" is to be maintained in the police station thereby indicating it to be different from the case diary. In some States there are police standing orders to the effect that the diary contemplated under Section 172 Cr.P.C. can be of two parts; the first one relating to the steps taken during the course of investigation by the police officer with particular reference to tune at which the police received the information and the further steps taken during the investigation like visiting the places etc. and the second part contains statement of the circumstances ascertained during the investigation which obviously relate to the statements recorded by the officer in terms of Section 161 Cr.P.C. and other relevant materials gathered during the investigation. The copies of the second part which mainly contains the statements of the witnesses as a matter of course are supplied to the accused persons.

19. For instance Madras Police Standing

Order No. 589 provides that the record of an investigation shall be made in the case diary (Form no. 82) which is the diary prescribed in section 172 of the Criminal Procedure Code. It will bear the number of the First Information Report. Order No. 590 further lays down that the record of investigation in a case diary should contain only daily details of the time at which the information reached the Investigation Officer, 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 and that the Police will truly record the statement of persons examined by them in the court of the investigation. Para 2 further adds that case diaries should be prepared in two distinct parts, viz., (1) Investigation Part and (2) Statement of witnesses recorded under Section 162 Cr.P.C. and that the second part alone should be handed over to the Magistrate's clerk for making out copies to be furnished to the accused. Likewise in A.P. Police Standing Orders, Order No. 599 refers to Section 172 Cr.P.C. and lays down that the said provision requires that every police officer making an investigation should enter day by day his proceedings in the investigation in the diary, setting forth 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. Para (3) of the said order says that the case diary proper should contain these details and should be written in Form No. 71. Para (2) further lays down that statements of witnesses examined by the police during the investigation should be recorded in Form No. 72 and should be attached to the case diary for the day. Police Standing Order No. 600 is to the effect that the copies of the statements of witnesses proposed to be examined during an inquiry or trial should be made available to the accused before the inquiry or trial commences and that the case diary proper may be put to use to the extent as provided under Section 172 Cr.P.C. Police Standing Order No. 601 contains the detailed instructions regarding writing of the case

diary.

20. Therefore it is clear that the diary referred to in Section 172 and which the court may call for and which can be used to the limited extent mentioned therein obviously refers to the first part and to the copies of which the accused is not entitled to and the entries of which can be used to the limited extent by the court as well as by the accused as contained in Section 172 Cr.P.C. If by virtue of such police standing orders, the second part also forms compendiously part of the diary as a whole and if that also is before the court, the use of the entries in such second part which contains the statements of the witnesses recorded, would be of different nature. In some States for instance Uttar Pradesh there are regulations regarding the maintenance of general and case diaries. Section 161 Cr.P.C. provides for examination of witnesses by police. It further lays down that the police officer during investigation may examine the witnesses and may reduce into writing any statement made to him in the course of such examination and if he does so he shall "make a separate and true record" of the statement of each such person. Section 162 lays down that no such statement made by any person to a police officer shall if reduced to writing be signed "nor shall any such statement or any record thereof whether in a "police diary" or otherwise" be used for any purpose at any inquiry or trial save as provided under that Section. The words "police diary or otherwise" used in this Section have perhaps been the basis for dividing the diary into two parts. Section 167, an important provision, deals with the procedure when investigation is not completed within 24 hours and provides for production of the accused before a magistrate for seeking remand. This provision also lays down that the officer in charge of a police station or the police officer making the investigation "shall forthwith transmit to the nearest judicial magistrate a copy of the entries in the diary hereinafter prescribed relating to the case" and at the same time forward the accused to such magistrate. Likewise sub-section (2a) of Section 167 which provides for production of

the accused before an executive magistrate lays down that the copy of the entry in the diary "hereinafter" prescribed relating to the case shall be transmitted while forwarding the accused. The object underlying is that the magistrate before remanding the accused to custody should satisfy himself that there is a prima facie case for doing so after a perusal of the copies of the entries "in the diary". We are referring to this aspect only to point out that some vagueness or confusion is there in respect of the meaning of the word "diary" used in Section 172 and other Sections of Cr.P.C. and we suggest that a legislative change is necessary providing for framing of appropriate and uniform regulations regarding the maintenance of the diaries by the police for the purpose contemplated by Section 172 Cr.P.C. vis-a-vis the other sections referred to above.

