

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO.760 OF 2023

Mahendrasingh S/o. Vikramsingh Chauhan
Vs
The Central Bureau of Investigation (CBI)
and others

Mr. Abhaykumar D. Ostwal, Advocate for the applicant
Mr. S. R. Yadav-Lonikar, APP for the respondents/State
Mr. Ajay G. Talhar, DSGI for the respondent No.1
Mr. Kiran P. Rathod, Advocate for the respondent No.6

CORAM : KISHORE C. SANT, J.

RESERVED ON : 28th MARCH, 2023

PRONOUNCED ON : 04th MAY, 2023

P. C.

1. This petition is by the original accused No.1 in Sessions Case No. 78/2014 pending before the learned Additional Sessions Judge, Latur for the offences punishable under Sections 302, 201, 203, 120-B read with Section 34 of the Indian Penal Code. The petitioner is aggrieved by order dated 07-02-2023 passed by the learned Additional Sessions Judge, Latur rejecting his application Exh.1310. This application was preferred at the fag end of the trial praying to permit him to

undergo Narco Analysis, Brain Mapping, polygraph/lie detector test at his own expense.

2. Facts in short are that:

3. The petitioner during trial, prayed that his tests be carried at his own expenses. He had also stated that even if the tests result goes against him he will be bound by the same. Learned Additional Sessions Judge, Latur by order dated 30-03-2017 was pleased to allow this application. This order came to be challenged by the Central Bureau of Investigation by filing criminal application No.6586/2017. This court by order dated 20-04-2018 held that CBI cannot be asked to conduct the above said tests and therefore, set aside only order dated 30-03-2017 whereby the Sessions Court had directed the Investigation Officer (CBI) to do needful to take accused to the Central Forensic Science Laboratory, Bombay or Gandhinagar.

4. After the order dated 30-03-2017 the petitioner filed

another application below Exh.276 stating that Laboratory had informed that such tests are to be conducted through the Investigating Officer. In view of this application and the deposition the Sessions Court passed another order dated 03-08-2017 whereby direction was issued to the CBI to take the petitioner for undergoing such tests. It is specifically stated that the order dated 30-03-2017 is not disturbed. However, in spite of that no Narco test was conducted for some reasons and the matter proceeded. Now, evidence of the prosecution is over. Statement under Section 313 is also recorded. In question No.964 in 313 statement petitioner stated that he wants to undergo all these tests again and requested that Narco test be conducted and filed application below Exh.1310. At Exh.1313 he gave his written say in which he again submitted that his tests be conducted without directing CBI to take him to concerned laboratory. It is this application that came to be rejected. The learned trial court while rejecting the application has observed that the investigation stage is already completed. Though the order dated 30-03-2017 was passed the petitioner

has not persuaded for compliance of the order after he was released on bail at the earlier stage before framing of charge or before recording the evidence. The application is filed after lapse of five years and five months from the date of order. He had already filed an application below Exh.359 and that was rejected. Thereafter, the trial is made time bound by the Hon'ble Apex Court and directed to conclude the case within a period of two months. It is further observed that no purpose would be served by allowing the application after lapse of five years and five months and after recording evidence of 126 witnesses by the prosecution. It is further observed that accused No.2 is in jail since 2014 etc. Test if conducted now would be after lapse of eight years of the alleged incident and rejected the application.

5. Before going to the submission now it would be of some help to record few dates and facts. First charge-sheet came to be filed on 24-06-2014 by the CID Flying Squad, Pune. On 12-12-2014 second supplementary charge-sheet came to be filed. On 10-12-2016 third supplementary charge-sheet came to be

filed. On 04-08-2016 charge came to be framed by the court. On 08-08-2016 investigation in the aforesaid crime in question was transferred to CBI. On 14-10-2019 supplementary charge-sheet came to be filed by CBI as by then investigation was came to be transferred to CBI. In the application below Exh.1313 dated 01-02-2023 & in the written submission the petitioner has stated that earlier reports such as DNA etc. were fabricated and were changed under political pressure. DNA reports are managed to match with the DNA report of the blood of the deceased person etc and therefore, his other test are necessary.

