

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.**

CRM-M No.45571 of 2018

Date of Decision: 03.12.2018

Gurmeet Ram Rahim

....Petitioner

Versus

Central Bureau of Investigation, Special Crime,
Unit-II, Plot No.5B, Second Floor, CGO Complex,
Lodhi Road, New Delhi

....Respondent

BEFORE :- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Tanveer Ahmed Mir, Advocate
Mr. Dhruv Gupta, Advocate
and Mr. Munish Behl, Advocate
for the petitioner.

Mr. Sumeet Goel, Advocate
for the respondent-CBI.

DAYA CHAUDHARY, J.

Petitioner has filed the present petition under Section 482 Cr.P.C for quashing of impugned order dated 29.09.2018 (Annexure P-1) passed by the Special Judicial Magistrate, CBI Haryana at Panchkula in case FIR No.RC1(S)/2015 SCU.V/SCII/CBI/New Delhi dated 07.01.2015 registered under Sections 120-B, 326, 417 and 506 IPC at Police Station SCII/CBI New Delhi titled as “**CBI vs Gurmeet Ram Rahim and others**” to the extent of dismissal of application dated 28.09.2018 filed by him under Section 91 Cr.P.C and further directing the respondent-Central Bureau of Investigation to supply all copies of the documents as mentioned in the application including statements of the witnesses recorded under Section 161 Cr.P.C by the Investigating Agency during investigation.

Briefly stated the facts of the case as made out in the petition

are that during pendency of the trial, an application was moved by the petitioner under Section 91 Cr.P.C for supplying the material documents collected by the Central Bureau of Investigation during the course of investigation including statements of the witnesses under Section 161 Cr.P.C, which are not part of the charge sheet/final report/challan. Said application has been dismissed vide order dated 29.09.2018 passed by the Special Judicial Magistrate, CBI Haryana at Panchkula, which is subject matter of challenge in the present petition.

Learned counsel for the petitioner submits that the petitioner had filed an application under Section 207 read with Section 91 Cr.P.C seeking directions to the prosecution/Investigating Authority to file on record and also to supply him the copies of statements of witnesses of total 122 persons recorded by the Investigating Agency. Earlier the petitioner had approached this Court by way of filing CRR No.2740 of 2018 under Section 401 read with Section 482 Cr.P.C which was dismissed by this Court vide order dated 04.10.2018. Learned counsel also submits that although the statements of 128 witnesses were recorded but around 20 persons, whose statements were recorded, admitted that they were castrated and did not support the case of the prosecution and 20 witnesses refused to undergo medical examination. Statements of 122 witnesses examined during the course of investigation were concealed and were neither brought to the notice of the Court nor copies thereof were supplied to the petitioner, whereas, those statements are most essential and crucial to confront the witnesses at the time of cross-examination. Learned counsel also submits that in absence of aforesaid statements, it would be difficult for the accused persons to test the credibility of the statements given by the alleged victims.

Learned counsel for the petitioner has also relied upon the judgments of Hon'ble the Apex Court in cases ***Dayal Singh and others vs State of Uttaranchal 2012(8) SCC 263, Purshottam Jethanand vs The State of Kutch AIR 1954 SC 700, Nitya Dharmananda and others vs Gopal Sheelum Reddy and others 2018(2) SCC 93, Arulvelu and another vs State 2009(10) SCC 206, Dilawar Balu Kurane vs State of Maharashtra 2002(2) SCC 135, Union of India vs Prafulla Kumar Samal and another 1979(3) SCC 4, Zahira Habibullah Sheikh vs State of Gujarat 2004 Crl. L.J. 2050***, judgment of Delhi High Court in case ***Shakuntala vs State of NCT Delhi 139 (2007) DLT 178***, judgment of Bombay High Court in case ***Kamal Ahmed Mohammed Vakil Ansari vs State of Maharashtra 2013 Crl. LJ 858***, judgment of Rajasthan High Court in case ***Neelesh Jain vs State of Rajasthan 2006 Crl. L.J. 2151***, judgment in case ***Pulukuri Kottaya and others vs Emperor AIR 1947 PC 67***, judgment of Gujarat High Court in case ***Pravinkumar Lalchand Shah vs State of Gujarat and another 1982 Crl. L.J. 763*** in support of his arguments.