21. We are constrained to go into this aspect in an elaborate manner as even on today we are coming across a number of cases where there has been a patent misuse of the case diaries to be maintained as per Section 172 Cr.P.C. The Full Court in Mannu's case observed, as long back as 1897, as under :

"It is within the experience of every Judge of this Court that much misconception exists in these Provinces as to the use which can be made by a Court or by an accused person or his agents of the diaries which are kept by Police officers under section 172 of the Code of Criminal Procedure, and which in these Provinces are known as special diaries. It is within our judicial knowledge that some Sessions Judges and some Magistrates have decided criminal cases by conviction or by acquittal of the accused on statements which are found in the special diary relating to the case."

10. The above referred judgment apart from dealing with the scope of Section 172 of Cr.P.C in detail, has also specifically dealt with the word Diary and has held that there is vagueness as to the nature of the Diary contemplated under this Section and has suggested a legislative change to provide an uniform procedure regarding the maintenance of the Diaries by the Police

for the purpose contemplated under Section 172 of Cr.P.C.

11. It will also be relevant to make reference to the judgment of the Hon'ble Supreme Court in Lalita Kumari .Vs. Govt. of Uttar Pradesh reported in [2014 (2) SCC 1]. In this judgment, the Hon'ble Supreme Court had an occasion to deal with a General Diary as contemplated under Section 44 of the Police Act, 1861. The relevant portions of the judgment is extracted hereunder:

"57. It is contented by the learned ASG appearing for the State of Chhattisgarh that the recording of first information under Section 154 in the "book" is subsequent to the entry in the General Diary/Station Diary/Daily Diary, which is maintained in the police station. Therefore, according to the learned ASG, first information is a document at the earliest in the General Diary, then if any preliminary inquiry is needed the police officer may conduct the same and thereafter the information will be registered as FIR. This interpretation is wholly unfounded. The first information report is in fact the "information" that is received first in point of time, which is either given in writing or is reduced to writing. It is not the "substance" of it, which is to be entered in the diary prescribed by the State Government. The term "General Diary" (also called as "Station Diary" or "Daily Diary" in some States) is maintained not under Section 154 of the Code but under the provisions of Section 44 of the Police Act, 1861 in the States to which it applies, or under the respective provisions of the Police Act(s) applicable to a State or under the Police Manual of a State, as the case may be.

58. Section 44 of the Police Act, 1861 is reproduced below:

"44. Police Officers to keep diary - It shall be the duty of every officer in charge of a police station to keep a General Diary in such form as shall, from time to time, be prescribed by the State Government and to record therein all complaints and charges preferred, the names of all persons arrested, the names of the complainants, the offences charges against them, the weapons or property that shall have been taken from their possession or otherwise, and the names of the

witnesses who shall have been examined.

The Magistrate of the district shall be at liberty to call for and inspect such diary".

59. It is pertinent to note that during the year 1861, when the aforesaid Police Act, 1861 was passed, the Code of Criminal Procedure, 1861 was also passed. Section 139 of that Code dealt with registration of FIR and this section has also referred to the word "diary", as can be seen from the language of this section, as reproduced below:

"139. Complainant, etc., to be in writing - Every complaint or information preferred to an officer in charge of a police station, shall be reduced into writing, and the substance thereof shall be entered in a diary to be kept by such officer, in such form as shall be prescribed by the local Government". (emphasis supplied)

Thus, the Police Act, 1861 and the Code of Criminal Procedure, 1861, both of which were passed in the same year, used the same word "diary".

