

CASE NO.:
Appeal (crl.) 201 of 2007

PETITIONER:
State of NCT of Delhi

RESPONDENT:
Ravi Kant Sharma & Ors

DATE OF JUDGMENT: 13/02/2007

BENCH:
Dr. ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
J U D G M E N T
(Arising out of SLP (Crl.) No. 3480 of 2006)

Dr. ARIJIT PASAYAT, J.

Leave granted.

Challenge in this Appeal is to the direction given by the Delhi High Court directing that if the gists of the interrogation can be regarded as statements under Section 161(3) of the Code of Criminal Procedure, 1973 (in short the 'Cr.P.C.'), although in summary form, then the same would have to be supplied over the accused i.e. the respondents herein.

The background facts in a nutshell are as follows:

Respondents filed a petition under Section 397 and Section 401 read with Section 482 of the Cr.P.C. regarding the opinion expressed by the trial court during recording of cross examination of PW 193 (Inspector Sukhwinder Singh) with regard to submissions alleged to have been made by PW 166 (Rakesh Bhatnagar).

For the purpose of adjudication of the present controversy, reference has to be made to the opinion expressed by the trial court which reads as follows:

"It is not in dispute that this witness has admitted to have interrogated PW Rakesh Bhatnagar several times but copy of seven statement (recorded by me and other IO's) only is supplied to accused R.K. Sharma. In my opinion even the gist made after interrogating a person i.e. PW Rakesh Bhatnagar was a statement in view of aforesaid provision and the accused was entitled to get copy of such gists of statements. Prosecution is accordingly to supply the copies of such gists to accused R.K. Sharma".

This opinion/direction was questioned by the appellant

because in terms of such opinion/direction the prosecution has been directed to supply copies of 'gists' of statement said to have been recorded while interrogating PW 66. Stand of the appellant is that these are not statements which fall within the meaning of Section 161(3) of the Cr.P.C. and, therefore, the accused is not entitled to any copy of the so called 'gists'. It was pointed out that these 'gists' were not statements but mere observations of the investigating officer. Relevant portion of the cross examination of PW-193 reads as follows:

"At this stage learned defence counsel requests that he be supplied copies of the gist of statements of interrogation of Rakesh Bhatnagar recorded in case diary under Section 161. The witness submits that he did not record the gists of statement but the gist of interrogation which was his own observation and not the statement."

It was pointed out by the appellant before the trial court that PW 193 has categorically and clearly stated that he did not record gist of statements of PW 66. On the other hand the gist related to his own observation and cannot be treated as statement of PW 66. Since the plea did not find acceptance by the trial Court, High Court was moved by filing a revision petition. Maintainability of revision was questioned by the respondents. It was also pointed out that in terms of Section 172 Cr.P.C., the investigating officer is required to maintain a case diary. With reference to the decision of this Court in *Shamshul Kanwar v. State of Uttar Pradesh* (1995 (4) SCC 430) it was submitted that in some States the case diary comprises two parts i.e. first relating to the steps taken during investigation and the second part consists of statements of circumstances ascertained during the investigation. This Court observed that these statements obviously refer to the statements recorded by the officer in terms of Section 161 Cr.P.C. and copies of second part which mainly contains statement of the witnesses as a matter of course are to be supplied to the accused persons.

After considering the rival submissions, learned Single Judge of the High Court observed that revision was maintainable and on merits observed as follows:

"As regards the merits, considering all the arguments advanced by the learned counsel for the parties and particularly in view of the statements made by PW 193 in the course of his cross-examination that the gists recorded by him were gists of his own observation and not the statement of PW-66, it would be necessary to ascertain by looking at the case diary itself as to whether this statement of PW 193 is made out or not. There is not doubt that if the gists pertain to only observations made by PW-193 himself then these are not to be disclosed to the accused/respondents. However, if the gists can be regarded as statements under Section 161(3) of the Cr.P.C., although in summary form, made by PW-66 then in view of the various decision of this Court and particularly in the case of *Shamshul Kanwar*, the same would have to be made over the

accused/respondents. It would be necessary to examine the case diary to ascertain the same. The matter is, therefore, sent back to the concerned trial court for determination of this issued in view of the aforesaid guidelines. Thereafter, the court may pass appropriate orders. The impugned direction/order is set aside.

The revision petition stands disposed of."

According to the learned counsel for the appellant, the conceptual difference between the statement of witnesses recorded under Section 172 Cr.P.C. and case diary under Section 161 Cr.P.C. has been lost sight of. It is submitted that Shamsul Kanwar's case (supra) on which the High Court relied dealt with cases having composite case diary which include the statement recorded under Section 161 Cr.P.C. as well as the observation of the investigating officer under Section 172 Cr.P.C. It is submitted that in the State of NCT of Delhi the case diary is being maintained separately and hence there is no question of any portion of case diary being looked into to find out whether statement under Section 161 have been recorded therein or not.

Per contra learned counsel for the respondents submitted that the statements prayed for by the respondents are statements recorded under Section 161 Cr.P.C. and not of statements relatable to Section 172 Cr.P.C. as projected by the appellants. With reference to Section 172 Cr.P.C. it is submitted that it does not contemplate recording of: (a) statement of witnesses; (b) gists of statement of witnesses. Therefore, recording of statement of witnesses in case diary would not confer such statement the protection granted under Section 172 Cr.P.C.

Sections 161 and 172 Cr.P.C. read as follows:

"Section 161: Examination of witnesses by police: (1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer 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.

Section 172: Diary of proceeding in investigation : (1) Every police officer making an investigation under this Chapter shall day

by day enter his proceeding 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.