Learned counsel for the respondent-CBI submits that a detailed speaking order has been passed by the trial Court. He also submits that the petitioner has a right of having those documents only which are part of challan and in case, any other document or statement is required, it was for the trial Court to see the relevancy. Learned counsel further submits that as per provisions of the Evidence Act, the petitioner is not required to have those statements which are not part of final report.

Heard the arguments of learned counsel for the parties and have also carefully gone through the impugned order as well as other documents on the file.

The main grievance of the petitioner, in the present petition, is to supply the copies of statements of those witnesses, which are not part of final report stating to be necessary to confront the witnesses at the time of their cross examination for just decision and fair trial of the case. It is not disputed that the Investigating Agency while filing challan has relied upon only the statements of some of the witnesses but not all. The statements of six witnesses, who were the victims and cited as witnesses were supplied to the defence/accused under Section 207 Cr.P.C. The application moved by the petitioner was for supplying statements of total 122 witnesses, which were not relied upon by the Investigating Agency while filing final report. As per argument of learned counsel for the petitioner, a liberty was given to the petitioner to avail an appropriate remedy, in case, such necessity arises while dismissing the petition bearing **CRM No.M-22639 of 2018**. Thereafter, an application was moved by the petitioner. Reply to the application was also filed, wherein, it was mentioned that the accused had no right to invoke powers under Section 91 Cr.P.C. Only six witnesses, who were victim were cited as witnesses and their statements were made part of challan. The copies of those statements were supplied. Section 91 of the Cr.P.C is relevant for the controversy in the present case, which is reproduced as under :-

*“ **Section 91 :-** Summons to produce documents or other things :- (1) Whenever any court or any officer in-charge of the police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceedings under this code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power*

such document or thing is believed to be, requiring him to attend and produce it, or to produce it at the time and place stated in the summons or order.

(2) – (3) x – x – x – x – x – x – x –

*Now, on this aspect, applicability of section 91 Cr.P.C has also been explained by Hon’ble Supreme Court in case titled as **State of Orissa Versus Debendra Nath Padhi 2005 (1) SCC 568**, and the relevant para 25 states “any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is “necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the code.” The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage, when a prayer is made for the production. It is to be borne in mind that under the section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. In so far as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of the defence. When the section talks of the documents being necessary or desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227, what is necessary and relevant, it is only the record produced in terms of Section 173 of the Code. Under Section 91 summons for production of documents can be issued by the court and under a written order an officer in-charge of the police station can also direct production thereof.”*

A perusal of provision of Section 91 of the Cr.P.C shows that in case, any court or any officer in-charge of the police station considers that

the production of any document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceedings under the code by or before such Court or officer, such Court may issue summons to the person in whose possession or power such documents are there and thinks that the same is required to be produced. It has been left to the officer concerned or the Court, in case, the same is necessary and desirable for the purpose of investigation or inquiry or trial. The first and foremost requirement of the section is that such document/statement should be necessary or desirable. The necessity and desirability is to be examined by the Court by mentioning the reasons. The power is there with the Court but it is to be invoked, in case, there is necessity and desirability and for that purpose and the relevancy is to be seen. During investigation, a large number of documents were collected but subsequently, while filing the final report, the Investigating Agency relied upon only some of the documents which were considered necessary for arriving at the truth. It is not necessary that all the documents collected or the statements recorded are necessary to be a part of final report.

It is also necessary to consider the relevant provisions of Sections 173 and 207 of Cr.P.C., which are reproduced as under :-

“ 173. Report of police officer on completion of investigation -

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

[(1A). The investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer in charge of the police station.]

(2)(i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate

empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating -

- (a) the names of the parties;*
- (b) the nature of the information;*
- (c) the names of the persons who appear to be acquainted with the circumstances of the case;*
- (d) whether any offence appears to have been committed and, if so, by whom;*
- (e) whether the accused has been arrested;*
- (f) whether he has been released on his bond and, if so, whether with or without sureties;*
- (g) whether he has been forwarded in custody under section 170;*
- [(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under Section 376, 376A, 376B, 376C [Section 376D or Section 376E of the Indian Penal Code (45 of 1860)].]*
- (ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any whom the information relating to the commission of the offence was first given.*
- (3) Where a superior officer of police has been appointed under section 158, the report, shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer incharge of the police station to make further investigation.*
- (4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.*

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceeding or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

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

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

207. Supply to the accused of copy of police report and other documents. In any case where the proceeding has

been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following :-

- (i) the police report;*
- (ii) the first information report recorded under section 154;*
- (iii) the statements recorded under Sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under Sub-section (6) of section 173;*
- (iv) the confessions and statements, if any, recorded under section 164;*
- (v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173:*

Provided further that if the Magistrate is satisfied that any document referred to in clause.