60. However, in the year 1872, a new Code came to be passed which was called the code of Criminal Procedure, 1872. Section 112 of the Code dealt with the issue of registration of FIR and is reproduced below:

"112. Complaint to police to be in writing - Every complaint preferred to an officer in charge of a police station shall be reduced into writing, and shall be signed, sealed, or marked by the person making it, and the substance thereof shall be entered in a book to be kept by such officer in the form prescribed by the local Government".

It is, thus, clear that in the Code of Criminal Procedure, 1872, a departure was made and the word "book" was used in place of "diary". The word "book" clearly referred to the FIR book to be maintained under the Code for the registration of FIRs.

61. The question that whether the FIR is to be recorded in the FIR book or in the General Diary, is no more res integra. This issue has already been decided authoritatively

by this Court.

62. In *Madhu Bala v. Suresh Kumar*, this Court has held that FIR must be registered in the FIR register which shall be a book consisting of 200 pages. It is true that the substance of the information is also to be mentioned in the Daily Diary (or the General Diary). BUT, the basic requirement is to register the FIR in the FIR book or register. Even in *Bhajan Lal*, this Court held that FIR has to be entered in a book in a form which is commonly called the first information report.

63. It is thus clear that registration of FIR is to be done in a book called FIR book or FIR register. Of course, in addition, the gist of the FIR or the substance of the FIR may also be mentioned simultaneously in the General Diary as mandated in the respective Police Act or Rules, as the case may be, under the relevant State provisions.

64. The General Diary is a record of all important transactions/events taking place in a police station, including departure and arrival of police staff, handing over or taking over of charge, arrest of a person, details of law and order duties, visit of senior officers, etc. It is in this context that gist or substance of each FIR being registered in the police station is also mentioned in the General Diary since registration of FIR also happens to be a very important event in the police station. Since General Diary is a record that is maintained chronologically on day-to-day basis (on each day, starting with new number 1), the General Diary entry reference is also mentioned simultaneously in the FIR book, while FIR number is mentioned in the General Diary entry since both of these are prepared simultaneously".

12. The Hon'ble Supreme Court in the above judgment had discussed about the General Diary in relation to the registration of an FIR. Wherein, the General Diary entry reference is also mentioned simultaneously in the FIR Book, and FIR number is mentioned in the General Diary since both are prepared simultaneously.

13. The next important judgment to which reliance can be placed upon is the judgment of the Hon'ble Supreme Court in Sidhartha Vashisht alias Manu Sharma .Vs. State [NCT Of Delhi] reported in [2010 6 SCC 1]. The relevant portions of the judgment is extracted hereunder:

"209. What is the significance of requiring an investigating officer/officer in charge of a police station to maintain a diary? The purpose and the object seems to be quite clear that there should be fairness in investigation, transparency and a record should be maintained to ensure a proper investigation.

210. In the case of Habeeb Mohammad v. State of Hyderabad, A.I.R. 1954 S.C. 51, this Court stated the principle of law that the criminal court may send for the police diaries of a case under inquiry/trial in such court and may use such diaries, not as evidence in the case but to aid in such inquiry or trial. It seems to the Court that the learned Judge in error in making use of the police diaries at all in his judgment and in seeking confirmation of his opinion on the question of appreciation of evidence from statements contained in those diaries. The proper use of diaries he could make in terms of Section 172 Cr.P.C. by elucidating points which need clarification. The Court in this case was primarily concerned with the argument that diaries were not produced.

211. Further in the case of Khatri v. State of Bihar A.I.R. 1981 SC 1068 though in a writ petition this Court was concerned with a question whether the documents called for by the Court vide its Order dated 16th February, 1981 liable to be produced by the State or production of those documents is barred under Sections 162 & 172 of the Code and the petitioners in those cases are not entitled to see such documents. The Court rejecting the contention held as under:

"It is common ground that Shri L.V. Singh was directed by the State Government under Section 3 of the Indian Police Act, 1861 to investigate into twenty four cases of blinding of under-trial prisoners where allegations were made by the under-trial prisoners and First Information Reports were lodged that

they were blinded by the police officers whilst in police custody, Shri L.V. Singh through his associates carried out this investigation and submitted his reports in the discharge of the official duty entrusted to him by the State Government. These reports clearly relate to the issue as to how, in what manner and by whom the twenty-four under-trial prisoners were blinded, for that is the matter which Shri L.V. Singh was directed by the State Government to investigate. If that be so, it is difficult to see how the State can resist the production of these reports and their use as evidence of these reports and their use as evidence in the present proceeding. These reports are clearly relevant under Section 35 of the Indian Evidence Act."

