

S.J. Chowdhary Vs. State

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Court : Delhi

Decided On : Jan-25-1984

Reported in : 1984CriLJ864; 1984(1)Crimes717; 25(1984)DLT254; 1984(6)DRJ251; 1984RLR245

Judge : Jagdish Chandra, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 161

Appeal No. : Criminal Miscellaneous (Main) Appeal No. 15 of 1984

Appellant : S.J. Chowdhary

Respondent : State

Advocate for Pet/Ap. : B.G. Singh,; P.K. Chaube and; M.L. Sachdev, Advs

Judgement :

Jagdish Chandra, J.

(1) By means of this petition brought under Section 482 of the Code of Criminal Procedure (for short the Code) the petitioner Col. S.J. Chowdhary has challenged the correctness of the order dated 20-12-83 of Sh. K.C. Lohia, Metropolitan Magistrate, New Delhi whereby the application dated 12-12-83 of the petitioner for being supplied copies of statements of prosecution witnesses and documents relied upon by the prosecution had been disallowed.

(2) The petitioner was arrested in the case under Sections 120-B/302 I.P.C. and under Sections 3, 4 and 6 of the Explosive Substances Act. Challan was submitted in Court on 28-10-83 and the documents as required under Section 173 of the Code were furnished to the accused-petitioner but, it is alleged, on scrutiny of documents he found that most of the documents, statements and exhibits relied upon by the prosecution to prove the charge against him had not been furnished to him which necessitated the making of the aforesaid application, dated 12-12-1983 to the learned committing magistrate Sh. K.C. Lohia, Metropolitan Magistrate.

(3) It is urged by the learned counsel for the petitioner that a number of witnesses have been cited for the prosecution in this case and the statements of some of them have been recorded by the Investigating Agency more than once and some of those statements have been recorded in the police diaries and the copies of those statements have not been furnished to the accused-petitioner whereas it was his right to the supply of the same inasmuch those are nevertheless statements contemplated under Section 161(3) of the Code and no privilege is open to the prosecution in regard to the matter of supply thereof simply on the ground that the same find set out in the police diaries maintained under Section 172 of the Code and for that reason the order of the learned committing magistrate was wrong. Under Section 161 of the Code a police officer making an investigation of a case may examine orally any person supposed to be acquainted with the facts and circumstances of the case and under Sub-section (3) thereof he 'may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.' Then the wording of Section 162 of the Code is very significant as the same goes to show that such statements of the witnesses examined during investigation by a police officer may be recorded by him in a police diary or otherwise making it abundantly clear in an unmistakable manner that the statements of witnesses during investigation can be recorded by a police officer not only on ordinary sheet of paper but even in police diary. It looks desirable to set out the relevant portion of Section 162 of the Code and the same is reproduced as under :- 'Statements to police not to be signed :- Use of statements in evidence-(1) 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: A police diary is normally meant for a police officer investigating a criminal case for recording therein his day-to-day doings regarding the investigation but he is not debarred from recording the statement of any witness therein. and so the privilege in the matter of calling a police diary by an accused person or his agent contemplated under Section 172 of the Code extends only to the doings recorded by a police officer therein and not to the supply of copies of the statements of the witnesses recorded therein as those statements would be covered by Sub-section (3) of Section 161 of the Code. Section 172 reads as follows :-

'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. (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 (I of 1872), shall apply.'

