

Sudhir v. State of Maharashtra, **(2023-2)210 PLRIJ 004 (Bom.)**

The case involves a CD that was placed before the trial court without a certificate under Section 65B of the Indian Evidence Act in proceedings u/s 156(3).

The JMFC refused to pass an order for viewing the CD or any other material.

Plea the court is not accepting the document as proof in the trial or adjudicating any issues with its help. The CD is only being used to ascertain whether a case is made out to issue directions under Section 156(3) of the Cr.P.C.

The question of admissibility of the CD would come only during the trial and not before it is tendered into evidence.

The objection is only to viewing the CD by the Revisional Court.

The Sessions Judge has rightly held that there is no bar to look into the documents and has permitted the respondent to display the video recording.

Criminal Procedure Code, 1973 (II of 1974) S. 156(3) - Evidence Act, S. 65B - CD placed without certificate before the trial court - JMFC refused to pass an order - Whether for viewing CD or any other material, whether certificate under section 65B of the Indian Evidence Act is necessary? - At this stage the Court is not accepting the said document as a proof in the trial and is also not adjudicating upon any of the issues or the points with the help of such a document - It is only for the purpose of ascertaining as to whether case is made out to issue directions under S. 156(3)- Assuming that the Court takes cognizance by rejecting the prayer for directions under S. 156(3) of the Cr.P.C. and direct police to make an inquiry under S. 202 of the Cr.P.C., still stage of trial is yet to come - The question of admissibility of offence would come only in the Trial and not any time before such document is tendered into evidence and sought to be proved by the prosecution or the parties to the proceedings - Therefore, the question of expecting a certificate under section 65B of the Indian Evidence Act itself does not arise at this stage.

Held, Court finds only that a revision is pending before the Sessions Court against order passed by the learned JMFC refusing to pass order under section 156(3) of the Cr.P.C. The objection is only to viewing of the CD by the Revisional Court. The learned Sessions Judge has rightly held that there is no bar to look into the documents and has rightly rejected the application and permitted the respondent to display the video recording.

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HIGH COURT OF JUDICATURE AT BOMBAY (BENCH AT AURANGABAD)

SUDHIR – Appellant,

Versus

STATE OF MAHARASHTRA – Respondents

Criminal Writ Petition No. 76 Of 2023

Criminal Procedure Code, 1973 (II of 1974) S. 156(3) - Evidence Act, S. 65B - CD placed without certificate before the trial court - JMFC refused to pass an order - Whether for viewing CD or any other material, whether certificate under section 65B of the Indian Evidence Act is necessary? - At this stage the Court is not accepting the said document as a proof in the trial and is also not adjudicating upon any of the issues or the points with the help of such a document - It is only for the purpose of ascertaining as to whether case is made out to issue directions under S. 156(3)- Assuming that the Court takes cognizance by rejecting the prayer for directions under S. 156(3) of the Cr.P.C. and direct police to make an inquiry under S. 202 of the Cr.P.C., still stage of trial is yet to come - The question of admissibility of offence would come only in the Trial and not any time before such document is tendered into evidence and sought to be proved by the prosecution or the parties to the proceedings - Therefore, the question of expecting a certificate under section 65B of the Indian Evidence Act itself does not arise at this stage. [Para 16]

Held, Court finds only that a revision is pending before the Sessions Court against order passed by the learned JMFC refusing to pass order under section 156(3) of the Cr.P.C. The objection is only to viewing of the CD by the Revisional Court. The learned Sessions Judge has rightly held that there is no bar to look into the documents and has rightly rejected the application and permitted the respondent to display the video recording.

Mr. Aditya N. Sikchi, Advocate for the petitioners. Mr. Y.G. Gujarati, APP for the respondent No.1/State. Mr. S.B. Deshpande, Sr. Advocate a/w. Mr. Mukesh Swami i/b. Mr. Shreyas Deshpande, Advocate for respondent No.2.

JUDGMENT

Kishore C. Sant, J. – (Reserved On : 03.04.2023 , Pronounced On : 05.06.2023) – Rule. Rule made returnable forthwith by consent of the parties.