(v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.”

On perusal of provisions of Section 173 of Cr.P.C, it is apparently clear that on completion of investigation, the investigating officer prepares a detailed report and the concerned officer In-charge of the police station forwards such report to the Magistrate having jurisdiction to take cognizance. Thereafter, the Magistrate considers the charge sheet and the accompanying documents as well as the statements of the witnesses and decide as to whether to take cognizance of the offence or not. In terms of Section 207 Cr.P.C after appearance of the accused, the Magistrate is

required to furnish to the accused persons following reports :-

- (i) Copies of police report;*
- (ii) First Information Report;*
- (iii) Statements recorded under sub-section (3) of Section 161 Cr.P.C of all the persons whom the prosecution proposes to examine as its witnesses excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of Section 173 of Cr.P.C.*
- (iv) The confessions and statements, if any, recorded under Section 161 of Cr.P.C.; and*
- (v) Any other document or relevant extract thereof forwarded to the Magistrate with police report under sub-section (5) of Section 173 of Cr.P.C.*

A perusal of abovesaid provisions as contained in Section 207 of Cr.P.C shows that it is the obligation of the Magistrate to see that all the documents which are necessary for the accused for proper conduct of his defence, are furnished to him/her well before the trial.

A conjoint reading of section 173(5), 173(6) and first proviso attached to Section 207 of Cr.P.C leaves no scope of doubt that it is the bounden duty of the police officer to forward to the Magistrate all the statements mentioned in sub-section (5)(b) of Section 173 of Cr.P.C without any exception so as to enable the Magistrate to discharge his duty under Section 207 of Cr.P.C by furnishing copies of such statements to the accused. In case the police officer considers that the disclosure of any part of such statements would not be expedient in the public interest or not essential in the interest of justice, he is supposed to append a note in his forwarding memorandum to the Magistrate to that effect along with his reasons for withholding such statements or parts thereof from the accused.

Wherever any such reservation is made by the police officer, it still lies within the discretion of the Magistrate whether to allow such request or not and it is only in the event where Magistrate agrees with the reasons given by the police officer for not supplying any statement or part thereof to an accused, he may order accordingly while agreeing with the objection raised by the police official.

It can be said in other words that it is only when a specific request has been made by a police officer while forwarding memorandum of the charge-sheet while being forwarded to the Magistrate stating that any particular statement recorded under Section 161(3) of Cr.P.C or any document or any part thereof should not be supplied to the accused. The Magistrate has a discretion which has been conferred upon him, by virtue of first proviso attached to Section 207 of the Code after considering the reasons given by the police officer making such request, would either issue directions for furnishing copy of that part of statement or would issue directions for furnishing any relevant portion of that statement thereof to the accused or otherwise. In case, when no such request is made by a police officer while forwarding the charge-sheet to the Magistrate then the copies of all the statements recorded under Section 161(3) of Section 207 of the Code are required be provided to the accused.

It is settled law that an impartial and fair opportunity in a trial is the legal right of an accused. Justice can only be ensured if the rules of procedure are diligently adhered to and no Court shall allow breach of those principles. It is also a settled law that fair and just investigation is a hallmark of any investigation. It is not the duty of the Investigating Officer to strengthen the case of prosecution by withholding the evidence collected by

him. In case, the Investigating Officer withholds the evidence collected by him, the accused has a right to rely upon that evidence and tell the Court to take that evidence into account while framing the charges. The Court while framing charges may not take into account the defence of the accused or the documents in custody of the accused which were not produced by the accused before the Investigating Officer or which did not form part of the investigation. However, the Court is duty bound to consider the evidence collected by the Investigating Officer during the investigation of the case. Some of the evidence or documents which have been withheld by the Investigating Officer or the prosecution deliberately, the Court has a power to order the Investigating Officer to place the entire investigation before it and ask him to produce case diaries.

