
(2005) 12 RAJ CK 0009

Rajasthan High Court (Jaipur Bench)

Case No: Criminal Miscellaneous Petition No. 1107 of 2005

Neelesh Jain

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision: Dec. 20, 2005

Acts Referred:

- Constitution of India, 1950 - Article 14, 21
- Criminal Procedure Code, 1973 (CrPC) - Section 161, 170, 172, 173, 173(6)
- Evidence Act, 1872 - Section 114, 123, 124, 145, 161
- Penal Code, 1860 (IPC) - Section 323, 328, 342, 376

Citation: (2006) CriLJ 2151 : (2006) 1 RLW 653 : (2006) 2 WLC 214

Hon'ble Judges: Raghvendra S. Chauhan, J

Bench: Single Bench

Advocate: G.C. Chatterjee, B.L. Sharma, Sandeep and Luhadia, for the Appellant; Arun Sharma, Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

R.S. Chauhan, J.

Accused of offence u/s 376(g) IPC, wanting to defend his liberty and honor, the petitioner had moved an application u/s 91 Cr.P.C. for seeking the production of certain documents which were available with the police, but which the prosecution chose not to file with the charge sheet. However, vide order dated 22.8.05, the Additional Sessions Judge (Fast Track) No. 1, Jaipur City, Jaipur dismissed the said application. Hence, this petition before us.

2. The brief facts of the case are that on 13.9.04, the prosecutrix's father lodged a report at a Police Station Murlipura, Jaipur. However, in the said report he did not claim any fact with regard to sexual exploitation of his daughter, Miss. Reena Sharma by the accused petitioner and by others. Subsequently, the prosecutrix lodged a complaint against the petitioner and others before the Mahila Thana and the Police Station, Murlipura, wherein

she alleged sexual exploitation by them. On the basis of the complaint lodged at Police Station Murlipura, a formal FIR, FIR No. 333/2004, was registered for offences under Sections 342, 376(g), 323, and 328 IPC against the petitioner and others. Moreover, during the course of investigation, on information furnished by the accused petitioner, the police had recovered certain photos, love letters between the prosecutrix and the accused petitioner, some STD bill slips and a ledger book. In fact, the police had not only made a recovery memo, of the said recovery, but had also prepared a site plan of the place of recovery. Thus, the police had in its possession the earlier report lodged by the prosecutrix's father, the report lodged by the prosecutrix at Mahila Thana, and the documents, which were recovered at the petitioner's instance. However, when the police filed the charge sheet against the petitioner, it did not submit these documents along with the said charge sheet. In case these documents were produced, they would probablize the case of the accused that the prosecution had fabricated a case against him. Since these documents, which were in the custody of the police, were required by the defense, the accused petitioner moved an application u/s 91 under the Criminal Procedure Code, (henceforth to be referred to as the Code, for short) praying that the prosecution be directed to produce these documents. However, vide order dated 22.8.05, the Learned Additional Sessions Judge dismissed the said application. Hence, the petition before us.

3. Mr. G.C. Chatterjee, the learned Counsel for the petitioner, has argued that the investigating agency is duty bound to carry out an impartial investigation. While filing the charge sheet, the investigating agency must disclose all the facts discovered by them, during the course of investigation, to the Trial Court. The prosecution cannot be permitted to place a one sided story before the Trial Court. Moreover, the petitioner is entitled to receive those documents which are in his favour, but which are being withheld by the prosecution. He further argued that these documents are needed for confronting the prosecutrix father when he enters the witness box. Thus, these documents, which would throw light on the case, are "necessary or desirable" for the purpose of the trial. According to the learned Counsel, without realizing the scope and ambit of Section 91 of the Code, without appreciating the inter-relationship between Section 91 and Section 173 of the Code, the learned Trial Court has mechanically, rejected the application u/s 91 of the Code.

4. On the other hand, Mr. Arun Sharma, the Learned Public Prosecutor, has contended that the Petitioner is not so much interested in getting the documents, as in getting the trial prolonged. Further, the petitioner can always seek these documents when he is about to enter his defense. Further, since the prosecutrix has not mentioned the existence of these documents, the learned Trial Court was justified in passing the impugned order.

5. We have heard the learned Counsels for the parties and have examined the impugned order.

6. The spark of liberty burns in the soul of every Man. The spark has ignited many revolutions, from the American to the French, from the Russian to our own struggle for freedom. We the people have promised ourselves liberty. We have also promised Justice-social, economic and political. Justice and liberty are inextricably inter-related. Both are essential for the protection of the individual, for the protection of democracy. In democracy, Justice is the protection of peoples' liberty. For, a liberty deprived without reason, without procedure established by law, is injustice. Justice does not exist in a vacuum. It needs to be protected, promoted and delivered for the benefit of the people. The *raison d'être* (the reason for being) of any court is to do complete justice to the people. Thus, the judiciary, called the archangel of the rights of the people, has to be committed to the cause of Justice.