212. In the case of Malkiat Singh and Ors. v. State of Punjab (1991) 4 SCC 341 this Court reiterated the principle that use of entries in the case diary is really of no use and is of benefit to the accused but unless the investigating officer or the Court uses the entries in the case where either to refresh the memory or contradicting the investigating officer as previous statement under Section 161 in terms of Section 145 of the Evidence Act the entries can be used by the accused as evidence. The free use thereof is not permissible under defence.

213. In case Mukund Lal v. Union of India A.I.R. 1989 SC 144, this Court clearly stated the denial to the accused of an unfettered right to make roving inspection of the entries in the case diary regardless of whether these entries are used by the police officer concerned to refresh his memory or regardless of the fact whether the Court has used these entries for the purpose of contradicting such police officer cannot be said to be unreasonable. This was treated to be a very important safeguard as the Legislature has reposed complete trust in the Court which is conducting the inquiry or the trial and has empowered the Court to call for these diaries therefore the right of the accused is not unfettered but in fact is limited as noticed.

214. Usefully, reference can also be made

to the judgment of this Court in the case of Shamshul Kanwar v. State of U.P. A.I.R. 1995 SC 1748 wherein this Court while issuing direction for requiring the State to make a general hearing in terms of Section 172 of the Code clearly stated that it was mandatory for the police officer/in charge to maintain the diary in terms of the said provision and there is jurisdiction in the criminal code to call such diaries and make use of them not as evidence but only to aid such inquiry or trial. It is generally confined to utilize the information therein as foundation for the question put to the witnesses, particularly, to the police witnesses where the police officer has used the entries to refresh his memory or if the Court uses them for the purpose of contradicting such police officer then provisions of Section 161, or 145, would be applicable. The right of the accused to cross-examine the police officer with reference to the entries in the General Diary is very much limited in extent and even that limited scope arises only when the Court uses the entries for the aforestated purposes. The investigating officer has a right to refresh his memories and can refer to the general diary. The Court has power to summon the case diary in exercise of its powers and for the purposes stated. The accused is vested with the power of making use of the statements recorded during investigation for the purposes of contradiction and copies thereof the accused is entitled to see in terms of Section 2 & 7 of the Code State of Kerala v. Babu (1999) 4 SCC 621 and State of Karnataka vs. K. Yarappa Reddy (1999) 8 SCC 715.

215. As is evident from the consistently stated principles of law, that right of the accused in relation to the police file and the general diary is a very limited one and is controlled by the provisions afore-referred. But still the accused has been provided with definite rights under the provisions of the Code and the constitutional mandate to face the charge against him by a fair investigation and trial. Fairness in both these actions essentially needs to be adhered to.

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, what 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 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 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 places 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 afore-referred. 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 has a material bearing on this subject and makes 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, statement, confessional statement 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 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 bonafidely 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.

222. The concept of disclosure and duties of the prosecutor under the English System

cannot, in our opinion, be made applicable to Indian Criminal Jurisprudence stricto sensu at this stage. However, we are of the considered view that the doctrine of disclosure would have to be given somewhat expanded application. As far as the present case is concerned, we have already noticed that no prejudice had been caused to the right of the accused to fair trial and non-furnishing of the copy of one of the ballistic reports had not hampered the ends of justice. Some shadow of doubt upon veracity of the document had also been created by the prosecution and the prosecution opted not to rely upon this document. In these circumstances, the right of the accused to disclosure has not received any set back in the facts and circumstances of the case. The accused even did not raise this issue seriously before the Trial Court".