02. This petition is by the persons shown as accused, against whom application came to be filed seeking directions under section 156(3) of the Cr.P.C. Said application came to be rejected. Respondent No.2 therefore filed Criminal Revision Application in the Court of learned Sessions Judge, Jalna. Pending said revision, the petitioners filed an application raising objection that the material such as Compact Disk (CD) produced by the complainant/respondent No.2 cannot be seen by the Sessions Court while deciding the revision application, as the same is not produced along with certificate under section 65-B of the Indian Evidence Act. The learned Sessions Judge rejected the said application and thus the petitioners are before this Court.

03. At the time of alleged offence, petitioner No.1 was Dy. Superintendent of Police, petitioner No.2 was Police Inspector, petitioner No.2 was Police Sub-Inspector, Petitioner Nos.4,5 and 7 were Police Constables and petitioner No.6 was a driver in the Police Department. Petitioner No.8 is a Home Guard at Jalna. Respondent No.2 happens to be the

complainant.

04. Facts in short as alleged by respondent No.2 are that he happens to be a social worker and is a person having prestige in his community. One person from his community met with an accident and was admitted to ICU. Respondent No.2 came to know this as he had been to see his relative in the same hospital and therefore he went to see that patient as well. The said patient died in the hospital. On knowing this, a mob gathered in the hospital. The management of the hospital looking at the mob, called police force. Present petitioners, therefore, went to the hospital. Petitioner No.1 on reaching to hospital started abusing the persons from Gavali community. Since respondent No.2 happens to be a person from Gavali community, he did not like the same and he therefore started recording the incident with his mobile phone. One of the police constable, therefore, snatched the mobile and told about video recording to petitioner No.1. On that petitioner No.1 assaulted the complainant. In the incident the complainant received injuries. After some time, the complainant and other persons were taken to the police station. The respondent was kept in the police station for the entire night without giving him water and food. On next day at around 1.30 p.m. again the complainant was produced before petitioner No.1. Petitioner No.1 again abused him in the name of caste. As per the allegations, petitioner No.1 even demanded money from the complainant. With these and other serious allegations, the complainant tried to lodge a complaint with the police. However, no cognizance was taken. The complainant, therefore, went to the office of the Superintendent of Police for lodging the complaint. However, there again he was pressurized by the authorities and was asked not to file any complaint. On this, the complainant/respondent No.2 filed an application under section 156(3) of the Cr.P.C. in the Court of learned JMFC, Jalna.

05. The learned JMFC by his order dated 27.07.2021 rejected the prayer under section 156(3) by holding that the power is discretionary power. No FIR can be registered against public servant without sanction from the competent authority. It is observed that by way of amendment to section 156(3), a public officer enjoys special privilege. It is further considered that the incident has occurred when police tried to control the mob gathered at the hospital and thus they were discharging official duty. It is also observed that since the alleged act is connected in discharge of official duty, prior sanction was necessary before passing order under section 156(3) of the Cr.P.C.

06. This order came to be challenged by respondent No.2 by filing a Revision in the Court of learned Sessions Judge. The petitioners filed an application objecting viewing of the video recorded on the CD having recording of the incident. It is stated in the application that there is no record as to how the video recording is copied on the CD and as to who has prepared the CD etc. The main objection is about the evidentiary value of the said video recording stating that the said CD is not accompanied by a certificate under section 65-B of the Indian Evidence Act. Respondent No.2 filed his say stating that in the revision, the Sessions Court has power to look into the entire material produced before the Trial Court. This is not a stage to consider the evidentiary value of the said material. It is only during the course of trial, such question needs to be considered. It is also stated that the said video in fact is available online and even on YouTube Channel. The petitioners have not taken action against uploading said video and prayed for rejection of the application.

07. The learned Sessions Court by way of the impugned order held that the Court while dealing with revision application against an order under section 156(3) of the Cr.P.C., need not decide admissibility of the document. Since the documents are filed before the learned Trial Court, there is no bar in looking into the said documents. It is made clear that the issue of admissibility of document can be considered at the appropriate time and held that the document needs to be viewed by permitting the respondent to display the video

recording. This order is under challenge in this petition.

08. The learned Advocate for the petitioners submits that in view of section 65-B of the Indian Evidence Act, unless a CD is accompanied by a certificate, it cannot be viewed. He further submits that viewing of the document itself amounts to taking of cognizance. If the evidence is admissible then only it can be seen at any stage. The Revisional Court's power is limited to correct the legal mistake committed by the Trial Court and for that purpose, it is not necessary to view the CD. About the main matter, he submits that till date no application for sanction to prosecute the petitioner is filed. It was necessary for the learned Sessions Judge to apply his mind before viewing the CD. The Court below has failed to appreciate that it is a revision against public servants and the proviso to section 156(3) (Maharashtra Amendment) is made to protect the public servants. While considering as to whether the order is legal or not, it is not necessary to view the CD.