7. Even while exercising criminal jurisdiction, the court cannot forget the inter-relationship between the Constitutional mandate to protect liberty of the people and to do justice with them. If it ignores the Constitutional mandate, it does so at its own peril. For, then the people lose faith in the judiciary. The judiciary loses its relevance and its legitimacy, its reason for existence.

8. The Code prescribes an elaborate procedure for protecting the liberty of the accused and for protecting the interest of the society. The first principle of Common Law is that everyone is presumed to be innocent till proven guilty. Hence, it is for the State to prove the guilt of the offender. However, as the individual is pitted against the might of the Leviathan State, the Code provides enough weapons to the offender to protect his liberty. But, simultaneously, it provides enough restrictions to protect the public interest. Hence, while interpreting the provisions of the Code, we have to keep this jurisprudential background in our mind.

9. Chapter XII of the Code deals with the information to the police and their power to investigate. Section 172 deals with the maintenance of case diary by the police. It states as under:

(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 (1 of 1872) shall apply.

10. Hence, the Code imposes a duty on the police to maintain a case diary of the particular case. The Section further empowers the court to use the diaries as an aid in inquiry or trial. Although Sub-section (3) seems to place an embargo on the right of the accused to call for such diaries or to see them, but the second part of the Sub-section permits the accused to use the said diary for the purpose of contradicting the witness while cross-examining the witness or to cross-examine the witness if such diary is used for refreshing one's memory. Hence, this section does provide accessibility of the diary to the accused under two circumstances.

11. Moreover, Section 173 of the Code imposes a duty on the police to submit the charge sheet against the accused person. Further, Sub-section (5) reads as under:

(3) 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 u/s 161 of all the persons whom the prosecution proposes to examine as its witnesses.

Sub-Section (6) reads as under:

(6) 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.

12. Sub-section (6) permits the Investigating Agency to withhold that portion of the statements recorded by them u/s 161 Cr.P.C., which is "not relevant to the subject-matter", or "the disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest." The power to withhold statements or documents is not an unbridled power. It can be used only in the three circumstances enumerated above and not beyond that. Moreover, while exercising the said power, the police are legally bound to state reasons for withholding the statements or documents. Therefore, the police are not entitled to use the power according to its whims and fancies, but must use the power sparingly and for cogent and reasonable reasons. The investigating agency cannot forget the fact that it is part of the State. Every action of the State has to be "just, fair, and reasonable." The principles of Administrative Law are as applicable to the

investigating agency as they are to the State. Hence, the police must exercise its power under Sub-section (6) of Section 173 of the Code keeping in mind that its action must be "just, fair and reasonable." Any action, which is unjust, unfair and unreasonable, would be an anathema to the concept of equality enshrined in Article 14 of the Constitution of India. The investigating agency cannot be permitted to violate the fundamental rights of the accused in the carb of existing its power under Sub-section (6) of Section 173 of the Code.

13. Furthermore, since the police is required to state reasons for withholding the statements/documents, it is the legal duty of the court to examine if the information is being withheld within the four corners of the Sub-section or is the police going beyond the permissible limits. Even if the police were to conclude that the information should be withheld from the accused, the Court is not bound by such a conclusion. The Court must exercise its discretion independently u/s 91 of the Code. Section 91 of the Code reads as under:

(1) Whenever any Court or any officer in charge of a 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 proceeding 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) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed--

(a) to affect Sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers" Book Evidence Act, 1891 (13 of 1891) or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.

14. A bare perusal of the Section reveals firstly, that it is not subjected to Section 172 and Section 173 of the Code. Therefore, the prohibitions contained in Sections 172 and 173 of the Code do not crib, cabin and confine the powers of the Court u/s 91 of the Code. Secondly, a purposive interpretation has to be given to Section 91. This provision empowers the Court to summon the production of documents or things which the Court considers "necessary or desirable for the purposes of any... inquiry, trial or other proceeding under this Code." It bestows a power on the Court to direct the production of the document or thing before the Court. This is a tool given in the hands of the Court to discover the truth of the controversy before it. It, thus, enables the Court to do complete

Justice with the parties before it. It is precisely to arm the Courts with this weapon that the said section is not subject to Section 173 of the Code. In case the legislature wanted to give the complete power of withholding information from the court to the prosecution, then the legislature would have made Section 91 subject to Section 173 of the Code. But, such is not the case. Therefore, the only harmonious interpretation of the two provisions would be that Sub-section (6) of Section 173 does not curtail the power of the Court u/s 91 of the Code. In case the Court is of the opinion that the prosecution has withheld vital, relevant and admissible evidence from the court, it can legitimately use its power u/s 91 of the Code to discover the truth and to do complete justice to the accused. Hence, any information that is relevant for the just decision of the case, which has been gathered by the investigating agency, must be produced before the Court provided that such revelation would not jeopardize the public interest. To do injustice is against public Interest, For, the people loose faith in the judiciary. One cannot forget the maxim that "justice should not only be done, but it must also appear to be done." Thus, while entertaining an application u/s 91 of the Code, the Court should first consider if any of the three criteria prescribed by Sub-section (6) of Section 173 of the Code is satisfied or not? It should also see if the police have given any cogent reasons for withholding the copies of the statements/documents from the Court. In case the criteria prescribed by Section 173 is satisfied, the Court should then consider if the documents or things are "necessary or desirable" for the just decision of the case. In case it is, then the Court should allow the application u/s 91 of the Code notwithstanding the embargo contained in Section 173 of the Code. In case, the Court comes to the conclusion that the documents or things are irrelevant for the just decision of the case or that the application has been moved with ulterior motive, then it should reject the application. Naturally, the discretion vested in the Court must be applied judiciously, while keeping in mind the Constitutional mandate, and the purpose of Section 91 of the Code. The Court is not expected to reject the application in a mechanical manner. Since rejection of such an application is subject to the scrutiny of higher Courts, the Trial Court must assign reasons for rejecting the application u/s 91 of the Code.