Under Section 161 Cr.P.C. the police officer may reduce into writing any statement made to him in the course of examination under that provision and if he does so he shall make separate and true record of the statement of each such person whose statement he records. The provision in other words authorizes the police officer to reduce into writing any statement made by a witness. In a given case the investigating officer may record circumstances ascertained during investigation in the case diary in terms of Section 172 Cr.P.C. It is only when the investigating officer decides to record the statement of witnesses under Section 161 Cr.P.C. that he becomes obliged to make a true record of the statement which obviously will not include the interpretation of the investigating officer of the statements or the gists of statement. At this stage it will be necessary to take note of sub-section (b) of Section 173 Cr.P.C. which authorises the police officer to claim a sort of privilege in respect of any statement recorded under Section 161 Cr.P.C. after giving reasons as to why such statement may not be provided to the accused. Such privilege can only be claimed in respect of statement recorded under Section 161 Cr.P.C. and not in respect of what the officer records in the case diary i.e. the gist of the statement under Section 172 Cr.P.C. It will also be necessary to take note of Section 207 Cr.P.C. The Magistrate has to, in terms of that provision, provide to the accused, free of cost, copies of statements recorded under Section 161 (3) subject to the exceptions in terms of Section 173(6). A categorical statement has been made by the learned counsel for the appellant that the gist of the statement has not been produced by the prosecution to prove the guilt of the accused and the gists of the statements were not recorded in terms of Section 161 Cr.P.C. and accused has no right to ask for the gists of such statements if recorded under Section 172.

At this juncture it would be necessary to take note of sub section (3) of Section 172 which provides that neither the accused nor his agents shall be entitled to call for such diaries meaning diary of proceedings in investigation nor shall he or they be entitled to see them merely because they are referred

to by the Court.

As rightly submitted by learned counsel for the appellants, in different States case diaries are maintained in different ways. Some States have a composite case diary which includes the statements recorded under Section 161 Cr.P.C. as well as the observations of the investigating officer under Section 172 Cr.P.C. This court, therefore, in *Shamshul Kanwar's case* (supra) held that the statements under Section 161 need to be separated from observations which are recorded under Section 172 in order to make available the statement under Section 161(3) to the accused. The position is entirely different here. Certain observations made by this Court in two recent cases also need to be noted. In *Sunita Devi v. State of Bihar and Another* [2005(1) SCC 608] it was observed at para 27 as follows:

"The supervision notes can in no count be called. They are not a part of the papers which are supplied to the accused. Moreover, the informant is not entitled to the copy of the supervision notes. The supervision notes are recorded by the supervising officer. The documents in terms of Sections 207 and 208 are supplied to make the accused aware of the materials which are sought to be utilized against him. The object is to enable the accused to defend himself properly. The idea behind the supply of copies is to put him on notice of what he has to meet at the trial. The effect of non-supply of copies has been considered by this Court in *Noor Khan v. State of Rajasthan* (AIR 1964 SC 286) and *Shakila Abdul Gafar Khan (Smt.) v. Vasant Raghunath Dhoble and Anr.* (2003 (7) SCC 749). It was held that non-supply is not necessarily prejudicial to the accused. The Court has to give a definite finding about the prejudice or otherwise. The supervision notes cannot be utilized by the prosecution as a piece of material or evidence against the accused. At the same time the accused cannot make any reference to them for any purpose. If any reference is made before any court to the supervision notes, as has noted above they are not to be taken note of by the concerned court. As many instances have come to light when the parties, as in the present case, make reference to the supervision notes, the inevitable conclusion is that they have unauthorized access to the official records. We, therefore, direct the Chief Secretary of each State and Union Territory and the concerned Director General of Police to ensure that the supervision notes are not made available to any person and to ensure that confidentiality of the supervision notes is protected. If it comes to light that any official is involved in enabling any person to get the same appropriate action should be taken against such official. Due care and caution should be taken to see that while supplying police papers supervision notes are not given."

Similarly in Sidharth and Ors. v. State of Bihar [2005 (12) SCC 545] at para 27 it was noted as follows:

"Lastly, we may point out that in the present case, we have noticed that the entire case diary maintained by the police was made available to the accused. Under Section 172 of the Criminal Procedure Code, every police officer making an investigation has to record his proceedings 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. It is specifically provided in sub-clause (3) of Section 172 that 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 Cr.P.C. or the provisions of Section 145 of the Evidence Act shall be complied with. The court is empowered to call for such diaries not to use it as evidence but to use it as aid to find out anything that happened during the investigation of the crime. These provisions have been incorporated in the Code of Criminal Procedure to achieve certain specific objectives. The police officer who is conducting the investigation may come across a series of information which cannot be divulged to the accused. He is bound to record such facts in the case diary. But if the entire case diary is made available to the accused, it may cause serious prejudice to others and even affect the safety and security of those who may have given statement to the police. The confidentiality is always kept in the matter of criminal investigation and it is not desirable to make available the entire case diary to the accused. In the instant case, we have noticed that the entire case diary was given to the accused and the investigating officer was extensively cross-examined on many facts which were not very much relevant for the purpose of the case. The learned Sessions Judge should have been careful in seeing that the trial of the case was conducted in accordance with the provisions of Cr.P.C."

The direction of the High Court as contained in the impugned order is not a definite one. It only refers to Shamshul Kanwar's case (supra) and concludes that if the 'gists' can be regarded as statements under Section 161 Cr.P.C. although in summary form they would have to be made over to the accused. It does not factually find out that as to whether the gists can be regarded as statements in view of the position of law stated above. It did not take note of the specific stand of the appellant about separate maintenance of case diaries.

In view of what has been stated above, the directions of the High Court are clearly unsustainable and are set aside.

Appeal is allowed.

JUDIS