09. The learned Sr. Advocate for respondent No.2 opposed the petition, submitting that the petition is misdirected and misconceived. As on today, no order adverse to the petitioners is passed. The Court cannot be restrained from looking into document or the material before the Court in revision. In view of section 397 of the Cr.P.C., the Court has power to call for record and proceedings. In this case the CD is a part of the record and proceedings and therefore same can certainly be viewed by the Court. Viewing CD itself does not amount to looking to the evidence or admitting the CD into evidence. At this stage there is no occasion to come to any conclusion about locus of the complainant. Viewing of the CD will not cause any prejudice to any of the parties. The impugned order is not under section 397 of the Cr.P.C., but is only an order rejecting the application of the petitioners. Thus, all the points are yet to be decided. This is premature stage to go into admissibility of the evidence. He submits that in-fact, at this stage the Sessions Court is duty bound to consider the material on record. When the Court has not come to any conclusion, nor has decided any question and therefore said order cannot be challenged.

10. The learned APP submits that the Sessions Court has power to see the entire record. The application filed by the petitioners is without any provision of law and prayed for dismissal of the petition.

11. In rejoinder, the learned Advocate for the petitioners submits that viewing video recording of the CD itself would be taking cognizance and also entertaining the complaint. The Court has to take strict view in such matter. In this case no such material can be seen and ultimately prays to allow the petition.

12. After hearing both the sides, following points arise for consideration :-

- (a) Whether the petitioners have locus standi to file any such application objecting viewing the material on record?
- (b) Whether viewing of the CD produced on record amounts to taking cognizance of the case?
- (c) Whether the order passed by the learned Sessions Court is illegal?

13. Coming to the first point, it is to be seen that the present petitioners are only shown as accused in the application under section 156(3) of the Cr.P.C., which is rejected. Said order is under challenge, where the Revisional Court has to only consider the material for a limited purpose of looking to the order and to examine the correctness, as section 397 of the Cr.P.C. gives Sessions Court a power to call for and examine record of any proceeding before any inferior criminal Court situated within its local jurisdiction. Section 397 of the Cr.P.C. reads as under :-

“397. Calling for records to exercise powers of revision – (1) The High Court or any Sessions Judge may call for an examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding. Sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

xxxxxxx” [emphasis supplied]

14. Thus, the Sessions Court has power to call for and examine record. Secondly the Court has to satisfy itself as to correctness, legality or propriety of any finding, sentence or order, recorded or passed. It is not a case of the petitioners that the CD is not forming part of the record. Said CD also is a document for the purpose of inquiry or trial or investigation etc. Thus, the learned Sessions Court certainly has power to examine the record. As the CD is forming part of the record, the learned Sessions Judge has every power to view recording on the CD. When the power under the revision is to be exercised, the question that arises – whether the proposed accused have locus to take objection to view any document and material by the Sessions Court. The answer certainly has to be in the negative. This Court holds that the accused do not have a locus standi to file such an application raising an objection to view particular material produced before the Court. More so, when the same material forms a part of material produced before lower Court. The accused being respondents in the revision have to only defend/justify order passed by the learned JMFC. They cannot make the Court to exercise such jurisdiction, only in the manner they want. In fact, filing of such application itself is telling the Court not to exercise its jurisdiction which, certainly, cannot be allowed. This Court holds that the petitioners have no locus standi to file such an application before the Sessions Court in revision.

15. So far as the second point – as to whether looking into material or the document amounts to taking cognizance? This point needs to be decided as to whether even allowing revision and issuing directions under section 156(3) of the Cr.P.C. can be said to be taking cognizance. It is well settled that issuing order/direction under section 156(3) of the Cr.P.C. is a pre-cognizance stage and it cannot be said to be taking of a cognizance. Looking at the documents and the material is only for the purpose of coming to a conclusion as to whether the case is made out from the allegations and the material on record to direct the police to investigate into the offence. Thus, looking to the material or the documents for the purpose of ascertaining whether directions under section 156(3) of the Cr.P.C. is necessary and also cannot be said to be taking cognizance.

