Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO 694 OF 2017
(Arising out of SLP (Crl.) No. 9314 of 2016)

Balakram ....Appellant

Versus

State of Uttarakhand & Ors. ...Respondents

J U D G M E N T

MOHAN M. SHANTANAGOUDAR, J.

Leave granted.

2. The judgment in Miscellaneous application No. 1123 of 2016, passed by the High Court of Uttarakhand at Nainital setting aside the order dated 31.8.2016 in I.A. No. 174 Kha in S.T. No. 1 of 2015 is called on question in this appeal.

3. Respondent No.3 herein, along with another accused, is facing trial in ST No. 01 of 2015 before the Sessions Court, Champawat for the offences punishable under Section 302 and 201 of IPC. During the course of the trial, after the completion of examination in chief of PW-15, an application was filed by the respondent No.3 herein (one of the accused), the contents of which read thus:-

> "In the above mentioned case applicant wants to submit some key and relevant documents which are necessary for the fair and just trial of instant case.
>
> It is therefore, humbly prayed that your Honour may kindly grant permission for the same in the interest of justice."

4. Along with the application, list of documents to be produced was also filed. The documents are stated to be copies of certain pages of Police diary maintained under Section 172 of the Code of Criminal Procedure, 1973 (for brevity, Cr.P.C.), by the Investigation Officer (PW-15), which were obtained by respondent No.3 by making an application under the provisions of Right to Information

Act, 2005. The respondent No. 3 proposes to confront PW 15 with those documents.

5. Such application was opposed by the appellant herein/complainant on the ground that the fresh documents cannot be allowed to be produced by the accused at the premature stage of trial and it is always open for the accused to produce such documents during the stage of recording of statements of the accused under Section 313, Cr.P.C. It was further contended by the appellant that it is open for the accused to lead evidence on their behalf after recording of the statements of the accused under Section 313, Cr.P.C.

6. The application came to be rejected by the Sessions Court on 31.8.2016. Being aggrieved by the same, respondent No.3 herein filed Misc. Application No. 1123 of 2016 before the High Court of Uttarakhand at Nainital under Section 482 Cr.P.C. By the impugned order the High Court allowed the said miscellaneous application.

7. Learned counsel for the appellant taking us through the order of the Courts below, argued that entries made

in the police diary referred to in Section 172 of the Cr.P.C. cannot be used for the purpose of Section 145 of the Indian Evidence Act, 1872 unless the conditions laid down under Section 172(2) and (3) of Cr.P.C are satisfied; that the High Court is not justified in allowing the accused/respondent herein to produce certain pages of police diary obtained by the respondent under the provisions of Right to Information Act. He argued in support of the order of the Trial Court.

8. Per contra, advocate for the respondent argued in support of the order of the High Court contending that the documents sought to be produced were for confronting PW 15-Investigation Officer who is the author of those documents; the defence will lose an opportunity to confront the investigation officer, in case the respondent is not allowed to produce the documents in question. According to him, it is always open to the accused to produce the documents to be relied upon by him at the time of recording his statement under Section 313 of the Cr.P.C. but the accused would not get chance

to confront the Investigation Officer with such documents.

9. Before proceeding further it would be relevant to note the provisions of Section 172 Cr.P.C. and Section 145 of the Indian Evidence Act for deciding the issue involved:-

> **"Section 172 of the Code of Criminal Procedure, 1973**
>
> **172. 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 (1 of 1872), shall apply,
>
> **Section 145 of the Indian Evidence Act, 1872**
>
> **145. Cross-examination as to previous statements in writing.**—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or

> being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

10. The afore-mentioned provisions are to be read conjointly and homogenously. It is evident from sub-section (2) of Section 172 Cr.P.C., that the Trial Court has unfettered power to call for and examine the entries in the police diaries maintained by the Investigating Officer. This is a very important safeguard. The legislature has reposed complete trust in the Court which is conducting the inquiry or the trial. If there is any inconsistency or contradiction arising in the evidence, the Court can use the entries made in the diaries for the purposes of contradicting the police officer as provided in sub-section (3) of Section 172 of Cr.P.C. It cannot be denied that Court trying the case is the best guardian of interest of justice. Under sub-section (2) the criminal court may send for diaries and may use them not as evidence, but to aid it in an inquiry or trial. The information which the Court may get from the entries in

such diaries usually will be utilized as foundation for questions to be put to the police witness and the court may, if necessary in its discretion use the entries to contradict the police officer, who made them. But the entries in the police diary are neither substantive nor corroborative evidence, and that they cannot be used against any other witness than against the police officer that too for the limited extent indicated above.

