
(1965) 06 BOM CK 0004

In the Bombay High Court

Case No : Criminal Revision Application No. 129 of 1965

Bashir Hussain Peshimam

APPELLANT

Vs

Gulam Mohomed Ismail Peshimam and Others

RESPONDENT

Date of Decision : 15-06-1965

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 173(4), 252, 253, 254, 255
Evidence Act, 1872 — Section 145, 157

Citation : AIR 1966 Bom 253 : (1965) 67 BOMLR 748 : (1966) CriLJ 1395 :
(1966) ILR (Bom) 770

Hon'ble Judges : Tulzapurkar, J

Bench : Single Bench

Advocate : J.M. Gandhi and S.B. Khoja, R. Jethamalani and R.B. Shah,
instructed by Hussein Dr. and Co., V.H. Gusmates, Addl. Govt. Pleader, for the
Appellant; K.J. Khandalawala, B.M. Mistry, Adi P. Gandhi, U.A. Kazi, L.D. Shah
and T.C. Patel, for the Respondent

Judgement

[1] This criminal revision application has been preferred by the petitioners bashir Hussain peshimam against the order passed by the learned presidency Magistrate 28th Court, Esplanades, Bombay on 5t February 1965, whereby the learned Magistrate rejected the application of petitioners for a direction that the special prosecutor or the collectors of the central Excise be directed to furnish him with copies of certain statements and documents in their possession or in the alternative to issue a summons under S. 94 of the Criminal procedure code, directing the special prosecutor or the collectors, of central excise to produce such statement, nd documents for his inspection before the inquiry started.

[2] The facts giving rise to the application made by the petitioner to the learned magistrate and the order passed by the learned Magistrate thereon may be state, on 3rd August 1964, Shri H.R. Jokhi Assistant collectors of central Excise Marine Preventive Division Central Excise Bombay filed a compliant [being Criminal Case No. 203/W/64] in the court of the learned presidency Magistrate [28th Court, Esplanade, Bombay] Charging the petitioners Bashir Hussain Peshimam [being

Accused No.1] and 8 others under S. 120B of the I.P.C. read with S. 167[81] of the Sea customs Act 1878 as amended, under Ss. 167 [81] of the Sea custom and Ss. 109 and 114 I.P.C. under 8[1] and 23 of the Foreign Exchange Regulation Act and under S. 120-B I.P.C. read with Ss. 8[1] and 23 of the Foreign Exchanges Regulation Act reset of 77,600 tolls of gold brought into India at Bombay from pales outside India between July 1960 nd March 1962, in pursuance"s to conspiracy it appears that prior to the legging of this implant against the petitioners and 8 others under directions of Shri H.R. Jokhi investigation had been carried on the several customs officers and during the course of such investigation, statement of various persons including those of caused were recorded. Similarly those several documents and papers were seize under panchanamas. Inter alia on 10th February 1962 the houses of the Accused No.1 and seized from the houses of accused NO.2 while a motor car bearing Registrant by Mr. Gumaste was seized from near the house petitioner had No documents as such were seized from either of them or from any other accused during the investigation. If further appears that during the course of this investigation reports of the from time to time and notes or notes - sheets in respect thereof submitted by the interior officers to their superior officers. Accused No.1 was arrested on 22nd February 1962, accused No.2 was arrested on 3rd march 1962, accused No.5 was arrest on 14th March 1962, while accused Nos.3 and 4 were arrested on 19th April 1962. Accused Nos., 6 and 7 were required to remain present in court on 3rd August 196, when the complaint was filed and they were put under arrest on that day. Accused Nos. 8 and 9 are still absconding. It further appears that before filling the complaint, adjudication proceedings for confiscation of the gold were undertaken for shows causes notices were issued and served open some of the accused and in particular upon the petitioner, in which diverse allegations up were made against the petitioners and in the correspondences that ensued between the petitioner and / or his Advocate on the one hand and the Customs Authorities and / or their Advocate on the one hand the customs Authorities and / or their Advocate on the others, a request was made on behalf of the petitioner that he should be on furnished with copies of all the statements of person that had been seized during the course of investigation to ennoble him to show cause why the gold or the motor car should not be confiscated but that request was not acceded to. It further appears that even after his compliant was filed the petitioner through his Advocates letter dated 17th September 1964 inter alia requested for furnishing of copies of all the statements of persons recorded and of documents and papers seized including the reports and nothings made by the Customs officers and offered to pay the necessary charges therefor. By his reply dated 22nd September 1964, Shri Adi. P. Gandhi the learned advocate [whose appears as the special prosecutor in the case] stated that the petitioners was not entitled to the copies of any statements, documents etc. At that stage but without prejudice to that contention it was made clear in the said reply that the statements of such of the witnesses on which the prosecution would reply, would be tendered in evidence by way of the corroboration at the time when the evidence would e lad an that

such of the statement of the witnesses called, on which the prosecution would not reply by way of coronation would be made available to the petitioner on his asking the for the same at the that the documents on which the prosecution would reply would be tendered at the time of leading evidence and it would be open to the petitioners to see those documents at that time for the purpose of cross - examination. In other words, the request for copies of statement and documents beforehand was turned down.

[3] Thereafter on 4th January 1965, the petitioner made an application to the learned Magistrate for two reliefs viz.:

[a] to direct the special Prosecutor or the collectors of central Excise him with the copies of the statements o various witnesses whom the prosecution was going to examine and of the documents of which the prosecution was going to rely including the statement of accused persons as well as the nothings, note sheets and report of central Excise officers made during the course of the investigation.

[B] in the alternative, to issue a summons u/s 94 of the Criminal procedure code, directing the special prosecutor or the collectors of central excise to produce in court before the inquiry starts the statements was of various witnesses whom the prosecution was going over to examine as well as the nothings, f note - sheets nd the reports of the central Excise officer made during the course of the investigate of the case".

The first relied was sought by the petitioners on the ground that thought the complaint had been filed as a private complaint, the complainant was public officer [being the central Excise officer] and as such enjoyed all the power which to interrogate, arrest and carry out searches and that, therefore the compliant filed by him should not be treat as a private complaint and therefore under the provision of section 173[4] of the Criminal procedure code, which would be applicable he was entitled, before the commencement of the inquiry, to get the copies of the all the statement on which the recorded and of al the documents on which the prosecution proposed to rely, including the statements of accused persons and even the nothings note - sheets and reports of the Central Excise officers, in order to enable him to properly mound his defense and instruct that in case the courts held that the him. In the alternative, the petitioner averred that in case the court held that the complaint lodged by the central Excise officer was a private complaint and not a complaint logged by any police officer, in the interest of justice and fair trial, he should be refurbished with the copies of all the aforesaid be statements and documents on which the prosecution was going to rely on the principles analogous to the Principe contained in section 173[4] of the criminal procedure code. In further alternative the petitioner averred that if the copies of all this statement of and documents could not be furnished to him as prayed for either under the provisions of section 173[4] of the criminal procedure code or in principles analogous to the principle contained in that section, the court should exercise its power u/s 94 of the criminal procedure code by issuing a summons directing the special prosecutor the collector of Central