14. The ratio that can be culled out from the above judgment is that the right of an accused in relation to a Police file and "the General Diary" is a very limited one and is controlled by Section 172 of Cr.P.C. The Hon'ble Apex Court has categorically held that the right of the accused to cross examine the Police Officer with reference to the entries in the General Diary is very much limited in extent and even that limited scope arises only when the Court uses the entries for the purposes stipulated under Section 172 (3) of Cr.P.C.

15. From the above, it is clear that the Hon'ble Supreme Court has not differentiated between a case Diary and a General Diary and in fact the same has been used synonymously. Therefore, the restriction placed under Section 172, will equally apply to the entries made in the General Diary also. That is the reason why the Hon'ble Supreme Court in the judgment in Samshul Kanwar referred supra, has suggested a legislative change to Section 172 to bring uniformity regarding maintenance of Diaries by the Police, for the purpose contemplated by Section 172 of Cr.P.C. However, till date the legislature has not taken any steps to bring that clarity.

16. In view of the above, this Court is of the considered view that the limitations placed in relying upon the entries made in the Police Diaries as an evidence in the case, will equally apply to a General Diary also. It will also be relevant to point out that a General Diary will consist of entries with regard to complaints, charges preferred, names of all accused arrested, names of complainants, names of witnesses etc., pertaining to all the cases in a Police Station and the General

Diary stands in a higher pedestal than a case Diary, since it contains details regarding all the cases registered in the concerned Police Station and it will not be in public interest to summon the same for the purpose of a particular case.

17. The submission made by the learned counsel for the petitioners that Section 172 of Cr.P.C deals only with a case Diary and not a General Diary, is not sustainable. The first reason is that in view of the judgment of the Hon'ble Apex Court referred supra. The Second reason is that if the legislature had thought it fit to restrict the usage of entries of a Case Diary as an evidence, it is even more incumbent to place the same restriction for the General Diary also since it involves all the entries pertaining to different cases, which has come to the notice of the concerned Police Station.

18. It is the duty of this Court to place on record one judgment of this Court in Siva .Vs. State, Inspector of Police, F-2, S.S.Colony, Madurai City Police Station reported in [2000 (3) MWN CrI.P.23] Wherein, this Court had held that the General Diary maintained by the Police is not a Police Diary within the scope of Section 172 of Cr.P.C. The relevant portions of the judgment is extracted hereunder:

"3. The Police Officers are required to maintain two diaries, viz., (i) A diary where entries are made about the events which take place in the Police Station in Chronological order and it is ordinarily difficult to fabricate false entries in such diary and this diary has to be maintained day by day. This diary is known as general diary. (ii) Apart from general diary, the Police Officer who happens to be the investigating officer has to maintain a case diary. The case diary should set forth the proceedings day by day of the investigating officer and must record inter alia 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 circumstances ascertained through his investigation.

4. What is referred to under Section 172 (1) Cr.P.C. is the case diary. It has two parts, viz., (i) relating to the steps taken during investigation by the Police Officer with particular reference to the time at which the Police received the information, the time at which the Police Officer began and closed investigation, the place and places visited by him: and (ii) a statement of circumstances

ascertained through his investigation.

5.The Police Diary mentioned in sub-section (2) to Section 172 Cr.P.C. refers to the diary of the first category mentioned above. The entries in the diary prepared under Section 172 are only notes of secondary evidence of witnesses who can be examined in the first instance and whose evidence, if necessary, should be recorded in the open Court in the presence of the accused. Therefore, they do not assume the character of either the substantive evidence or the corroborative evidence. It therefore follows that neither the accused nor his agent is entitled to see the diary, though the Court may call for the diary and refer to it.

6.What has now been sought for by the petitioner is the copies of th entries in the general diary maintained by the Police Control Room and not the case diary maintained by the investigating officer or the general diary maintained by the concerned police. The Officials of the Police Control Room cannot be termed as investigating Officers. I feel, the diary maintained by the Police Control Room may not assume the character of a police diary adumbrated under Section 172 Cr.P.C. The findings of the learned II Additional Sessions Judge, Madurai that a diary maintained in the Police Control Room also comes within the purview of Section 172 (2) Cr.P.C appears to be erroneous. The orders passed by the learned Sessions Judge is set aside. The learned II Additional Sessions Judge is directed to furnish a copy of pages 9,10, 17 and 18 of the Diary dated 8.8.1997, maintained by the Madurai City Police Control Room to the petitioners."