11. Coming to the use of police diary by the accused, sub-section (3) of Section 172 clearly lays down that neither the accused nor his agents shall be entitled to call for such diaries nor he or they may be entitled to see them merely because they are referred to by the Court. But, in case the police officer uses the entries in the diaries to refresh his memory or if the Court uses them for the purpose of contradicting such police officer, then the provisions of Sections 145 and 161, as the case may be, of the Evidence Act would apply. Section 145 of the Evidence Act provides for cross examination of a witness as to the previous statements made by him in writing or

reduced into writing and if it was intended to contradict him in writing, his attention must be called to those portions which are to be used for the purpose of contradiction. Section 161 deals with the adverse party's right as to the writing used to refresh memory. It can, therefore, be seen that, the right of the accused to cross-examine the police officer with reference to the entries in the police diary is very much limited in extent and even that limited scope arises only when the Court uses the entries to contradict the police officer or when the police officer uses it for refreshing his memory.

12. In other words, in case if the Court does not use such entries for the purpose of contradicting the police officer or if the police officer does not use the same for refreshing his memory, then the question of accused getting any right to use entries even to that limited extent does not arise. The accused persons cannot force the police officer to refresh his memory during his examination in the Court by referring to the entries in the police diary.

13. Section 145 of the Indian Evidence Act consists of two limbs. It is provided in the first limb of Section 145 that a witness may be cross-examined as to the previous statements made by him without such writing being shown to him. But the Second limb provides that, if it is intended to contradict him by the writing, his attention must before writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. Sections 155 (3) and 145 of Indian Evidence Act deal with the different aspects of the same matter and should, therefore, be read together.

14. Be that as it may, as mentioned supra, right of the accused to cross examine the police officer with reference to the entries in the police diary is very much limited in extent and even that limited scope arises only when the Court uses such entries to contradict the police officer or when the police officer uses it for refreshing his memory and that again is subject to provisions of Sections 145 and 161 of the Indian Evidence Act. Thus, a witness may be cross-examined as to his previous statements made by

him as contemplated under Section 145 of the Evidence Act if such previous statements are brought on record, in accordance with law, before the Court and if the contingencies as contemplated under Section 172(3) of Cr.P.C. are fulfilled. Section 145 of the Indian Evidence Act does not either extend or control the provisions of Section 172 of Cr.P.C. We may hasten to add here itself that there is no scope in Section 172 of the Cr.P.C. to enable the Court, the prosecution or the accused to use the police diary for the purpose of contradicting any witness other than the police officer, who made it.

15. In case of **Malkiat Singh and others** vs. **State of Punjab**[1], this Court while considering the scope of Section 172(3) Cr.P.C. with reference to Section 145 of the Indian Evidence Act observed thus:-

> "It is manifest from its bare reading without subjecting to detailed and critical analysis that the case diary is only a record of day to day investigation of the investigating officer to ascertain the statement of circumstances ascertained through the investigation. Under sub-section (2) the court is entitled at the

1. 1991(4) SCC 341

> trial or enquiry to use the diary not as evidence in the case, but as aid to it in the inquiry or trial. Neither the accused, nor his agent, by operation of sub-section (3), shall be entitled to call for the diary, nor shall he be entitled to use it as evidence merely because the court referred to it. Only right given thereunder is that if the police officer who made the entries in the diary uses it to refresh his memory or if the court uses it for the purpose of contradicting such witness, by operation of Section 161 of the Code and Section 145 of the Evidence Act, it shall be used for the purpose of contradicting the witness, i.e. Investigation Officer or to explain it in re-examination by the prosecution, with permission of the court. It is, therefore, clear that unless the investigating officer or the court uses it either to refresh the memory or contradicting the investigating officer as previous statement under Section 161 that too after drawing his attention thereto as is enjoined under Section 145 of the Evidence Act, the entries cannot be used by the accused as evidence."