Excise, to produce in the court before the inquiry starts the aforesaid statements and documents. On behalf of the prosecution, a reply was filed on 11th January 1965, wherein it was contended that the petitioner's application was misconceived inasmuch as section 173[4] of the criminal procedure code was not applicable to the facts of the case and that the copies of the statements furnished to the petitioner in the interest of justice and fair trial on principles analogous to the principle contained in section 173[4] of the criminal procedure code. It was pointed out that the investigation that had preceded the lodging of the complaint was not carried on by any police officer under Chapter XIV of the Criminal Procedure code, and as such the provisions of section 173[4] of the Criminal procedure code were inapplicable and further it was a warrant case instituted otherwise than on a police report, and therefore the procedure enacted in section 252 to 259 under Chapter XXI of the Criminal Procedure code was not applicable and there was no provision in those sections for furnishing copies of such statements and documents on which the prosecution wanted and documents on which the procedure code, no order directing the furnishing of the copies of the statement and documents to the petitioner could be made on principles of analogous to the provision of Section 173[4] of the criminal procedure code. As regards the scope of section 94 of the criminal procedure code was very limited and it was not open to the petitioners to apply for an issue of an omnibus summons for the application for an issue of statements of witnesses and of all documents seized during the investigation including the notes, maps, sheets and report made by the central Excise Officers. It was also contended that the stage at which such an application was made by the petitioner there was no material placed before the learned magistrate from which the learned Magistrate could come to the conclusion that production of all such statements and documents was either necessary or desirable for the purpose of the inquiry and the learned magistrate should not exercise his discretion in favor of the petitioner. The learned Magistrate after hearing the arguments on both sides took the view of the fact that the petitioner was not entitled to get copies of all the statements of the witnesses and of all the documents of which the prosecution wanted to rely before the inquiry commenced. He held that the provision of section 173 [4] of the criminal procedure code were not applicable to the facts of the case, instituted otherwise than upon a police report. He further negated the petitioners contention that copies of the statements of witnesses and the documents on which the prosecution wanted to rely should be ordered to be given to the petitioners in the interest of justice and fair trial on the grounds analogous to justice and fair trial on the grounds analogous of S. 173[4] of the Criminal P.C. as his view prevailed while amending the criminal procedure code by act XXVI of 1955 had deemed it expedient to provide for two separate and distinct procedures, one for cases instituted otherwise than on police report, and to the cases instituted otherwise than on police report would result in removing the said distinction in the said procedures and it would be an action against the scheme of the criminal procedure code itself regarding the petitioners prayer for issue of summons u/s 94 of the criminal procedure code.

the learned Magistrate took the view of that the inquiry had not even commenced before him when the application was preferred to by the petitioners and hence was there was absolutely no material before him at stage to determine the necessity or him desirability of summons begin issued u/s 94, especially when the application was not for a particular documents or a things but nor for was for all documents statements and of witness statements o the accused and nothings, note sheets and reports etc. He further held that the only use that could be made of any previous statement of a witness was either for the purpose of corroboration or contradiction and nothing more and since the learned special prosecutor had offered to make all previous the statements more witness or was either for the purpose of corroboration or contradiction and nothings more and since the learned special prosecutor had officer to make all previous of the statement of such of the person who were going to the be examined as production witnesses in the case available as to the defense after examination in chief of each one was over and since the special prosecutors had further offered to make available to the defense all such documents on which the prosecution of wanted rely at the time when they would be tendered while leading evidence there was no question of any prejudice being caused to the petitioner or the other accused in their defense and as such no case had been made out the by the petitioner for the exercise of the discretion vested in the court u/s 94 of the criminal procedure code. In this view of the matter the learned Magistrate rejected the petitioner application on 5th February 1965. The petitioner has come in revision against the said order.

[4] At the out set I may state sine I was informed at the Bar that he question involved in this revision application has been constantly arising in several customs of cases and since several case involving this point as case still pending in the Magistrates courts below apart and from Mr. J.N. Gandhi who argue the revision application on behalf o the petitioners herein with ability I also permitted Mr.Jethamalani to intervene and put forth his submerses on the point involved in the case of his as Mr. Jethamalani is appearing in several customs of prosecutions of that similar point has arisen. On behalf of the customs authorities Messrs. Khandalawala and Adi. P. Gandhi and Mr. Gumaste, the learned additional Government pleader tried to support of the learned Magistrate order on servile grounds. Having regarding to the rival contention that has been put forwards at the bar the followings been three question write for determination in thecae. First whether an accused person the against whom a warrant case has been launched against whom a warrant code has been lunched on the basis of the private of complaint and not open of police report, it entitled as matter of rights to get of copies of all the statement of witnesses whom the prosecution is going to as examine and of all the documents on which the commencement of the inquiry or the trial against him? Secondly, it he is not a so entitled whether of the same should be made available to him or principles analogous be to the provisions of section 173[4]? And thirdly whether the court u/s 94 of the Criminal procedure code, should exercise it discretion in manner so as to the enable the

accused to obtain such copies of statements and documents at or before the commencement of the inquiry or trial ? For the purpose of deciding these question, it is obvious that I will have to take into consideration [1] the provisions of the chapter XIV of code under the which cognisable offenses are investigated by the police officers and non - cognisable offense investigated order of a Magistrate of the behalf, [ii] chapter XXI of the code, under which procedures for trial of warrant cases [warrant of cases instituted upon a police report as well as warrant case instituted otherwise than on police report] by Magistrates have been prescribed and [iii], section 94 which occurs in Chapter VII of the code. During the course of arguments reference was made to the provisions of section 145 and 157 of the Evidence Act I will also consider those provisions

[5] On the first point as to whether in the present case petitioner and his co - accused are entitled to get copies of all the statements of witness, whom the prosecution is going to examine and of all documents in which the prosecution is going to rely, reliance was placed upon the provisions of section 173[4] of the Criminal Procedure Code but it is obvious that section 173[4] is inapplicable to the present case, inasmuch as it is a warrant case instituted not upon a police report but upon a private complaint and the procedure contained in section 252 to 259 occurring in chapter XXI of the code, would be applicable. Section 173[4] is applicable only to those cases in which the investigation has been made in which the investigation has been made by a police officer and that too under Chapter XIV of the code. In the present case the prosecution has been instituted otherwise than upon police report of at the instances of Shri H.R. Jokhi Assistant collector of Central Excise, Bombay upon a private complaint lodged by him before the learned Magistrate and investigation into case has been done by the various customs officers under the supervision of Shri H.R. Jokhi, and such investigation is obviously to be under the Chapter XIV of the Criminal Procedure Code. Mr. Gandhi however urged that the Assistant collectors of central Excise who has filed the complaint is public officer as such officer he enjoys power to interrogate arrest and carry out search under the provisions of the sea customs act which are similar to the powers enjoyed by a public officer, who undertakes investigation under Chapter XIV of the criminal procedure and therefore and the criminal case should be treated as having been instituted upon police report and not on the basis of the private complaint. It has now been well settled by the decision of the Supreme Court in *The State of Punjab Vs. Barkat Ram*, that a matter in interrogation, arrest and search he performs similar functions as are performed by a police officer. I may also mention that the recently in *Laxman Padma Bhagal and Others Vs. The State*, a similar view has been taken that a customs officer is not a police officer. In that view of this position, it is not possible to accept Mr. Gandhi's contention that the Assistant collector of central Excise who has lodged this complaint should be regarded as a police officer. Further, it could also be clear that by a stretch of imagination it could be said that the investigation carried on by the several customs officers under the supervision of Shri H.R. Jokhi in this case is an investigation under