Then under Section 173(5)(b) of the Code when the investigation is completed, the police officer shall send his report to a magistrate empowered to take cognizance of the offence on a police report and along with the same he shall also forward 'the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses' even though an exception to the same is

provided in Sub-section (6) of Section 173 of the Code whereby if the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings 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. But this exception has not been resorted to nor availed of by the Investigating Officer in the case in hand while supplying to the accused copies of the documents contemplated under Section 173 of the Code. Reference to Section 207 of the Code also appears necessary and the relevant portion thereof is set out as under :-- '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 there from 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 :- The reading of Section 173(5)(b) and Section 207(iii) would go to show that the emphasis is on the persons whom the prosecution proposes to examine as its witnesses during trial and not on their statements on which the prosecution proposes to rely for proving charge against an accused person and this distinction is doubly re-assured from the use of the word 'whom' in these two provisions of law which must necessarily refer to the persons and not to their statements for which the word 'which' would have been used instead. This distinction is of great significance from the standpoint of an accused person inasmuch if the investigating agency has recorded the statement of a witness more than once, there may be material contradictions in the same and the accused may like to utilise the same for his benefit and the ends of justice in that behalf can be secured by providing to him the copies of all such statements but such a purpose would be frustrated if the copies of only such statements as are sought to be relied upon by the prosecution, are supplied to the accused and by denying the supply of the rest and this would be the case if the emphasis were on the supply of copies of

these statements relied upon by the prosecution. The emphasis on the witnesses relied upon by the prosecution would mean that the prosecution would be bound to supply all the statements even if recorded more than once of such witnesses as contemplated under Section 161(3) of the Code whether recorded in a police diary or otherwise and thereby a very valuable right has been conferred upon an accused person and the same can not be denied to him and was wrongly denied to him by the prosecution as also by the learned committing magistrate by rejecting the prayer of the accused-petitioner in that behalf by wrongly placing emphasis on the 'statements' sought to be relied upon by the prosecution in a contra-distinction to the 'witnesses' making them. The provision of Sub-section (3) of Section 161 of the Code was introduced only to put a halt to the curious and rather perverted ingenuity of the police officers in following the practice of incorporating oral statements made to them by the witness in the case diaries under Section 172 of the Code in the belief that by doing so those statements could be kept back from the knowledge of the accused but that practice was not abolished by the law and is maintaining its continuance to subserve the surreptitious mischief of an Investigating Officer. These Interpretations also find support from certain authorities. It was held In -State of Kerala v.Raghavan etc . as follows :-

'The prosecution cannot pick and choose and refuse to supply to the accused the copies of the statements which are contradictory to the prosecution case on the ground that the prosecution is not going to rely on the statements of those witnesses. Otherwise it would mean deviation from the mandatory provisions of criminal law and to deny the accused the just and fair trial.'

(4) In The State of Punjab v. Mohinder-Singh and others 1974 76 Plr 364 it is laid down as under ;-

'If the police officer does not record the statements of all or some of the witnesses under Section 161(3), Criminal Procedure Code, but cleverly incorporates the same in the case diary maintained under Section 172, Criminal Procedure Code in the belief that by doing so those statements can be kept back from the knowledge of the accused) then the accused cannot be deprived of the copies of those

statements. The provisions of Sections 162, 173(4) and 207(3), Criminal Procedure Code, impose an obligation upon the prosecution agency to supply copies of statements of witnesses, who are intended to be examined at the trial to enable the accused to obtain a clear picture of the case against him to utilise them in the course of cross-examination to establish his defense and also to shake the testimony of the prosecution witnesses. The words 'such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record' in Sub-section (1) of Section 162, Criminal Procedure Code, make it abundantly clear that statements of witnesses during investigation even if taken down in the police diary maintained under Section 172, Criminal Procedure Code, can be used by the accused for the purposes specified in proviso to Section 162(1) Criminal Procedure Code. A very valuable right is given to the accused under the proviso to Section 162(1) and he can exercise this right only if the copies of all the statements made by the witnesses during the investigation, whether recorded under Section 161(3) or in the police diary maintained under Section 172, Criminal Procedure Code are supplied to him. It follows, therefore, that the accused is entitled to the copies of statements of persons whom the prosecution proposes to examine as witnesses even though those statements are recorded in the police diary maintained under Section 172, Criminal Procedure Code.'