19. With all due respects to the learned Single Judge who had rendered the above said judgment, this Court is not in agreement with the above said judgment. Under normal circumstances, this Court would have referred this case to be placed before a Division Bench. However, in view of the later judgment of the Hon'ble Supreme Court, which has been referred supra, this Court falls in line with the judgment of the Hon'ble Supreme Court and holds that a General Diary also falls within the scope of Section 172 of Cr.P.C, and the bar that has been provided under Section 172 of Cr.P.C will equally apply to a

General Diary also. The accused shall not be entitled to call for a General Diary, unless it falls within the scope of Section 172 (3) of Cr.P.C. The questions raised by this Court are answered accordingly.

In the result, the order passed by the Court below is hereby confirmed, and the Criminal Original Petition is dismissed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

KP

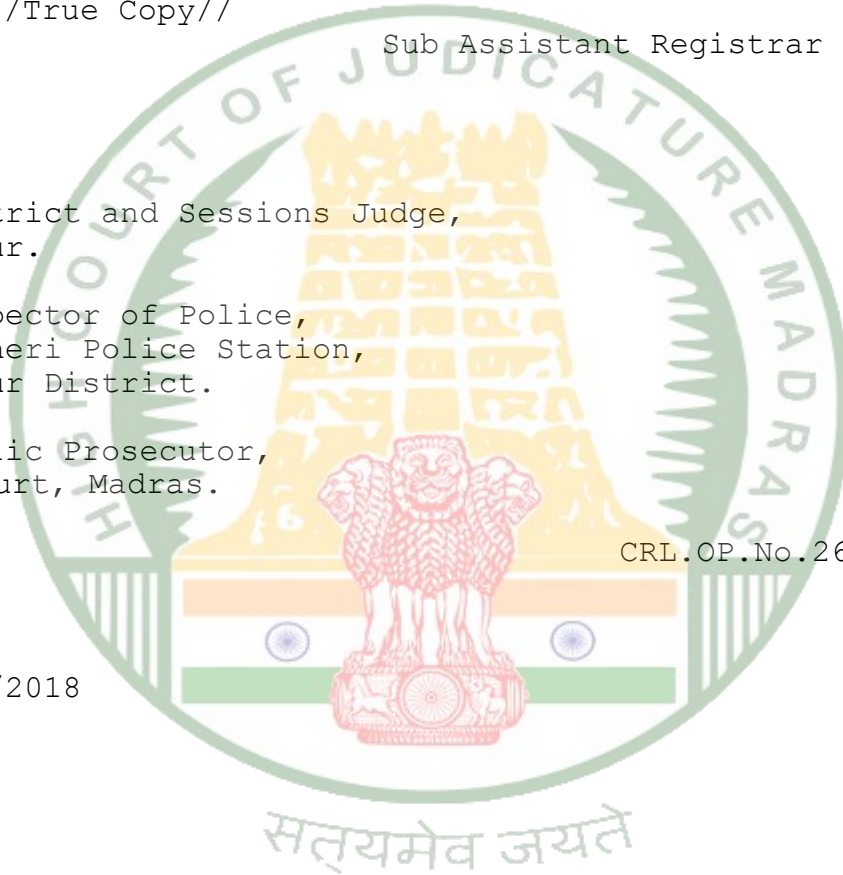
To

- 1.The District and Sessions Judge,
Tiruvarur.
- 2.The Inspector of Police,
Koradacheri Police Station,
Tiruvarur District.
- 3.The Public Prosecutor,
High Court, Madras.

CRL.OP.No.26744 of 2018

SVN(CO)

rrs 14/12/2018



WEB COPY