Customs Chate XIV of the Criminal procedure code. It is therefore, clear that he procedure of section 173[4] which occur in chapter XIV of the criminal procedure of code would in applicable to the present case and as such the petitioners to the present case and as such the petitioners and his co - accused are not entitled to get copies of all the statements of witnesses whom the prosecution on which the prosecution proposes to rely at or before that commencement of the inquiry or trial.

[6] The next ground on the basis of the which the petitioners claim to copies of all the statements, of witnesses whom the prosecution was going to the examine and of the all the documents on which the prosecution was going to rely, was pressed was that such copies statement and documents should be furnished on principles analogous to the principles contained in section 173[4] of the criminal procedure code. It was urged on behalf of the petitioner that if in prosecution which were launched on the basis of polices reports - and which prosecution usually pertained to serious cognisable offenses like murder etc. It has been made obligator u/s 173[4] upon the offence officer in charge of the a police station in furnish a copy of all other documents on which the prosecution proposes to rely, including the statements and confession, if any, including recorded u/s 164 and the statements recorded u/s 161 of all the person, whom the prosecution proposes to examine as witnesses to the accused before the commencements of the inquiry or trial, it would be fair and just to furnish copies of similar statements and documents to the accused in a private complaint launched against him to enable him to properly defend the case. It was pointed out that the object of the introducing section 173 [4] in chapter XIV of the criminal procedure code was not merely to avoid delay and help expeditions dispose of criminal cases but the also the to enable the accused to know the case but also that the has to meet and to safeguard his interest by the giving him the fullest information in the possession to case in the beforehand and he cold mound his defense accordingly and effectively defend himself. In that behalf reliance of was placed upon the observations of His Lordship Mr. Justice Shah of the supreme court in the case of the Noor Khan Vs. State of Rajasthan, . It was therefore contended that on principles analogous to the principle contained in section 173 [4] copies of all such statements of and documents should be ordered to be furnished to the accused in warrant order case instituted upon the private complaint like the present one. As I will indicate presently it is difficult to accept this contention for more than one reason.

[7] In the first place the arguments based on the proposition that on principles analogous to the principles contained in section 173[4] of the criminal procedure code such copies of statements of and documents would be furnished to the accused on in a warrant was case instituted upon a private complaint it is in my view fallacious, for it postulate or presupposes that section 173[4] embodies some principle. If the prevision of section 173[4] of are carefully scrutinized, it will at once become clear that the its purely for it to the enjoin upon a police officer in charges of public station to see that after he has furnished a report

under sub section [1] to the Magistrate, a copy of such report as so the first information report recorded as also the first information section 154 and if on which the prosecution proposes of reply, including the statements and confession, it any record u/s 164 and the statements recorded u/s 161 [3] of all the persons, whom the prosecution proposes to examine as its witnesses are furnished to the accused before the commencement of inquiry or trial. In other words, the section prescribes what should be done by the police officer in charge of a police station and at what state he should do what he is enjoined to do thereunder. It is no doubt true that it is by virtue of this provision which was introduced by may of in amendment in 1955, than a accused person has become entitled to receive copies of the all the statements of witnesses ,whom the persons prosecution of going to examine as its witnesses and also of documents on which the prosecution is going to rely at the trial but it is well settled that the provision of sub section [4] are directory and not mandatory and the words "shall" occurring in the said sub section has been constructed accordingly. I may refer to the judgment of the supreme court in the case of Narayan Rao Vs. The State of Andhra Pradesh, where the effect of non -compliance of non -observances of the provisions section 173[4] and section 207-A[3] has been considered. The relevant observations appear in paragraphs 10 of the judgment of runs as follows

"There is no doubt that those provisions [meaning the provisions of section 173[4] read with section 207-A[3] have been introduced by the amending act of 1955, in order to simplify a the procedure in respect of inquiries leading unto a session trial and at the sometime to safeguard the interest of accused persons y enjoining upon police officers, concerned and Magistrate before the whom such proceedings are brought, to see that the documents necessary to give the accosted persons all the information for the proper conduct of their defense are furnished.

It has rightly been contended on behalf to the appellants that was the duty of the Magistrate to see that the provisions aforesaid of the code, have been fully complied with. Magistrate therefore have to be circumspect, while conducting such proceedings to see to it that accused persons are not handicapped I their defense by any omission on the parts of the police officers concerned, to supply the necessary copies.

But we are not prepared to hold that noncompliance"s with those provisioned of has necessarily the result of vitiating those proceedings and subsequent of trial. The words "shall" occurring both in the sub section [4] of section 173 and sub section [3] of section 207 - A, is not mandatory but only directory be causes of an omission by a police officers, to fully comply with the provisions of section 173, should not be the allowed to have such a far - reaching effect as to render the proceedings including the trial before the court of sessions, wholly ineffective.

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Certainly, if it is shown, in particular case, on behalf of the accused persons that the omission, on the part of the police officers concerned or the magistrate before the whom the committal proceedings had happened has caused prejudice to the accused in the interest of Justice the court may re - open the proceedings by instating upon the full compliance with the provisions of the code."

Their Lordship have further gone on to observe that unless such non - compliance has caused prejudice to accused that same will amount to an irregularity curable by the provisions of section 537 of the code, In other words it is clear that the provisions of section 173[4] have been held to be directory and non - compliance thereof, unless to be it has caused serious prejudice of to an accused person, or resulted in failure of justice, is an irregularity curable by section 537 of the criminal procedure code or resulted by section criminal procedure code. Similarly I may also point out that though sub section [4] of section 173 clearly provides for furnishing of copies of all statement of witnesses and of all documents of which the prosecution is going to rely to the accused before the commencement of inquiry or trial, it is not as if that once a trial has already commenced, the prosecution is prevented from producing and tendering additional documents which may be relevant and necessary [copies where may not have been furnished to accused before the commencement of the trial], or from examining additional witnesses whose statement, might have been recorded even whose statement after the trial has commenced. The prosecution is never precluded from leading such additional evidence simply because of copies of the statements of such witness or of such additional documents have not been furnished to accused before the commencement of the trial. In such situation all that the court is required in such situations, all that the court is required in such situation all that the court is required to do is to see that the accused is not in any manner handicapped in his defense and this the court can ensure by the calling upon the prosecution to make such additional document or statement of such further witnesses if available to the accused in good time and if necessary by granting adjournment. It will thus appear clear that section 173[4] both in its scope as well as its scope it purely procedural and merely provides as to what should be done by a police officer and at that stage he should do it. Unlike section 403[1] of the code, which embodies the doctrine of *autrefois acquit*, S. 173[4] does not enact any fundamental principles of criminal jurisdiction of as such as and the provisions therefore being purely procedural it would be a fallacious argument to contend that on principles analogous to content to the principles counted inspection 173[4] [which it does not] copies of statements of witness and documents on which the prosecution is going to rely should be ordered to be furnished to accused persons in warrant case instituted upon a private complaint. At the highest, one could not say that in view of the provisions of section 173[4] the prosecution should not be allowed to examine witnesses or produce at the trial in manner so as to cause prejudice to the accused or to put him under any handicap in the matter of his defense, but certainly and principle of criminal jurisprudence as such is involved especially on the aspect of the matter as to a