(5) In 'Gogikari Narsoji V. State ILR 1955 Hyd 644, it was held as under:-

'THE Amendment Act xviii of 1923 substituted a new sub-section to Sub-section (1) of Section 162 by which the words 'whether in a police diary or not' were added; it is now clear that the statements of witnesses during investigation, even though taken down in the special diary, can be used by the accused for the purpose specified in the provision.'

The next item urged by the learned counsel for the petitioner is the photographs. It is the admitted case of both the parties that as many as 40 photographs of the scene of occurrence were taken by the Investigating Agency and all those photographs were sent by the said agency to the expert for his opinion. Out of those as many as 31 photographs were supplied to the accused-petitioner and the

supply of remaining 9 has been denied to him by the prosecution on the plea that the same are not relevant for the purposes of the case and that the prosecution does not want to rely thereupon. This plea of the prosecution, when thought out in the proper perspective and as validly explained by the learned counsel for the petitioner, does not commend itself for the reason that the prosecution admittedly does rely upon the expert opinion to whom all the 40 photographs had been sent and who took into consideration all those photographs for formulating his opinion regarding the entire scene of occurrence and the complete pictorial scene of the place of occurrence could be visualised by him only in the context and background of all the photographs and in this view of the matter it would be not only unjust for the prosecution to withhold the remaining 9 photographs by not supplying the same to the accused-petitioner because those are unfavorable to it but is also not permissible under the law as the defense may suffer in the cross-examination of prosecution witnesses who happen to depose about the scene of occurrence and in the matter of confronting under Section 145 of the Indian Evidence Act if they happen to admit the correctness of the photographs and especially at the time of cross-examining the expert, and thus the learned magistrate was in error in disallowing the prayer of the accused on this point.

(6) The next item comprises two cassettes in respect of the tape recorded conversation allegedly amongst the accused and his divorced wife Rani Chowdhary and her mother. Transcript of that conversation has already been supplied to the accused which fact is not disputed by him but he also urges for the supply of the cassette in duplicate. The learned counsel for the accused-petitioner submitted that the supply of the cassette in duplicate to the accused was necessary in order to enable him to play the tape himself so as to prepare himself as to the interpolations and the erosions made in the tape recorded conversation and thus to defend himself against the same during the trial. The matter of voice whether it is of the accused or not, would be a basically important factor in respect of this piece of evidence of the prosecution and there is no justification whatever to refuse to supply the cassette in duplicate to the accused-petitioner at the earliest so as to enable him to prepare his defense in regard to the same and the contention of the learned counsel for the C.B.I, that the accused may be permitted. The facility of getting the tape recorded conversation heard in Court during trial

looks in fact a poor substitute as the same would be an antithesis of the preparation of defense which has to start sufficiently well in advance and not almost on the spur of the moment. In *Kalle Byre and others v. State of Andhra Pradesh* where statements in English said to be translations of original statements made by the witnesses in Telugu were supplied to the accused and the statements in Telugu were deliberately suppressed, it was held that the accused were prejudiced in their defense and hence were entitled to acquittal. The further contention of the learned counsel for the C.B.I. that if the prayer of the petitioner is accepted, he would fill in the lacuna to his own advantage, is again not sufficient so as to deprive the accused of his aforesaid valuable right in this matter. Moreover, there can be no difficulty whatever in the matter of the preparation of the cassette in duplicate. The decision of the learned magistrate on this point is thus erroneous cannot be sustained and the prosecution shall supply the cassette in duplicate to the accused-petitioner without any delay.

(7) The last item pointed out and urged by the learned counsel for the accused-petitioner was regarding the supply of the copy of letter No. 4247 dated 1-10-83 sent by local police to C.B.I. on the basis of which C.B.I. recorded afresh the F.I.R. and registered a case afresh. The learned counsel has pointed out that the aforesaid letter stands on the same footing as the rukka of a police officer on the basis of which F.I.R. is usually recorded. The learned counsel for the C.B.I. had nothing to say against this contention which was in fact conceded.

(8) No other point was urged at the Bar and in view of the aforesaid discussion, the petition is allowed. Stay already granted is vacated.