16. For considering whether the learned Revisional Court has rightly passed the order and at this stage whether for viewing CD or any other material, whether certificate under section 65B of the Indian Evidence Act is necessary? At this stage the Court is not accepting the said document as a proof in the trial. The Court is also not adjudicating upon any of the issues or the points with the help of such a document. As stated, it is only for the purpose of ascertaining as to whether case is made out to issue direction under section 156(3) of the Cr.P.C. assuming that the Court takes cognizance by rejecting the prayer for directions under section 156(3) of the Cr.P.C. and direct police to make an inquiry under section 202 of the Cr.P.C., still stage of trial is yet to come. The question of admissibility of offence would come only in the Trial and not any time before such document is tendered into evidence and sought to be proved by the prosecution or the parties to the proceedings. Therefore, the question of expecting a certificate under section 65B of the Indian Evidence Act itself does not arise at this stage.

17. To consider whether the Sessions Court has rightly passed order, it would be necessary to consider the judgments relied upon by the learned Advocate for the petitioners. The first judgment he relied upon is the judgment in the case of *Anvar P. V. v. P. K. Basheer* reported in AIR 2015 SC 180. The Hon'ble Apex Court in this case was considering admissibility of the evidence in an election petition. It is held that unless the parties produce certificate under section 65-B of the Evidence Act, in support of document the document on record cannot be said to have been proved.

18. The next judgment is the judgment reported in the case of *State of U.P. v. Paras Nath Singh* reported in (2009) 6 SCC 372. This case is in respect of prayer to taking cognizance of the offence in absence of section 197 of the Cr.P.C. It is held that when a public servant while discharging his duty, commits certain acts or omission then sanction is necessary. The Trial Court held accused guilty of the offence. However, the Additional Sessions Judge in appeal allowed the appeal on the ground that the sanction was not accorded by the person authorized as fundamental ground and acquitted the accused. There is no dispute about the said proposition. However, in this case all these question are yet to come.

19. The next judgment cited is in the case of *Anil Kumar and Ors. v. M.K. Aiyappa and Ors.* reported in (2013)10 SCC 705. It is held that at the stage of issuance of directions under section 156(3) of the Cr.P.C. the Magistrate is required to apply his mind. In this case the learned Magistrate issued process merely by saying that he has gone through the complaint, documents and heard the complainant. There is again no doubt about this proposition. In this case it is further held that once it is noticed that there is no previous sanction, the Magistrate cannot order investigation against a public servant by invoking powers under section 156 (3) of the Cr.P.C. In the present case the learned Sessions Judge is yet to apply his mind. It is too premature a stage to tell the Court not to look into the material.

20. The next judgment cited is in the case of *Malkeet Singh Gill v. The State of Chhattisgarh* reported in AIR 2022 SC 3283. Here also the question is about exercise of powers under section 397 of the Cr.P.C. Other judgments are also relied by the petitioners, however, all are in respect of powers under section 156(3) of the Cr.P.C., on the point of powers under section 397 of the Cr.P.C. the Revisional Court and also about evidentiary value and admissibility of evidence in absence of certificate under section 65-B of the Indian Evidence Act.

21. This Court finds in view of above discussion that at this stage, what needs to be considered is only that a revision is pending before the Sessions Court against order passed by the learned JMFC refusing to pass order under section 156(3) of the Cr.P.C. The objection is only to viewing of the CD by the Revisional Court. The learned Sessions Judge has rightly held that there is no bar to look into the documents and has rightly rejected the application and permitted the respondent to display the video recording. This order is passed only to enable the Court to look into the material that was produced before the Magistrate and nothing else. This Court finds that no fault can be found with the impugned order. For the above reasons, the order passed by the learned Sessions Judge does not require any interference.

22. Hence, the criminal writ petition is dismissed. Rule stands discharged.

[KISHORE C. SANT, J.]

. After pronouncement of judgment, the learned Advocate for the petitioners submits that in this petition, interim relief was granted by this Court and it is running till now. He prays for continuation of the same for a period of four weeks.

. The learned Advocate for the respondent opposes the prayer. . However, considering that the interim relief is running since long, same is continued for four weeks from today.

[KISHORE C. SANT, J.]

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