15. At times, the prosecution has used the loophole in the law, in the garb of using the power and Section 173 of the Code, to withhold those documents, which weaken their case against the accused. However, such a free exercise of power is against the spirit of the Code. Once a person has been accused of the commission of an offence, it is for the investigating agency to discover if in fact the offence has been committed by the said offender or by someone else. Like an archeologist, the investigator must brush layers of evidence to reach the truth. But in his endeavor to book the accused, he cannot collect one- sided evidence and present it to the court. For the investigating agency has to be impartial in its investigation. Moreover, the prosecutor cannot convert himself into a persecutor by submitting one side of the investigation and by withholding relevant portion that would favor the accused person. Neither the investigating agency, nor the prosecution is supposed to merely claim, "Ashwatham maro," without informing the Court as to who has died, the Man or the elephant.

16. In case the prosecution is permitted to withhold vital evidence from the court, the unscrupulous prosecution would be permitted to keep the Court in the dark. The law does not permit the prosecution to play fowl with the Court. Like any party before the Court, the prosecution, too, must come to the court with clean hands. If information is withheld from the Court, then adverse inference should be drawn against the prosecution. Such an inference flows legally from Section 114 of the Evidence Act.

17. It is no argument to claim that the accused can ask for the documents withheld by the prosecution at the time of entering his defense. The defense has to be built up from day one of the trial and not an ad hoc basis. Unless all the evidence collected during the course of the investigation is given to the accused, he is prevented from constructing a proper defense. The right to defend, which flows from the fundamental right to "life" and "personal liberty" enshrined in Article 21 of the Constitution of India, is not an illusory right, but a substantive one. One cannot tie the hands of the accused, deprive him of the necessary evidence to defend himself and still claim that a fair trial is being conducted. Moreover, such piece-meal supply of relevant documents and evidence needlessly prolongs the trial. The Courts must endeavor to deliver justice in the shortest time period. Prolonged trial not only loses its relevance, it also adds to the burgeoning burden on the judiciary. Strategies need to be adopted which would make the Courts efficient and litigant friendly and which would ensure quick delivery of justice to the people. Thus, the documents or evidence, which can be provided immediately, need not be held back till the accused enters his defense.

18. In the case of Navin Ramji Kamani v. Shri K.C. Shekhar, Dy. Chief Controller of Imports & Exports and Anr. 1981 RCC 218 this Court held that, "The power given u/s 91 of the code is a general and wide power which empowers the court, the production of any document or any other thing at any stage of any investigation, inquiry or other proceedings under the Cr.P.C. It is no doubt true that the legislature has circumscribed this power to be exercised only where the court considers that the summoning of such document or things was necessary or desirable in its view, then the court could pass an order both in favor of the accused as well as the prosecution. It is no doubt true that such power would not be exercised where the documents or thing may not be found relevant or it may be for the mere purpose of delaying the proceedings or the order is sought with an oblique motive." Similar view has also been expressed in Rajesh Prasad v. State of Rajasthan 1998 (Supp) Cri.L.R. 265.

19. In the instant case the earlier report lodged by the prosecutrix's father on 13.9.04 can be used by the accused petitioner to confront the father when he steps into the witness box. The report lodged by the prosecutrix at Mahila Thana would also shed some light on the controversy in issue. Similarly, the documents recovered by the police at the instance of the accused would be necessary and desirable for the purpose of the trial. Hence, the Learned Additional Judge should have exercised the power u/s 91 of the Code.

20. In the result, this petition is allowed. We quash and set aside the impugned Order dated 22.8.05. We further direct and the Learned Additional Sessions Judge (Fast Track) No. 1 Jaipur City, Jaipur to call for the report lodged by the prosecutrix's father at Police Station, Murlipura, on 13.9.04, the alleged report lodged by the prosecutrix at the Mahila Thana on 28.10.04, and to call for the documents which were recovered at the instance of the accused petitioner on 30.10.04 such as photos, letters, ledger, and STD slips and to give copies of these documents to the petitioner within three weeks of the receipt of a certified copy of this order.