that stage of such copies of the statement and documents should be furnished to the accused even in trial effaces of which section 173[4] is applicable. Int he present case in view of the offer made of the customs authorities through their special prosecutor that statements of all witnesses which would be relied upon the to accused person no would be the made available to accused person no sooner the evidence of the such witnesses in chief is that overhand in view of upon further offer that the statement of such of the witnesses which may not bereaved upon for the purpose of the coronation would be available to caused persons on a demand begin made available to the accused persons as and when the are to the accuser petitioners and his co - accused would in any manner to prejudiced or handicapped in the matter of their defense. In may view therefore since section 173[4] does not embody any principles as such it is difficult to accept the arguments that on principles analogous to the principles statements witnesses and of documents on which the prosecution of going to rely should be made available to the accused before the commencement of the inquiry or trial.

[8] Secondly, having regard to the scheme of the criminal procedure code and the manner in which the material amendments have been effected to the relevant provisions of the code by Act XXVI of 1955, it is difficult to pass an order of directing furnishing or copies of statements of witness and of documents on which the prosecution is going to rely to the petitioners and his co - accused before the commencement of the inquiry or trial, as has been sought by the petitioner. In this behalf certain facts will have be to borne in mind. Admittedly the present case is a warrant case instituted otherwise than upon is a warrant case instituted otherwise than upon is a police report, that is to say upon private a compliant lodged to by the Assistant collector of central Excise, Bombay and as such the procedure enacted in section 252 to 259 contained in Chapter XXI of the Criminal procedure in code would be applicable and admittedly there is no provision in those section for furnishes on copies of such statements and of documents on which the prosecution would rely to the accused with before the commencement of inquiry of trial. For the first time by the amending Act XXVI of the 1955 section 173[4] was introduced in chapter XIV of the Criminal procedure code, which deals with powers of the police officers to investigate cognisable offences and also non - cognisable offences only upon receipt of an order from a Magistrate of in that behalf. Prior to the introduction of section 173[4] in Chapter XIV and prior to the amendments that was made in section 162, occurring in the same chapter, the position was that a very limited or restricted use of the police statements of witness would be made by the and that too in a certain manner of as was indicated by the proviso to the old section 162[1]. Under the proviso to the old section 162[1], it was enacted that whatever any witness was called for the prosecution whose statement had been taken don in writing the courts shall on the request of the accused refer to such writing and may then if the court thinks it expedient in the interest of justice direct that the accused in the to furnished with a copy thereof and that such statement may be used in impeach that credit of such witness in the manner provided by the Evidence Act, 1872. In

other words any use other than the one of mentioned in the aforesaid proviso of such police statement of the witness was completely barred of and it was only by the Amending Act XXVI of 1955, of that a provision for furnishing copies of all statements of the witness and of all documents on which the prosecution was going to rely, to the accused before the commencement of inquiry or trial come to be introduced, by incorporating section 173[4] in Chapter XIV of the Code. Further Prior to the amendment of the Code by the Act XXVI of 1955, the procedure for trial of warrant cases instituted otherwise than on police reports [i.e. upon private complaints] was the same but as a result the amendment of made by Act XXVI of the 1955, of different procedure was introduced for trial of warrant cases instituted on police reports and such procedure is now to be found in S. 251 [A], and sub -section [1] of S. 251 [A] provides that whenever the accused appears or is brought before a Magistrate at the commencement of the trial court such case instituted on the police report, the Magistrate shall satisfy himself that the documents referred to in S. 173 have been furnished to the accused while parliament deemed it fit and expedient to retain the same old procedure that was applicable of to warrant cases instituted otherwise than on police reports can the parliaments did not thinks it expedient of or necessary to incorporate in the set of procedure contained in Ss. 252 of 259 of the Code a provision of the furnishing of copies of statement of witnesses and documents on which the prosecution is going to rely to the accused. Having regard to the manner of which the amendment were effect in the Criminal Procedure code it would be reasonable to hold that the parliament deliberately omitted to make a provision similar to section 173 [4] in warrant cases instituted upon a private complaint and therefore it is difficult to the accept the argument that on the analogy of S. 173 [4] copy of such statement of witness and documents on which the prosecution is going and to rely should be ordered to be furnished to the accused warrant cases of instituted upon a private complaint.

[9] Mr. Jethamalani offered an explanation as to why parliament did not make a specific provision, similar to S. 173[4] while prescribing procedure applicable to warrant cases instituted upon the private of complaint. He pointed out that in cases instituted upon a private complaint the complainant who is an individual and has no state machinery behind him does not record statements of witnesses nor does he seizure documents of from custody of others before the he lodges a complaint, and therefore a private complainant is ordinary not in possession of any statements of witnesses or any documents any therefore the parliament of with knowledge of these therefore the parliaments have though it necessary to make a provision of similar to S. 173[4] while prescribing the procedure for case thought it necessary to make provision similar to S .173[4] while prescribing the procedure for the private complaint. I am unable to accept this explanation for the absence of such provisions this procedure prescribed for trial of warrant cases instituted upon private complaints. It is common knowledge that even before the criminal procedure code was amended by Act XXVI of 1955, for a number of years prosecutions on the basis of private complaints were launched

at the instanced of several local bodies only public authorities under provisions of different statutes like District Municipal Boroughs Act, City Municipal corporation act sales Tax act, income tax act companies act and sea customs act. Prosecution under these statues were always instituted and are very even now instituted upon a private complaint lodged by some officer duly authorized in that behalf ad these prosecutions were always tired and being tried as warrant cases instituted otherwise and being trial as warrant cases instituted otherwise than on police reports. It while it passed to amending act XXVI of 1955, was unaware of the these innumerable cases which were instituted otherwise than on police reports and parliaments of was equally aware of the act hat the local bodies or public authorities of the public officers concerned in such cases in the first collected materials in the from of statement of and document and had the same in their collected materials in the form of statement amending the criminal procedure to code by act XXVI of 1955, did not think fit to incorporate in the state of the procedure contained in Ss. 252 of 259 [which is applicable to such case instituted upon a private complaint] a provision code. In view of these fact it must he held that parliament intentionally omitted to provides for furnishing of copies of statement and document on which the prosecution was going to rely to the accused at or before the commencement of inquiry or trial of cases that were instituted otherwise than on police report. For these reasons it is not possible to accept Mr. Jethamalanis contention of that by analogy of section 173 [4] copies and statement of witnesses an documents on which the prosecution is going to rely, should be ordered to be furnished to the petitioner or his co - accused.