There is a great purpose behind the relevant provisions incorporated under Section 173(5) and 173(6) and Section 207 of the Code by the legislature. In case on perusal of certain documents or extracts thereof and/or statements under Section 161(3) of the Code filed along with the charge-sheet, the Court finds that there are discrepancies between those statements and the deposition of the witnesses made during trial and such discrepancies are found to be of serious nature then prejudice would definitely be said to have been caused to the accused as in such an eventuality, the accused would be denied proper opportunity of discrediting those witnesses by bringing on record the contradictions which exists between their evidence in the Court and their earlier statements recorded by the police.

In the present case, it appears that no specific request has been made by the police officer while forwarding the charge-sheet to the

Magistrate for withholding any statement under Section 161(3) of the Code or any particular document or portion thereof from the petitioner by citing reasons. It is also not disputed that the police officer has a discretion under Section 173(6) of the Code to withhold any part of the document, in case, he forms an opinion that it is inexpedient in public interest to do so and accordingly informs the Magistrate. The first proviso to Section 207(v) also gives a discretion to the Magistrate to provide to the accused even those statements which 'the Magistrate thinks appropriate' and the same are necessary to be furnished.

This is in contrast to the position regarding supplying of documents. Section 173(5)(a) of the Code refers to documents 'on which the prosecution proposes to rely' other than 'those already sent to the Magistrate during the investigation'. These documents are to be forwarded to the Magistrate along with report. Therefore at the stage when the supply of documents has to be made in terms of Section 207(v) of the Code what the Magistrate has with him are those documents which have already been sent to the Magistrate during the course of investigation and those documents which are forwarded by the police officer along with the charge sheet.

Under Section 207(v), the Magistrate has no discretion in the matter of not supplying such documents. The only limited discretion that the Magistrate has in terms of the second proviso to Section 207(v) of the Code is if the documents are so voluminous, he can direct the accused to allow to inspect documents.

It is also relevant to mention here that Section 172(1A) of the Code has been amended w.e.f. 31.12.2009 to expressly state that all the statements recorded under Section 161 of the Code have to be necessarily

recorded in the case diary.

The words `such statement or any other record thereof, whether in a police diary or otherwise, or any part of such statement or record in sub-section (1) of Section 162 of the Code makes it clear that the statements of witnesses recorded during investigation even if taken down in police diary maintained under Section 172 of the Code, can be used by the accused for the purposes specified in proviso to Section 162(1) of the Code. Meaning thereby, a valuable right has been given to accused under proviso to Section 162(1) of the Code and he can exercise this right, in case, the copies of the statements made by the witnesses during the investigation, whether recorded under Section 161(3) of the Code or in the police diary maintained under Section 172 of the Code are supplied to him. The accused is entitled to the copies of statement of persons whom the prosecution proposes to examine as witnesses even though those statements are recorded in the police diary maintained under Section 172 of the Code.

The purpose of amendment is apparent that in case, the prosecution is permitted to withhold the vital evidence from an accused to establish his case, the investigating agency may be able to keep the court in dark. The charges framed by CBI are of criminal nature and the accused under such circumstances has a right to lay down his defences for the purposes of which all necessary disclosures have to be duly made in accordance with the procedures laid down under the Code. The accused has a right to ask for the documents which were collected during the course of investigation to build up his defence so that any serious prejudice may not be caused to him. Under certain circumstances, in case, the accused seeks certain documents which support his case and do not support the case of the

prosecution and the investigating officer ignores those documents and forward only those documents which favour the prosecution, in such a situation, it would be a duty of the investigating officer to make such documents available to the accused.

The observations made by Rajasthan High Court in case ***Dhananjay Kumar Singh vs State of Rajasthan 2006 Cr. L.J. 3873*** relating to various provisions of the Code are as under :-

“ Despite the legal provisions, despite the case law, there is still a school of thought which postulates that the police and the prosecution can withhold information both from the accused and the Court. According to this thinking, in case the prosecution does not wish to rely on the statements of certain witness, or on some piece of evidence, then it is not bound to disclose the same, even if the evidence is in favour of the accused. Such an interpretation would be both against the Principles of Natural Justice and against the concept of fair play. Undoubtedly, Principles of Natural Justice are an integral part of a fair trial. Article 21 of the Constitution of India and the Universal Declaration, mentioned above, both guarantee a fair trial to the accused. Even if the Code does not contain any provision for providing “all” the evidence collected by the investigating agency such a provision has to be read into the Code. For principle of natural justice audi alteram partem would have to be read into the Code. It is trite to state that opportunity of hearing means effective and substantial hearing. Truncated evidence, half hidden evidence given to the accused or placed before the Court, do not amount to effective hearing. Thus, under the principle of audi alteram partem the accused would have the right to access the evidence which is in his favour but which the prosecution is

unwilling to produce in the Court and whose disclosure does not harm the public interest. In case the relevant evidence in favour of the accused is not supplied, we would be creating “Kangaroo Courts” and weaving an illusion of justice. Such Courts and such illusions are an anathema to the judicial sense of fair play.

