

MHNS010025582021



**IN THE COURT OF SPECIAL JUDGE (POCSO) AND
ADDITIONAL SESSIONS JUDGE, NASHIK.**
(Presided over by S. S. Kharat)

Special Case (POCSO) No. 187 /2021

The State of Maharashtra,
Through Bhadrakali Police Station,
Nashik City, District Nashik.

} Prosecution

Versus

Soni alias Rani alias Aruna
Baban Khicchi,
Age 28 years,
R/o – Sathe Nagar, Deolaligaon,
Nashik-Road, Nashik City,
District N a s h i k.

} Accused

Appearance :

Mrs. A.R. Patil, Learned Additional Public Prosecutor for the
Prosecution.

Mr. A.A. Pund, Learned Advocate for the Accused.

Common Order Below
Exhibits-47A & 65
(Pronounced on 4th August, 2023)

Application at Exhibit-47A is filed by PSI, Bhadrakali Police Station, the Investigating Officer, for production of school leaving certificate of victim 'R' while application at Exhibit-65 is moved by the same Investigating Officer seeking production of school leaving certificate of victim 'M'.

2. Contentions raised in application (Exhibit-47A) are that charge-sheet has been filed in C.R. No. I-96/2021 by Bhadrakali Police Station for the offences punishable under Sections 363, 366A, 370, 376(i)(n), 506 of the Indian Penal Code, under Section 4 of the Prevention of Immoral Traffic Act and under Sections 4, 6 and 12 of the Protection of Children from Sexual Offences Act. Victim 'R' is aged 14 years 5 months, but her age proof was not filed. Her mother produced the school leaving certificate of victim 'R' on 31-12-2022 of Raja Hussain Urdu Primary School, Bhusawal before them and, therefore, the same could not be annexed to the charge-sheet. Hence, prayed to annex the same now.

3. In application (Exhibit-65), it is contended that at the time of investigation, school leaving certificate of victim 'M' was not available with her mother and, therefore, the same could not be included in the charge-sheet. They also did not receive any information about the school in which the victim 'M' was taking education at the relevant time. Since now the

school leaving certificate of victim 'M' is made available, the same be taken on record of the charge-sheet.

4. The accused has put in his reply at Exhibit-37 to application (Exhibit-47A) and resisted the claim of the prosecution. It is submitted that the application filed by the prosecution is afterthought and without any legal provision of law. Further, once copies are filed under Section 173 of the Cr.P.C., additional documents could not be permitted to be filed as there is no such provision in the Code. The only stage of filing the documents is before the commencement of the trial. The law peripherally requires copies of all documents on which the prosecution relies to be furnished to the defence before the commencement of the trial.

5. According to the accused, the admitted position of the present case is that :

- (i) the charge has already been framed against the accused for the offences punishable under Sections 363, 366A, 376(p), 376(2)(n) of the Indian Penal Code, Section 16 read with Sections 4, 6 and 12 of the POCSO Act and Section 4 of the ITPA Act,
- (ii) the trial has commenced,
- (iii) Notice under Section 294 of the Cr.P.C. has been given by the prosecution,

- (iv) Material and other witnesses have already been examined by the prosecution,
- (v) In all eleven witnesses have been examined by the prosecution including the Investigating Officer,
- (vi) The accused has already opened his defence.

6. It is further contended that if additional documents are permitted to be taken on record, it would cause grave prejudice to the accused, particularly when investigation in that regard was not carried out and more so, when copies of those documents were not placed on record at the time of filing charge-sheet nor are they part and parcel of the report under Section 173 of the Cr.P.C., which were not seized during investigation nor were they collected during investigation. Thus, the application is preferred only to fill-in the lacunae in the case of prosecution and, therefore, it is likely to cause prejudice to the accused. Hence, prayed for rejection of the application.

7. I have gone through both the applications and the say of the accused.

8. Heard both sides.

9. Advocate for the accused has argued that in this case, prosecution has examined eleven witnesses. The case is now posted for recording statement of the accused under

Section 313 of the Cr.P.C. The Investigating Officer has now realized that birth certificates of alleged victims are not produced and, therefore, for filling-up the lacunae the prosecution now at the fag end of the trial, wants to produce the documents, which are not permissible. It is further submitted that additional documents can be produced on record by way of Section 173(8) of the Cr.P.C., but since the trial has already commenced and completed and now the case is fixed for statement of the accused under Section 313 of the Cr.P.C., even the supplementary investigation under Section 173(8) of the Cr.P.C. is not permissible/

10. In support of his contentions of arguments, advocate for the accused has relied upon the judgment in the case of Venubhai Haribhai Malaviya versus State of Gujarat, AIR 2019 SC 5233 wherein Hon'ble Supreme Court of India has ruled that, in case of trial before the Sessions Court, the trial shall be treated to have commenced when charges are framed under Section 228 of the Cr.P.C., 1973. Further, on an overall survey of pronouncements of the Court on the scope and purport of Section 173(8) of the Cr.P.C. and consistent trend of explication thereof, it is held that though the Investigating Agency concerned has been invested with the powers to undertake further investigation desirably after informing the Court thereof, before which it had submitted its report and obtaining its approval, no such power is available therefor to the learned Magistrate after cognizance has been taken on the basis of the

earlier report, process has been issued and the accused has entered appearance in response thereto. Further to say that the fair investigation would lead to the conclusion that a fair and just investigation would lead to the conclusion that the police retain the power, subject of course, to the Magistrate's nod under Section 173(8) of the Cr.P.C. to further investigate an offence till charges are framed.