[10] It was however contended by Mr. Jethamalani that in the interest of Justice and fair trial and copies, of all such statement of and document should be made available to the accused to that could have a complete picture of the case he has to meet and he cold effectively defend himself. It was urged that even in a warrant case instituted upon on private complaint to which provisions of Ss. 252 to 259 are applicable it is open to an accused to cross examined to the prosecution witness not only after but even before the charge of is framed and it is further open to him to satisfy the learned Magistrate even before a charges framed that the no case has-been made out against him by the complainant and that he should be discharged in this behalf here lied upon sub section [1] and [2] of S. 253 of the Code. Mr. Jethamalani, therefore urged that since a right to cross examined prosecution witness means a give rights to effectively cross examine them it would not be possible for he accused to effectively cross-examine the prosecution witnesses without their previous of statement being furnished to him. Mr. Jethamalani referred to the provision of section 145 of the Evidence act as under which a witness could be cross examined with reference of to his previous statement which the a witness could be cross examined with reference to his previous statement question. He therefore contended that in fairness to the accused copies of all such statement and document should be finished to him beforehand without which he is bound to satisfy the Magistrate ever before the charges framed the there is no case against him and that he deserves to be

discharged. He rely Mr. Khandalawala fairly coned that the accused to should be furnished with copies of the section was going to examine to enable him to effectively cross - examine them the refer pointed out that the offer made by the special prosecution before the learned Magistrate of would be examined - either before a charge was framed or thereafter would-be furnished to the petitioner on is co - accused and as when the was over and the documents on which the prosecution of were going to rely as and the when they just and fair of an in the manner if copies of statement and documents were made available to the defense there was no question of the accused being prejudiced or he not question receiving a fair trial. Mr. Khandalawala. In my view since the previous statement of a witness could only be used either for contradiction u/s 145 or for corroboration under S .157 of the Evidence act an officer of furnishing copies of such statements and document of to the defense in the manner suggested by the special prosecutor in the present case would meet the ends of justice and fair trial. Mr. Jethamalani however, demurred and pointed out that in order to ensure a fair trial it was necessary that the accused should be informed in sufficient time before the trial of the nature of the evidence to be called for by the prosecution. I do not for a moment dispute that in order that an accused person should have adequate opportunity to prepare his defence he must be informed in sufficiently good time of the nature of the evidence intended to be led by the prosecution against him. But in serious of cases involving the trial of cognisable offense this is ensured by S. 173[4] of under Chapter XIV and in warrant cases instituted upon police reports by S. 251A[1] in Chapter XXI, while in criminal case instituted upon private complaints by the very procedure contained in Ss. 252 of 259 of the Code. That procedure envisages leading of all such evidence which ordinarily includes testimonies of the complainant and his material witnesses as would be produced in support of the prosecution before any charge is framed and then the accused plead is taken on the charge and recording the accused plea is taken on the charge that may be framed and u/s 256 ordinarily at the commencement of next hearing [which means an adjournment after framed in the charge and recording the accused plea is contemplated] the accused the is given the right to recall at or such of the prosecution witnesses already examined as he wants for his cross - examination, notwithstanding the fact that the be might have cross - examined them earlier ie., before the charge was framed. It is thus clear that the accused is usually apprised of almost all the material prosecution evidence [and not merely the nature of thereof] in sufficient time to enable to time to prepare his defense. It is possible however, that the Magistrate might frame to enable him to witness name by the complainant under S. 252[2] are examined or he complainant might examine some material or important witness after the accused plea on the charge framed is taken and after the the accused has exercised his right to recalling the previously examined prosecution witnesses which is permissible under S. 256 - but neither of such cases the prosecution cannot spring a surprise upon the defense and sufficient opportunity must be given to the latter to prepare for cross - examination of such witnesses and this could be and is usual ensured by the granting reasonable time to the

accused. For instance in Emperor v. P.H. burn [1909] 11 Bom LR 1153 , which was followed in Emperor Vs. Nagindas Narottamdas Gandhi, it has been held that S .256 enables the prosecution to examine witnesses who had not been before examined to whose names had not been disclosed before the charge was framed, and if the accused desired him to enable him to cross examine witnesses whose names has not been disclosed it is open to the Magistrate to give time. In my view, if the prosecution were to examine any important witness whose name had been disclosed for the first time after the charge was framed and if such witness were to give out a long drawn out or complicated narration, it would be open to the Magistrate to entertain or grant a request for reasonable to entertain or time on the part of the accused to enable him to prepare for cross - examination of such witness. Such being the procedure applicable to warrant cases instituted upon private complaints the accused is invariably apprised of all material prosecution evidence in sufficient time to prepare his defense and even the offer made by the special prosecution of my view, sufficiently meets the ends of justice and fair trial to the petitioner and his co - accused.

[11] It was next contended by Mr. Jethamalani that the defence in this case should be supplied not merely to copies of statement of witness whom the prosecution was going to examine and document on which the prosecution was going, to rely at the trial but copies of statement of all person who had been interrogated during the investigation irrespective of whether during the investigation, again irrespective of whether the prosecution was going to make use of or rely on them or not, for according to him unless all such material collected by the prosecution during investigation is furnished to the defense of it may not be possible for the accused to mould his defence as his not be possible for accused to likely the some of such material might either held him directly or afford him some clues whereby he could collect and produce evidence in refutation. Incidentally, I may observe that this contention goes beyond what was applied for by the petitioner by his application in the lower court. Mr. Khandalawala objected on the grounds that it amounts to prying into prosecutors brief. He contended that the prosecution had absolute discretion in the matter of examination of witness the only obligation being to put before the court all material evidence which was necessary for unfolding its case and since the previous of the statement if witnesses could only be used either for corroborating him or contradicting him the petitioner and his co -accused could be and either for would be such furnished with copies of the previous actually examined in the to furnish copies of previous statement of such person whom the prosecution actually examined in the case it was neither necessary nor desirable the persons including those whom the prosecution were not going to examine. Similarly documents though seized during investigation on which prosecution was not going to rely could not be and need not be made available to the accused. In the supreme court in the recent of decision in Masalti Vs. State of U.P., . The relevant observation runs as follows:

"It is not unknown that where serious offences like murder are committed and a large number of accused person are tried, attempts are made either to terrorize in or win over prosecution witnesses and if the persecutors honestly and bona fide believes that some of his witnesses have been won over, it would be unreasonable to insist that the must tender such witnesses before the court. It is undoubtedly the duty of the prosecution to lay before the court all material evidence available to which is necessary for unfolding its case but it would be unsound to lay down as a general rule that every witness must be examined even though his evidence may be very material or even it is known that he has been won over or terrorized. In such a case it is always open to the defense to examine such witnesses as their witnesses and the court can also call such witnesses in the box in the interest in justice under S. 540."