6. Learned advocate for the petitioner submits that when the petitioner himself was ready to undergo all the tests which would be helpful to the prosecution and court in coming to the right conclusion, still his request is accepted by the trial court by the impugned order. He submits that in fact the order dated 30-03-2017 was passed by the trial court directing to take the petitioner for tests. That order was not disturbed by the High Court in Criminal Application No. 6586/2017. Objection was

only that CBI was directed to conduct the tests and therefore, High Court had only set aside the order directing CBI to conduct the tests and not the order directing such tests and in view of that present application ought to have been allowed. He submits that now it is the proper stage to lead the defense evidence and therefore he has filed an application after his statement under section 313 is recorded. He relied upon the certain judgments in support of this case.

7. Learned DSGI for respondent No.1 CBI vehemently opposed the petition. He submits that the application was filed under Section 232 (3) of the Cr. P. C. He submits that by giving dates that the incident has taken place on 27-03-2014. He further given dates of filing the charge-sheets which are not disputed. Material aspect to which he has invited attention is the order dated 16-08-2018 passed by the learned Additional Sessions Judge, Latur on application below Exh. 359 filed by the present petitioner. The petitioner by said application had sought direction to Investigating Officer to take him to approved

laboratory of Gandhi Nagar, Gujraht for conducting his Narco test pursuant to order dated 30-03-2017 passed on Exh.207. Said application was rejected and said order dated 16-08-2018 is accepted by the petitioner without any challenge. Now filing application at the fag end of the trial when the Hon'ble Apex Court has made the trial time bound is just to prolong the matter.

8. In the rejoinder learned advocate for the petitioner tried to justify as to why he has not challenged the order dated 16-08-2018 by relying upon the judgment in the case of Louis Vs State of Kerala since the trial was going on day-to-day basis now stage has come to file such application. When the petitioner has made it clear that he will bear expenses and he is not asking prosecution to bear the expenses, there is no reason to deny his request.

9. The learned advocate for the petitioner relied upon the judgment *reported in 2023 LiveLaw (SC) 168 in the case of*

Premchand Vs State of Maharashtra wherein the order passed by the High Court convicting the appellant under Section 302 was challenged. The Hon'ble Apex Court has observed that after 313 examination is over such statement be treated as part of statement of accused and when written statement is filed such statement be treated as statement under section subsection 313(1). The said statement need to be considered in the light of the evidence laid by the prosecution. To appreciate the truthfulness or otherwise of such case he relied upon the judgment *reported in (2010) 7 SCC 263 in the case of Selvi and Others Vs State of Karnataka*. Though it is held that no person should be posed even subjected to any of the techniques in question where in context of investigation in criminal cases or otherwise. However, result of test subsequently and voluntary administered can be admitted in accordance with Section 27 of the Evidence Act. He further relied upon the judgment *reported in (2017) 14 SCC 516 in the case of State of Uttar Pradesh Vs Sunil with connected matters* wherein the Hon'ble Apex Court has considered that giving fingerprings, footprints or signature

or specimen of handwriting is not personal testimony. Giving of a personal testimony must depend upon his violation where the accused can make any kind of statement or even refuse to make any statement. He further relied upon the judgment *reported in 2022 SCC Online Raj 1443 in the case of Sunil Bhati Vs State of Rajasthan* and another wherein it is held that right to defend is valuable right and the accused should be given opportunity. In that case also application was preferred at belated stage and was not filed during the course of the investigation. It was held that the accused is allowed to speak out before the court is the stage of defense i.e. under Section 313 of the Cr. P. C. Before 313 he has to simply go by commands of the prosecution and the court. Based upon the observation in the case of *State of Rajasthan Vs Jasveersingh Jat* reported in 2017 (4) Cri.L.R. (Raj) 2079 it is held that the right is indefeasible right created showing legislative intent of giving the accused an opportunity to present the evidence which in support of his evidence. It is held that denying the accused the said right would be a travesty justice.