11. In this case, the question of law is, whether, after a charge-sheet is filed by the police, the Magistrate has the power to order further investigation and if so up to what stage of a criminal proceeding.

12. It is also observed that the investigation includes all the proceedings under this Code for the collection of evidence conducted by a Police Officer or by any other person (other than Magistrate), who is authorized by the Magistrate in this behalf. Further, a report under Section 173 of the Cr.P.C. is normally the end of the investigation.

13. Whether the police desired to make a further investigation, the police could express their regard and respect for the Court by seeking its formal permission to make further investigation.

14. The powers under Section 173(8) of the Cr.P.C., as has been noticed here-in-above and would be available at all

stages of the progress of a criminal case before the trial actually commences. Further, since the Magistrate has the power to order further investigation until charges are framed under Section 156(3) read with Section 173(8) of the Cr.P.C., no question as to the Magistrate exercising any inherent power would arise in this case.

15. Further, the accused has relied upon the judgment in the case of *Sri Desaraju Venugopal versus Central Bureau of Investigation, 2022 LiveLaw (Del) 1156* wherein also it is held that there is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h) and Section 173(8) of the Cr.P.C. as has been noticed here-in-above, and would be available at all stages of the progress of the criminal case before the trial actually commences.

16. Thus, sum and substance of the arguments advanced by the accused is that additional documents can be produced on record after filing charge-sheet by way of Section 173(8) of the Cr.P.C., but till before commencement of the trial and not after that.

17. As against above, APP for the prosecution has placed reliance on the judgment in the case of *Bhagyashree Prashant Wasankar versus The State of Maharashtra, 2021*

ALL MR (Cri) 3030. In this case, the witness had sought permission to produce documents which were misplaced by him and since they were now found, he was seeking permission to place before the Sessions Court. In this case, Hon'ble Bombay High Court has held that the Cr.P.C. does not contemplate any procedure for a witness to directly produce documents during the course of trial. Recourse to the provisions of Section 242 as well as Section 294 of the Cr.P.C. cannot be taken by the witness. However, additional documents can be produced on record by following the procedure of further investigation as contemplated under Section 173(8) of the Cr.P.C. and the Prosecutor taking a call as to whether such documents need to be produced in order to prove the charge against the accused. It is further held that the whole purpose of filing charge-sheet after completion of investigation along with the documents upon which the prosecution desires to place reliance would be defeated if witnesses are permitted to directly produce additional documents as it would cause prejudice to the accused persons by depriving them of fair opportunity to prepare their defence.

18. APP has further placed reliance on the pronouncement in the case of Central Bureau of Investigation versus R.S. Pai, AIR 2002 SC 1644. In this case, Hon'ble Supreme Court has observed that it is apparent that normally the Investigating Officer is required to produce all the relevant documents at the time of submitting charge-sheet, but at the

same time as there is no specific prohibition, it cannot be held that the additional documents cannot be produced consequently. If some mistake is committed in not producing the relevant documents at the time of submitting report or charge-sheet, it is always open to the Investigating Officer to produce the same with the permission of the Court. Considering the preliminary stage and the context in which the Police Officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which prosecution proposes to rely, the word `shall' used in subsection (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. If further investigation is not precluded, then there is no question of not permitting the prosecution to produce additional documents, which were gathered prior or subsequent to investigation. In such cases, there cannot be any prejudice to the accused. In these premises, the application filed by the appellant for production of additional documents was allowed. In this case, the appellant had sought permission for production of additional documents, which were gathered during investigation, but were not produced before the Court.

19. APP further seeks to rely on the judgment of the Hon'ble Bombay High Court in the case of Niwas Keshav Raut versus The State of Maharashtra, 2016 ALL MR (Cri) 3742 wherein it is held that, the significant aspect of Section 294 Cr.P.C., one must note, is that it nowhere places any embargo upon the prosecution or accused to file a document at a stage subsequent to filing of the charge-sheet. It only says that if any document is sought to be produced before the Court, it should be included in the list of the documents and then the other side should be called upon to either admit or deny the genuineness of the document. In this case, at the close of examination-in-chief, the witness deposed that he discovered one chit from the case of spectacles and on reading its contents, he found the contents furnished some proof in support of the prosecution case against the accused and, therefore, APP had filed an application for permission to produce the chit before the Court. In this case, considering the fact that the cross-examination was not begun, there would be no question of causing of any prejudice to the accused and rightly so was observed the learned Sessions Judge. The learned Sessions Judge further observed that so far as the proof and effect of the document is concerned, same would have to be gone into at an appropriate stage, which again cannot be said to be a view standing opposite to law. Therefore, finding no illegality or arbitrariness in the impugned order passed by the learned Sessions Judge, Hon'ble High Court dismissed the writ petition.