Mr. Jethamalani did not dispute the position that it was in the discretion of the prosecution to decide how many witnesses it should examine and whether to examine a particular witness or not but he contended that it was not quite correct to say that the previous statement of witness could only a used for the purpose of either could corroborating him or contradicting him. He urged that during the course of investigation when several person are interrogated in their statement recorded such statement have some impact - either favorable or adverse - on each other and therefore unless the statement of all such person who have been interrogated are made available to an accused person before the commencement of the inquiry or the trial, he would not be in position to mould his defence properly. Elucidating his point further, Mr. Jethamalani pointed out to the that in a given case it was quite possible that a on vital factual issue involved in the case the prosecution of may have recorded statement of four person say A.B.C and D and it was just possible according to him that the statement of A.B. and C might be corroborative of each other but the statement of D might be having and adverse of impose upon the statement of A.B and C and prosecution may not choose and to call D as it s witness at the trial. In such a case according to him the non furnishing of the justice him in his defense of at the trial for the he would deprived on an opportunity for want of knowledge as to what D had stated during in the investigation, to examine him as defence witness or to collect materials on the lines of the statement given by D and produce the same in refutation of the evidence that might be given by A.B. and C on behalf of the prosecution. Similarly he pointed out that it was possible the some of the documents seized by he prosecution during the investigation may have adverse effect on its case and these may never fore urged that if was in the interest of fair trial for that copies of the statement on the person who had been interrogated by the prosecutions of irrespective of whether they were going to the called as witnesses or not and of all the persons who had been interrogated by the prosecution, irrespective irrespective of whether they were going to be called as witnesses or not and of all the documents to be tendered in evidence or not should be made available to an accused person in as much will be holds up to him in preparing his defense. In other words, according to him all material

collected to by the prosecution during the course of the investigation, irrespective of whether at the trial the prosecution was going whether to make use of it or rely upon it or not, must be made available to the accused, for it was likely that some of such material may have adverse impact on the accused in his defence. It is difficult to accept this contention of Mr. Jethamalani. In the first place it is based upon an assumed possibility or likelihood of the prosecution having collected some materials having adverse impact on its case. Secondly to grant the prayer for copies of all such statement and documents irrespective of whether the prosecution was going to make use of them or not in the hope or on off-chance that some of such material might turn out to be helpful to the accused in his defence or might proffer some clue to him to collect and produce materials in reductions, is nothing short of granting what may be called a roving discovery or a fishing inspection and I do not think that the consideration of fair trial to an innocent accused could be so stretched as to grant such roving discovery or fishing inspection.

[12] In this connection I may refer to an American decision in the case of *People Ex. Rell. Lemon v. Supreme Court*, 245 NY 24; 156 NE 84 where a somewhat similar question was considered. The facts of the case as could be gathered from the observations of Cardozo C.J. in *Wigmore on Evidence* [Third Edition] vol VI at pages 395-397 were as follows. One Lucy Early had been indicted for the murder of her husband by poisoning his food by the Grand Jury of Orange county. The effect of this indictment was to supersede information, filed by the district attorney with the recorder of the city of Newburgh, charging the same crime. The minutes of Grand jury had been inspected by the defendant under an order of the court. One Wagley, an accomplice had given testimony that the defendant had asked him for arsenic to enable her to kill her husband and had received the poison from his hands. He who had examined the contents of the stomach gave testimony as to the quantity of poison given testimony directed to the causes of the death and to the methods and agencies through which the poison was administered. A transcript of all this testimony, was given to the defendant and was embodied in the record. The defendant was not satisfied with this disclosure of the case against her. It was urged on her behalf that other evidences not submitted to the Grand Jury had been gathered by the district attorney and she prayed for an order that the same be submitted to her scrutiny. An order granting a very limited relief was passed in her favour. The defendant preferred an appeal and it was contended that criminal courts had inherent power to compel discovery of documents in furtherance of justice and that the defendant's prayer that all the other material collected by the district attorney which had not been submitted to the Grand Jury should be made available to the defence, should have been granted. Chief Justice Cardozo observed as follows:

"The Decision of this case does not request us to affirm or deny the existence of an inherent power in court of criminal jurisdiction to compel the discovery of documents in furtherance of the justice. The beginning or at least the

glimmerings of such a doctrine are to be found, as we have seen in court other than our own. A search of precedents in the this state yields results that are largely negative, if our scrutiny is confined to criminal prosecutions. On the other hand, the tendency of the unmistakable in the field of civil causes to limit the power strictly within the statutory and beyond it there is a supervisory jurisdiction as yet unplumbed and unexhausted, in respect of criminal prosecutions is something than can best be determined at the call of the particular exigencies in the setting of the concrete instance. The courts are properly reluctant to be in predetermined formulas of the occasion of its exercise. We have a statute to the effect that the rules of evidence shall be the effect same in criminal as in civil shall be civil causes [code Crim. Proc. 392]. The provisions of the civil codes for the discovery of documents are not rules of evidence in the strict sense. They are closely akin, however to such rules for they govern and define the remedies whereby are now so inveterate and established that they form part of the warp and woof of the procedural system of the state. The time has arrived so it is argued when they should be taken over by the criminal courts, and applied to criminal actions by the public policy implicates in the rule of uniformity of evidence, and by the necessities of justice.

We leave the question open, for if the power exists at all this case isn't within it. The most that can be argued with any shows of reason in behalf of the defendant is that the remedy of inspection in civil causes as now prescribed in by the statute it to be applied "in consimili casu" to criminal prosecutions. The power in criminal prosecutions may not improbably be less. It surely can be no greater, but the defendant it subjected can to that test, fails to make out her title to the remedy. She does not ask, as did the defendant in *Commonwealth v. Jordan*, supra that the body of the dead that man or any part of it be submitted to her scrutiny of that of her advisers. Her demand is that a prosecutor who has gathered statement from prospective witnesses shall place the statement in her hands that she may study and repel them. She does not ask may study in she inspect any confession made in her name and admissible against her. Conceivably such inspection may be necessary at times as for instance to enable be necessary at times, as for defendants to prove a forgery of a signature. She asks that she examine the incriminating statement of a conspirator whose confession will not be evidence except against himself. So far as the record shows he has not even been indicated. If indicated his trial will be separate from hers. The reason why she asks for a disclosure of the statement of the physician and the chemist is her belief that their statement to the prosecutor were fuller in the all probability than their statement to the Grand Jury already in her possession. A like reason explains, her request for confession. In a word, statements and memoranda collected by the prosecutor are to be exhibited to the defendants, though none of them will be admissible either for or against her if offered at the trial. She makes no claim that they will be. She takes the ground that she should have them because the study of the evidence will be helpful in preparing her defence. This is to enlarge the remedy beyond

anything's permitted by analogy or precedent.....

