

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.4537 OF 2021

Souvik Renupada De

...Petitioner

V/s.

The State of Maharashtra

...Respondent

Mr. Aabad Ponda, Senior Advocate a/w Mr. Sumit Krishna Kumar
Tiwari for Petitioner.

Mr. R. M. Pethe, APP for Respondent (State).

CORAM : AMIT BORKAR, J.

DATE : NOVEMBER 21, 2022

PC.:

1. The order challenged in the Writ Petition is rejection of Application of the petitioner under Section 173(8) of the Code of Criminal Procedure, 1973 to further investigate in relation to FIR No.469 of 2019 registered with Nerul Police Station for offence under Sections 376(1), 417, 500 read with 34 of Indian Penal Code, 1860.

2. The basis of the Application under Section 173(8) of Code of Criminal Procedure, 1973, was that there was consensual sex between the victim and the accused and, therefore, it needs to be investigated on the basis of material already on record in the form of seized cell phone. After the filing of charge-sheet, therefore, the accused filed an Application before the learned Sessions Judge seeking further investigation to bring on record

transcript of conversation between the accused and the complainant. According to the petitioner to substantiate his defence and for the purpose of transparent and fair investigation, further investigation as contemplated under Section 173(8) of Code of Criminal Procedure, 1973 needs to be allowed.

3. Learned Sessions Judge by the impugned order has rejected the Application holding that the investigating officer has made detailed investigation in the matter and collected true facts and data through the evidence of witnesses which mentioned in the charge-sheet and there is no need for further investigation. The accused has therefore filed present Petition challenging the said order.

4. Learned senior advocate appearing for the petitioner invited my attention to the relevant extracts of the transcript of record which according to the accused are between the victim and the accused. He submitted that for just and fair trial of the accused, impartial investigation is essential. It is one of the facet of the right under Section 173(8) of investigating agency to have just and fair investigation. In support of his submission, he relied on the unreported Judgment of the Single Judge of this Court in Criminal Writ Petition No.208 of 2014 in the case of **Datta Achyut Kothavale Vs. State of Maharashtra** decided on 28th February 2014 and the Judgment of the Apex Court in the case of **Vinubhai Haribhai Malaviya Vs. State of Gujarat**, reported in ((2019) 17 SCC 1).

5. Per contra, learned APP submits that such Application under Section 173(8) of Code of Criminal Procedure, 1973, was not maintainable. If the accused wants to bring on record the transcript between the victim and the accused, only remedy available for is to file an Application under Section 91 of Code of Criminal Procedure, 1973.

6. Having considered the submissions on behalf of both sides in my opinion, the issue involved in the Petition is fairly covered by the Judgment of Single Judge of this Court in the case of **Datta Achyut Kothavale Vs. State of Maharashtra**.

7. Learned Single Judge of this Court after considering the Judgment of Apex Court in the case of **Ramlal Narang Vs. State (Delhi Administration)** reported in (1979(2) SCC 322) in paragraph nos.7 and 8 held as under:

“7) No doubt, article 21 of the Constitution of India vests in every accused the right to demand a fair trial. This right which is fundamental in nature, casts a corresponding duty on the part of the State to ensure a fair trial. For the State is to ensure a fair trial, it must ensure a fair trial investigation. A fair investigation would include a complete investigation. A complete investigation would mean an investigation which looks into aspects of acquisition put it in favour of the accused or against him. Plain reading of section 173 (8) of Code of Criminal Procedure, 1973, inconsonance with Article 21 of the Constitution, it can be said that accused has a right to fair trial. It would thus, be necessary to bring on record a conversation between the accused and the victim in order to substantiate his case that it is rather a case of consensual sex.

8) Plain reading of section 173 (8) would indicate that there is nothing in the section which bars further investigation at the behest of the accused. In the case of Ramlal Narang(cited supra), Hon'ble Apex Court has also recognized a right of the accused for a fair investigation. It would be erroneous to presume that section 173 (8) contemplates investigation only at the behest of the complainant, prosecuting agency, etc. There is nothing in the section to infer that it does not cast a right upon the accused to seek further investigation in the interest of justice.”

8. Having considered the facts of situation of the case of **Datta Achyut Kothavale Vs. State of Maharashtra**, which in my opinion is similar to the fact situation of the present case, in my opinion, the similar order needs to be passed in the present case. In that view of the matter, I pass following order:-

- (i). The impugned judgment and order dated 21st September 2021, passed below Exhibit-3 in Sessions Case No.142 of 2020 is quashed and set aside.
- (ii). The Application below Exhibit-3 for further investigation is allowed.
- (iii). The investigating officer shall take necessary steps to further investigate into the aspects as mentioned in the Application and to file supplementary report alongwith copies of transcript of conversation between the victim and the accused within eight (8) weeks from today.

- (iv). Till the receipt of supplementary report, further proceedings of Sessions Case No.142 of 2020 pending before the Additional Sessions Judge, Thane shall remain stayed.
- (v). The copy of supplementary report alongwith copies of transcribe shall be included in the list of documents to be given to the accused and complainant under Section 294 of Code of Criminal Procedure, 1973.
- (vi). Rule is made absolute in the above terms. Writ Petition is disposed of. No Costs.

(AMIT BORKAR, J.)