20. On perusal of both the applications, it is apparent that the Investigating Officer has not mentioned the provision of law i.e. whether under Section 294 of the Cr.P.C. or under Section 173(8) of the Cr.P.C., the present applications are moved.

21. In this case, neither victim-1 (PW-2) nor victim-2 (PW-3) or mother of victim-1 during the course of their evidence have disclosed the date of birth of both victims. They have simply stated the age of both victims. During cross-examination on behalf of accused, questions were put to the Investigating Officer API Smt. Jayashree Anawane (PW-10) as regards date of birth of the victims, but she has fairly admitted that she has not collected documents relating to date of birth of both victims during investigation. Now, present case is fixed for recording the statement of the accused under Section 313 of the Cr.P.C. The accused has entered upon his defence.

22. For a brief moment if it is assumed that the present applications are moved under Section 173(8) of the Cr.P.C., but now the trial is over. The principles laid down in the case of Vinubhai Haribhai Malaviya (cited supra) show that further investigation (to collect evidence), so also supplementary charge-sheet can be filed up to the commencement of the trial.

23. In the present, trial has already begun and prosecution has examined all the material witnesses. The

accused has entered upon the defence and questions relating to birth date of the victims were put in the cross-examination of the witnesses. Thus, when the trial has commenced and on the verge of completion, report under Section 173(8) of the Cr.P.C. is not permissible. Even the Investigating Officer has not sought formal permission for the proceeding under Section 173(8) of the Cr.P.C.

24. In Bhagyashree Prashant Wasankar (cited supra), Hon'ble Bombay High Court has observed that an application filed by a third party/witness during the course of evidence is not permissible. However, additional documents, if any, could be produced only upon further investigation being undertaken under Section 173(8) of the Cr.P.C. by the Investigating Officer, but as per the judgments of the Hon'ble Apex Court since the trial has been commenced and the prosecution has examined nearly 11 witnesses, that stage under Section 173(8) of the Cr.P.C. is already over.

25. In the case of Niwas Keshav Raut (cited supra), Hon'ble Bombay High Court has observed that significant aspect of Section 294 of the Cr.P.C. shows that nowhere it places any embargo upon the prosecution or the accused to file documents at a stage subsequent to filing of the charge-sheet. In this case, the trial was commenced, but considering the fact that cross-examination of PW-1 was not started and, therefore, the Hon'ble Bombay High Court held that no prejudice would

be caused to the accused in that case. Thus, considering these circumstances, the production of additional documents under Section 294 of the Cr.P.C. was allowed. But in the present case, the prosecution has not moved the present applications under Section 294 of the Cr.P.C. So also, since the evidence of both victims, mother of victim-1 as well as the evidence of the Investigating Officer is over, the accused has also asked questions to the witnesses on the said point, if the production of the documents at the fag end of the trial is allowed, it would cause prejudice to the accused.

26. In the cited supra judgment Sri Desaraju Venugopal, Hon'ble Delhi High Court, by referring to the judgment of the Hon'ble Supreme Court in the case of CBI versus R.S. Pai, observed in para 18 that in a criminal trial, it is assumed that the investigation is completed and the prosecution has, as such, concertised its case against an accused before commencement of the trial. It is further settled law that the prosecution ought not to be allowed to fill-up any lacunae during a trial, but as recognized by the Hon'ble Supreme Court in CBI versus R.S. Pai, the only exception to this general rule is if the prosecution had "mistakenly" not filed a document, the said document can be allowed to be placed on record. But in the present case, during the course of cross-examination of the Investigating Officer the questions to that effect were asked. The Investigating Officer has fairly admitted that he has not collected the said documents during

investigation. Therefore, it cannot be said that mistakenly the documents were not filed. On the contrary, it appears that after noticing the said fact in the evidence, the prosecution wants to fill-up the lacunae at the fag end of the trial.

27. Viewed thus, in the case in my hand, if production of the documents is allowed at this stage, it would certainly cause prejudice to the accused and if the documents are produced, it would be de-novo trial before the Court by recalling all the concerned witnesses.

28. Thus, considering all the facts and circumstances, the present applications are liable to be rejected. Accordingly, I pass the following order :

Order

1	Applications (Exhibits-47-A and 65) moved by the prosecution in Special Case No. 187/2021 are hereby rejected,
2	No order as to costs.

This Order is being dictated in open Court.

Sd/-

(S. S. Kharat)

Special Judge (POCSO) and
Additional. Sessions Judge,

Nashik

Date : 04-08-2023

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