(Emphasis supplied)

Moreover, the investigating agency and the prosecution both represent the State. Every action of the state is legally required “to be fair, just and reasonable”. In case, the investigating agency and the prosecution withhold any evidence in favour of the accused from the accused, they are not being fair, just and reasonable with the accused. Therefore, their action would be in violation of Article 14 of the Constitution of India. Article 21 of the Constitution of India also requires that the procedure established by law should be fair and reasonable. A procedure which permits the withholding of evidence which is in favour of the accused from the Court and from the accused, cannot be termed as “fair and reasonable.” Thus, such a procedure would be in violation of Article 21 of the Constitution of India.

(Emphasis supplied)

Furthermore, in every judicial proceeding the parties are expected to come with clean hands. By withholding the evidence without any legal justification, the prosecution would be hiding vital facts from the Court. It would, thus, come to the Court with unclean hands. The prosecution is expected to reveal the whole truth and nothing but the truth to the Court. Neither the investigating agency, nor the prosecution can be permitted to keep the Court in the dark. After all, halfbaked truths are unpalatable to the judicial taste.

(Emphasis supplied)

Undoubtedly, it is the duty of the court to discover the

truth of the case. The courts are empowered to discover the truth. In its quest for the truth, the Court should not leave any stone unturned. In case, the Court is of the opinion that the application under Section 91 of the Code is genuine and has not been moved with ulterior motive of delaying the trial, the Court must exercise its jurisdiction and direct the production of the document including the case diary. The Criminal Court should keep in mind that justice should not only be done, but must appear to be done. In case the accused is denied access to evidence which is in his favour, he can reasonably conclude that justice has not been done with him. The feeling of injustice would weaken the faith of the people in the judiciary as an institution. The faith of the people, in a democracy, has to be protected and promoted. (paragraph no.31 of the reported judgment) I respectfully agree with the above observations, which in my opinion need to be kept in mind by the trial court as well as the learned Special Public Prosecutor.”

On perusal of all documents available on the file and the case law as cited above, I am of the considered view that the petitioner cannot be denied an access to the documents on record.

After hearing the arguments of learned counsel for the parties and the observations made in various judgments, no conclusion can be drawn at this stage as the matter needs to be reconsidered further by the trial Court. However, in case, after reconsideration of the matter in case the trial Court comes to the conclusion that the Investigating Agency is in possession of documents which are required by the accused petitioner, his prayer be considered.

In view of the above, the present petition is partly allowed and impugned order dated 29.09.2018 (Annexure P-1) passed by the Special

Judicial Magistrate, CBI Haryana at Panchkula in case FIR No.RC1(S)/2015 SCU.V/SCII/CBI/New Delhi dated 07.01.2015 registered under Sections 120-B, 326, 417 and 506 IPC at Police Station SCII/CBI New Delhi titled as “***CBI vs Gurmeet Ram Rahim and others***” is hereby set aside with a direction to the trial Court to allow the accused-petitioner through his counsel to inspect the whole record including the statements recorded under Section 161 of the Code and to supply the same, in case, there is relevancy and admissibility on moving such application by him. The petitioner be also allowed to inspect the file of the unmarked and unexhibited documents referred to in the application moved by the accused in the Court of Special Judicial Magistrate, CBI Haryana at Panchkula. Such inspection be completed within a period of two weeks from the date of moving of such application. The venue of such inspection and the persons by whom the inspection is to be done will be decided by the learned trial Court. It is also made clear that the right of inspection will not affect the validity of any part of the trial including the examination of the accused.

(DAYA CHAUDHARY)
JUDGE

03.12.2018
gurpreet

Whether speaking/reasoned

Yes/No

Whether Reportable

Yes/No