10. He also relied upon the judgment *reported in 2018 16 SCC 161 in the case of Navneethakrishnan Vs State By Inspector of Police*. He further relied upon the judgment in the case of *Mahesh Mohansing Shribas Vs State of Maharashtra reported in 2011 (1) Bombay C. R. (Cri) 153*. In the case of Mahesh Mohansing Shribas (supra) accused had given consent for Narco analysis test. However, accused No.1 had not given such consent. In that view of the matter learned Magistrate granted permission to conduct Narco analysis test only in respect of accused No.1. Grievance in the petition was that though there was no consent granted by the petitioner therein still the learned Magistrate had passed the order directing to conduct the Narco analysis test. The order was passed on an application filed by the Investigating Officer. The learned JMFC had directed to conduct the said test of both the accused persons. Accused No.2 had filed a petition challenging the said order. The Division Bench of this court by relying upon the Selvi's judgment had held that when accused No.2 had opposed the application of the Investigating Officer the learned JMFC

could not have directed Narco analysis test of accused No.2 and allowed the writ petition. This judgment is not applicable to the facts of the case.

11. He further relied upon the another judgment reported in 2021 4 SCC 1 in the case of *Tofan Singh Vs Tamilnadu*. The Hon'ble Apex Court by considering the Selvi's judgment again held that Narco analysis test cannot be directed against the choice of individual. Thus, this judgment is also not applicable to the facts of this case.

12. Learned DSGI by relied upon the judgment of the Hon'ble Apex Court in the case of *Dr. Rajesh Talwar and another Vs CBI and another in Special Leave Petition (Cri) No.7966/2013*. The Hon'ble Apex Court has held that in that case the petitioner had approached the court after closing of the evidence of the prosecution and after 313 statement of the Cr. P. C. came to be recorded. He filed an application under Section 311 for examination of seven other left over witnesses. He also

moved an application under Section 233 of the Cr. P. C. read with Section 91 in respect of reports of certain tests conducted on three persons who, at one time, were suspected accused and were in police custody. The reports of Narco analysis test, Brain Mapping Test, Lie detector test, polygraph tests, Psychological test etc were called. Said application was rejected even by the High Court. Therefore, the petitioner therein had approached the Hon'ble Apex Court on the ground that only upon examination of the reports by the court the accused would be able to put up their plea that crime is committed by other persons who were earlier suspected. In that case the Hon'ble Apex court held that the petitioner had approached at the belated stage and the petitioners were waiting for about 2 months and allowed to trial to proceed. It was held that said application was filed to delay the proceeding and in that view of the matter Special Leave Petition came to be rejected.

13. Learned DSGI relied upon another judgment in the case of *Yogesh @ Charu Ananda Chandane VS State of*

Maharashtra passed at Principal Seat at Bombay in Criminal Writ Petition No.2420/2016 where this court held that no interference was called for in the order passed by the learned Sessions Judge. It is specifically observed that it would be hazardous situation to permit any /other accused to undergo Narco analysis test for proving his innocence. It is for the prosecution to substantiate its case and prove the guilt of the accused beyond reasonable doubt, evidence collected by the Investigating agency in the course of the investigation would be material at the time of trial. As in exculpatory statement of the accused cannot be made basis for conviction in the same manner exculpatory statement cannot be used to acquit accused and the petition was rejected. Learned DSGI relied upon one another judgment *reported in 2021 DGLS (Ker) 967 in the case of Louis Vs State of Kerla*. In this case of the Kerla High court by relying upon the Selvi's judgment held that revelation brought out the Narco Analysis test under influence of particular drug cannot be taken as conscious act or statement given by the person. Possibility of accused himself making exculpatory statement to

support his defense also cannot be ruled out and dismissed the petition of the petitioner therein.

14. Coming to the facts of this case it is seen that after application below Exh.359 came to be rejected by the learned Sessions Judge by order dated 16-08-2018 the petitioner never made any attempt to challenge the said order or to get the said tests done. In view of the judgments this court finds that even on the facts making such application at the fag end of the trial after 313 statements are recorded would certainly cause delay in trial. The learned Sessions Court has rightly observed that other accused is in jail since 2014. As it is there is no sanctity attached to the reports of such tests. This court in the case of Yogesh @ Charu has held that as the exculpatory statement of the accused cannot form the basis for conviction so in case of statement cannot be used to acquit the accused. One more fact the court has rightly taken into consideration is that the Hon'ble Apex Court has made the trial time bound and it was to be completed it within two months.

15. On considering all the above position and facts of this case this court finds that there is no merit in the petition and the petition is therefore dismissed.

16. Since the trial is made time bound by the Hon'ble Apex Court and to be dismissed within a period of 2 months, the learned trial court is directed to dispose off the trial at the earliest.

[KISHORE C. SANT, J.]

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