It will thus be clear that the specific grounds on which the defendants wanted the statement and memoranda collected by the district attorney and which had not been submitted to the Grand Jury, to be exhibited to her scrutiny viz. Such statements made to the district attorney were in her belief, fuller in all probability than the in her statement to the Grand Jury [which were already in her possession] and that the study of the these would be helpful to her in preparing her defense was expressly negatived. Similarly, in the present case a request for roving discovery of fishing inspection of the all the material collected by the prosecution during investigation irrespective of whether to prosecution was going to make use of such material at the trial or not, on the ground of that a study of such material might be helpful to the accused in the preparation of his defence cannot be granted.

[13] During the of his arguments Mr. Jethamalani referred to and relied upon certain Articles in Wigmore on evidence. Particularly he relied upon the Article 1850, sub - articles ,1 ,2 3 and 4 Articles 1851, Article 1855 [a], Article 1859 [g] and Article 2224. It isn't necessary for me to set out these articles here. The first four articles appear at pages 390, 399, 417 and 475 respective in volume VIII of the third edition. So far as these articles, on the which reliance was placed by Mr. Jethamalani, are concerned in the first place in it will be clear that the learned Author has in these Article historically surveyed the legal position in the matter or furnishing names of witnesses their testimonies and documents of the accused by the first stating what the position was under the orthodox common Law Rules and how that the position changed from time to time under the Several statutes in several jurisdiction. It may be stated that just as in other jurisdiction considerations of fairness to an innocent accused led to he passing of statutes making provisions or contained in our criminal procedure on behalf of the prosecution there are statutory provisions contained in our criminal procedure on behalf of the contained in our criminal law rules or practices for instance section 204 [1] [a] of the code provides that no summons or warrant shall be issued against the accused until a list of the prosecution witnesses has-been filed. Section 173[4] itself is another instance in point, which however, is applicable to criminal cases. Where the investigation has been done by a police officer under Chapter XIV of the Code. Section 251[1] is another instances in point which is applicable to warrant in case institute on the basis of police reports. Secondly it is also clear that unless and to the extent to the which the statute law has made a departure the courts have inclined to follow the common law Rules in the matter like discovery and inspection in criminal cases. That this is no will appear clear for the observation of chief justice cardozo, which I have quoted above. So far as our Indian statute is concerned, I have already indicated above that if the matter of furnishing testimonies the intended witnesses and of documents to the deliberately omitted to make a provision there for while prescribing the procedure applicable to the warrant cases instituted otherwise then on police reports. In my view therefore the Article in Wigmore or evidence

relied upon by Mr. Jethamalani are of no avail to him. Having regard to the aforesaid discussion of copies of statement of prayer for furnishing of copies of statements of witness and of documents including of nothings etc. Was rightly rejected.

[14] lastly, it was contended that the learned Magistrate ought to have exercised the discretion vested in him under S. 94 of the Criminal procedure code and ought to have issued special prosecutor or the collector of Central Excise to prosecutor or the collectors of before the inquiry commenced all such statements of witnesses and documents on which the prosecution was going to rely. It was urged that if once the accused satisfies the court that the documents [which would include the statement of witnesses] were relevant to the facts in the issue, the production thereof would be desirable and if once the accused satisfies the court that the production of such documents was either necessary or desirable the court ought to exercise the discretion vested in it under the section. In this behalf it was pointed out that the previous statement on the witnesses whom the prosecution was going to examine in the case and the documents on which the prosecution wanted to rely at the trial would obviously be statements and documents relevant to the facts in issue and therefore their production was either and therefore necessary or desirable and as such it should have been held that the petitioner had made out case for the exercise of the decision by the learned Magistrate. Both Messrs, Gandhi and Jethamalani further contended that having regard to the languages used therein, section 94 could be invoked at any stage of an inquiry or trial and the same was not controlled by S. 257 of the code, under which the accused is entitled to apply for issue of any process for compelling attendance of a witness or the production of any documents only after he has entered upon his defence. In support of their contentions strong reliance was placed upon the Full Bench ruling of the Sind court reported in *Muhammad Rahim v. Emperor* AIR 1935 Sind 13 and on another decision of the Punjab High court in the case in *Haricharan v. The state* reported in AIR 1955 Punj 7.

[15] In the former case at the trial in the court of the learned Magistrate it was suggested to one of the prosecution witnesses that he had made a certain statement before the police officer during the departmental inquiry, he denied it whereupon the application was then made under S. 94 for an order of production of the previous statement recorded during the departmental inquiry. The learned Magistrate rules that this request at that stage was premature but that it might be repeated after the framing of the charge. It appears that in due course after the charges were framed the application was repeated by the learned Magistrate that rules that he had asked for and he had not considered those statements, necessary for the trial. The application was therefore rejected. It appears that in the view which he took on the earlier occasion while rejecting the application for production of document under S. 94, the learned Magistrate was influenced by the earlier decision of the Sind court reported in *Tahilram Lilaram v. Pitamberdas Valabdas* AIR 1914 Sind 135 where it has been held that

the proper stage at which the accused could apply for production of documents was only after he had entered upon his code. The full Bench of the Sing Court took the view that S. 257 of the criminal procedure code neither controlled nor imposed any limitation on the powers of a court to exercise its discretion in using the machinery provided by S. 94 of the Code. The relevant observations on which reliance has been placed by Messrs. Gandhi and Jethamalani runs as follows:

"in our opinion also there is nothing in S. 94, Criminal P.C., which restricts the use of the machinery provided there in to any particular proceedings under the code. On the contrary the section excludes the idea of any such restriction."

The court then considered the earlier decisions reported in AIR 1914 Sing 135 and then observes as follows:

"In these circumstances it seems to me that the question at issue in the case of 1914 Sind 135, was decided solely upon the provisions of S. 257 Criminal P.C., and it does not appear to have been the case that the accused that his application came within the terms of S. 94 Criminal P.C. In our opinion, S. 257 Criminal P.C. neither controls nor imposes any limitation of the powers of the court to exercise its discretion in a trial under the provisions by S. 94 Criminal P.C. it is not a bar to the exercise of that discretion of trial under the stage indicated in the By. 257. No such restriction is indicated by section itself or by any other section in Chap. 21. Section 257 and 94, Criminal P.C. are not antagonistic, they are interparty to an inquiry trial of other proceeding under the Code the facility of having documents and things produced at any stages of such inquiry trial or proceedings. The facility is restricted the restriction lies in the fact that the necessity or desirability of the production must be shown to the satisfaction of the court. Section 257, Criminal P.C. gives an accused person a right subject to another but lesser restriction consists in the accused having to satisfy the court that his demand is not made for the purposes of vexation his delay or for defeating the ends of justice." While considering the provisions of S. 94 in juxtaposition with the accused cross examine prosecution of witnesses with reference to their previous statements under S. 145, the court has observed as follows:

"to deny his claim to the production of the such documents would be to deny the accused a right given to him in the procedure prescribed for the trial of his case. In our opinion of a court for the exercising its discretion under S. 94, Criminal P.C., not only may call for the production of such documents at the request of the accused but ought to do so, their production is obviously necessary and desirable for the purposes of the trial."