16. The police diary is only a record of day to day investigation made by the investigating officer. Neither the accused nor his agent is entitled to call for such case diary and also are not entitled to see them during the course of inquiry or trial. The unfettered power conferred

by the Statute under Section 172 (2) of Cr.P.C. on the court to examine the entries of the police diary would not allow the accused to claim similar unfettered right to inspect the case diary.

17. This Court in the case of **Mukund Lal v**s. **Union of India and Anr[2].**, while considering the question relating to inspection of the entries made in the case diary by the accused has observed thus:-

> "We are of the opinion that the provision embodied in sub-section (3) of Section 172 of the CrPC cannot be characterised as unreasonable or arbitrary. Under sub-section (2) of Section 172 CrPC the court itself has the unfettered power to examine the entries in the diaries. This is a very important safeguard. The legislature has reposed complete trust in the court which is conducting the inquiry or the trial. It has empowered the court to call for any such relevant case diary; if there is any inconsistency or contradiction arising in the context of the case diary the court can use the entries for the purpose of contradicting the police officer as provided in sub-section (3) of Section 172 of the CrPC. Ultimately there can be no better custodian or guardian of the interest of

[2] AIR 1989 SC 144

justice than the court trying the case. No court will deny to itself the power to make use of the entries in the diary to the advantage of the accused by contradicting the police officer with reference to the contents of the diaries. In view of this safeguard, the charge of unreasonableness or arbitrariness cannot stand scrutiny. The petitioners claim an unfettered right to make roving inspection of the entries in the case diary regardless of whether these entries are used by the police officer concerned to refresh his memory or regardless of the fact whether the court has used these entries for the purpose of contradicting such police officer. It cannot be said that unless such unfettered right is conferred and recognised, the embargo engrafted in sub-section (3) of Section 172 of the CrPC would fail to meet the test of reasonableness. For instance in the case diary there might be a note as regards the identity of the informant who gave some information which resulted in investigation into a particular aspect. Public interest demands that such an entry is not made available to the accused for it might endanger the safety of the informants and it might deter the informants from giving any information to assist the investigating agency, as observed in *Mohinder Singh* v. *Emperor*:

"The accused has no right to insist upon a police witness referring to his diary in order to elicit information

> which is privileged. The contents of the diary are not at the disposal of the defence and cannot be used except strictly in accordance with the provisions of Sections 162 and 172. Section 172 shows that witness may refresh his memory by reference to them but such use is at the discretion of the witness and the judge, whose duty it is to ensure that the privilege attaching to them by statute is strictly enforced."
>
> The public interest requirement from the standpoint of the need to ensure a fair trial for an accused is more than sufficiently met by the power conferred on the court, which is the ultimate custodian of the interest of justice and can always be trusted to be vigilant to ensure that the interest of accused persons standing the trial, is fully safeguarded."

18. From the afore-mentioned, it is clear that the denial of right to the accused to inspect the case diary cannot be characterized as unreasonable or arbitrary. The confidentiality is always kept in the matter of investigation and it is not desirable to make available the police diary to the accused on his demand.

19. Since we are not called upon to decide the question as to whether the copy of the case diary or a portion thereof can be provided to the accused under the provisions of the Right to Information Act, we are not deciding the said question in the matter on hand. In the case of **Sidharth etc. etc.** vs. **State of Bihar[3],** the entire case diary maintained by the police was made available to the accused by the trial Court. In that context certain observations were made by this Court which read thus:-

> "….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 statements 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 CrPC."

[3] AIR 2005 SC 4352

20. Since in the matter on hand, neither the police officer has refreshed his memory with reference to entries in the police diary nor has the trial court used the entries in the diary for the purposes of contradicting the police officer (PW-15), it is not open for the accused to produce certain pages of police diary obtained by him under the provisions of Right to Information Act for the purpose of contradicting the police officer.

21. In view of the above, the High Court is not justified in permitting the accused to produce certain pages of police diary at the time of cross examination of PW-15/Investigating Officer. Accordingly, the impugned Order is liable to be set aside and the same stands set aside. The appeal is allowed.

SUPREME COURT OF INDIA
JUDGMENT

.....J.
(Dipak Misra)

.....J.
(A.M. Khanwilkar)

.....J.
(Mohan M. Shantanagoudar)

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New Delhi
Dated: April 19, 2017

SUPREME COURT OF INDIA
JUDGMENT