In the latter case of Hari Charan Vs. The State, production of certain documents was prayed for by the accused even before a charge has been framed against him by the Magistrate but the only order passed by the learned Magistrate was:

"There is no necessity for the prosecution to wait for the documents prayed for in the application. the prosecution shall proceed. These documents if at all be needed in defence, they may be summoned. Prosecution, need not wait". Against his order a revisional application was preferred to the Punjab High Court. Following the Full Bench ruling of the Sind Court, the Punjab High court took the view that the learned Magistrate could not refuse to call these documents merely on the ground that there could be summoned in defiance it at all these needed and directed to the learned Magistrate to issue a summons for production of those documents.

[16] According to Messrs. Gandhi and Jethamalanis these ruling clearly establish two propositions first that one of the accuse satisfied the court that the statement and documents were relevant to the facts in issue and therefore, the production thereof was either necessary or desirable for the purposes of any inquiry or trial the court ought to exercise of is discretion of under the section and direct production of thereof and secondly the discretion vested in the court under S. 94 could be invoked at any stage of an inquiry or trial and that S. 257 did not control the court's power under S. 94. That is undoubtedly so. But the real question is whether relevancy of statements the question whether necessary or desirable? Similarly though it is true that S. 94 is not controlled by S. 257 the question is whether the scope of the S. 94 should be enlarged so as to incorporate a provisions similar to S. 173[4] in the procedure applicable to warrant cases instituted upon private complaints?. In fact, at one stage it was contend that since S. 94 in the was that in code these was no necessity to make a provision to similar to S. 173[4] in the procedure applicable to warrant cases instituted upon private complaints and S. 94 could be resorted to for the purposes to enable the accused to inspect of the same at any stage of he inquiry of trial. Of courses, it is not possible to accept such contention for the simple reason that S. 94 has-been there in code all along and even them it was fled necessary to introduce S. 173[4] in chapter XIV dealing with criminal cases involving investigation into and trial of cognisable offences as also to introduce S. 251-A in the procedure applicable to warrant cases instituted upon the police reports by the Amending act XXVI of 1955.

[17] On the other hand, Mr. Khandalawala, though he conceded that S. 94 could be invoked at any stage of any inquiry or trial contended that the section did not confer any rights upon the accused to the production of all such statements and documents but that the section was merely an enabling section which conferred discretion upon the courts in the matters of issuing a summons directing producing of documents of articles or things and that such discretion had to be judicially exercised. He further contended that no materials had been placed by the petitioners before the learned Magistrate enabling him to reach a conclusion that the production of all the statements, and documents was either necessary or desirable and the therefore the learned Magistrate was right in refusing to exercise his discretion of I the matter. He pointed out that the offer made in this case by the special prosecutor [of making copies of statement of witnesses

available to the accused as and when the examination - in - chief of each was over and documents and as such there was no question of the statement or documents being either withheld or suppressed from the accused. He the direction, vested in the learned Magistrate under S. 94, which occurs in Chapter VII, which deals with "processes to complete the production of documents and other movable property and for the discovery of persons wrongfully confide did not offered to make theses statements and documents available to the accused thereto was no necessity to resort to the compelling processes contained in Chapter VII of the Code.

[18] In my view, there is considerable force in the submission made by Mr. Khandalawala on this point. Section 94 so far as it a material to the present cases runs as follows.

"Whenever any courts..... considers that the productions of any documents or to her things is necessary or desirable for the purposes of any investigation inquiry trial or other proceedings under this code by the before such courts such court may issue a summons to the person in whose possession or power such documents or things is believed to be requiring him to attend and produce it or to produce it at the time and place stated in summons xxxxx."

In the first place it is clear that no right in conferred upon the party to a criminal proceedings to obtain production of any documents or things under this section. Secondly though it is clear that the provisions of the section could be invoked at any stage of any investigation inquiry or trial at the commencement of the section, the words; such court may issue" clearly show that the section confers discretion upon the courts enabling it to order production of any documents or other things. Thirdly before the court exercises its discretion and orders the production of any documents or things under this section, it must satisfy itself that such production the documents or the things is either necessary of desirable for the purposes of the trial and lastly as has-been held by the sind courts, in deciding that question the court has to exercise of its discretion judicially in the sense of that it must satisfy itself that documents to the things was a bearing upon and is relevant to the case. What was urged very strenuously by Mr. Gandhi was that since the previous statements of witnesses whom he prosecution statements of witness and document of which the prosecution wanted to rely at the trial would be prosecution wanted to rely at the trial would be statement, and documents having bearing upon the relevance the to issues involved in the cases, their production was either necessary or desirable and as such the production ought to have been ordered by the learned Magistrate. In other words for the leaned exercise of judicial discretion vested in the court u/s 94, all that was necessary for a party in a criminal proceedings to show to the court was that the discretion ought to be exercised I an unable t accept this arguments of Mr. Gandhi. It is not doubt true that the while deciding whether production of documents or a things to the issues involved in the cases, but that is not the only

consideration which would guide the courts for ordering production. In the first place every thing that is relevant to the facts in the issue may not be that during the course of prior investigation the prosecution may have interrogated and obtained statements of 4/5 persons of the same vital point and evidence the prosecution may not think it necessary or desirable to examine all the 5 persons as its witnesses to prove the same point. In such a case the previous statements of all the 5 persons would undoubtedly be relevant to the point in issue but it cannot be said that their production is either necessary or desirable. Therefore the relevancy of a statement or a document or thing of which production is sought would be one of the considerations which the courts will have to take into account while deciding the question of the necessity or desirability of the production of such statements or documents or things. Further before the ordering production of any such statement or document or thing the court might consider whether such statement or documents or things are being suppressed or might be tampered with or destroyed by the party in whose possession it is or might be lost altogether or whether it would come before it in a normal way without resorting to the compelling processes contained in S. 94 or 96 of the Chap. VII of this code. These considerations would also weigh with the courts in exercising its judicial discretion while deciding the question whether the production of a document or a thing is either necessary or desirable for the purposes of an inquiry or trial. It is in this connection that Mr. Khanadawala's point assumes some significance. He has pointed out that section 94 occurs in Chapter VII of the code which deals with "processes to compel the production of documents and other movable property and for the discovery of persons wrongfully confined" and he has rightly urged that in view of the special prosecutors offer to make these statements and documents available to the accused no occasion for resorting to such compelling process by exercising the discretion u/s 94 arose. I can understand if the prosecution had either withheld or altogether refused to supply copies of statement of witnesses whom they are going to rely to the petitioners or his co-accused the learned Magistrate could have resorted to the compelling processes contained in Chapter VII of Code. In my view therefore the learned Magistrate was right therefore the learned Magistrate was right in not granting the alternative prayers of the petitioners u/s 94 of the Criminal procedure code.

[19] In the result, all the contentions urged by Messrs. Gandhi and Jethamalani fail and the rules are therefore, discharged.

[20] Petition dismissed.