

(2009) 10 GUJ CK 0052

In the Gujarat High Court

Case No : Special Criminal Application No. 1946 of 2009

Jairajsinh Temubha Jadeja

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 07-10-2009

Acts Referred:

Arms Act, 1959 — Section 25(1), 27
Bombay Police Act, 1951 — Section 135, 64
Constitution of India, 1950 — Article 14, 21, 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 154, 154(1), 155, 156, 156(3)
Evidence Act, 1872 — Section 123, 145, 155, 155(3), 159
Gujarat Police Manual, 1975 — Rule 240, 240(7), 240(8)
Penal Code, 1860 (IPC) — Section 120B, 143, 147, 148, 149

Citation : (2010) 2 GLR 1105

Hon'ble Judges : H.N. Devani, J

Bench : Single Bench

Advocate : Bhargav N. Bhatt, for the Appellant; H.L. Jani, Assistant Public Prosecutor for Respondent 1 and P.M. Thakkar and H.N. Jani, for Thakkar Assoc. for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

H.N. Devani, J.—By this petition under Articles 226 and 227 read with Articles 21 and 14 of the Constitution of India as well as u/s 482 of the Code of Criminal Procedure, 1973, the petitioner has called in question the order dated 26th August, 2009 passed by the learned Additional Sessions Judge, Gondal on the application Exhibit 505, filed by the petitioner seeking production of the case diary for the purpose of effectively cross-examining prosecution witness No. 44, and has prayed for the following substantive reliefs:

[6] Under the premises aforesaid, the petitioner prays before this Hon'ble Court that:

[A] Be pleased to allow the present petition and be further pleased to quash the impugned order vide Annexure-E passed in Sessions Case No. 88 of 2006 by

Additional Sessions Judge, Gondal, dated 26.8.2009.

[B] Be pleased to issue writ, orders or directions, directing the respondent to provide the portion of case diary, containing statements and procedure made or revealed to the petitioner in Sessions Case No. 88 of 2006 by Additional Sessions Judge, Gondal, dated 26.8.2009.

2. One Jayesh alias Pancha Muljibhai Satodia lodged a first information report against the petitioner and other accused persons alleging commission of the offences punishable under Sections 302, 307, 143, 147, 148, 149, 341, 120B and 201 of the Indian Penal Code, Sections 25(1)(a), 25(1)(b)(c) and 27 of the Arms Act and Section 135 of the Bombay Police Act which came to be registered vide Gondal City Police Station I - C.R. No. 25/2004. Upon conclusion of the investigation, charge-sheet came to be laid and the offences being triable only by a Court of Sessions the case came to be committed to the Court of Sessions at Gondal and was registered as Sessions Case No. 88/2006 and is pending in the Court of the learned Sessions Judge, Gondal. It appears that during the pendency of the trial, the first informant preferred an appeal before the Supreme Court against the order of the High Court granting the bail to the petitioner and prayed for cancellation of the bail granted to the petitioner. The Supreme Court vide order dated 29.01.2008, while setting aside the impugned order granting bail to the petitioner and others, also vacated the stay of trial granted by the High Court on 15th February, 2007 and further directed the trial of the case to begin forthwith. The Trial Court was directed to take up the trial on day to day basis and, if possible, to conclude the same within the next six months from the date of production of a certified copy of the judgment. The prosecution as well as the defence was directed to cooperate in conducting the trial on a day to day basis.

3. During the course of the examination-in-chief of the prosecution witness No. 44-Navalsinh Bhikhubha Jadeja below Exhibit 504, the said witness has deposed that on 8.2.2004, the P.S.O. informed him about the incident and he immediately reached the spot. It was approximately 10:00 o'clock at night. It was dark in the market area and the shops were closed, and people had stopped moving to and fro. A utility bearing No. G.J.-3-Y-6667 was lying near the wall of Monghiba School, and upon looking there it was found that the windscreen glass of the utility had fallen out, wherein "Markana" was written in Gujarati, and firearm shots were found in this glass. On looking inside the jeep, no person was present. Also on the door as well as on the posterior part of the jeep there were signs of firearm shots. It was not possible to know as to how the incident had taken place and who had been injured, hence, inquiry was made as to whether any injured had been taken to the hospital for treatment and the Police Station was told to inform the police control room and he also directed that nakabandhi and checking be carried out. He stayed at the scene of incident and inquired thereabout. However, as no one was present at the spot, it was not possible to ascertain anything in respect of how the incident had taken place. Meanwhile he

was informed by the Police Station that there was a dead body on the road opposite the Mamlatdar's office. Hence he proceeded towards the Mamlatdar's office, where he saw the dead body of a person lying, which had firearm signs on the right side of his head above the ear as well as behind his head and on his abdomen. He had not learnt as to who the deceased was. However, as "Markana" was written on the jeep, steps were taken on that basis to call someone who was present at Gondal Rajwadi who could identify the dead body. A chowkidar had come from there; however he had not identified the dead body. Thereafter one Kana Hirjibhai of Vachda had come and he informed that the dead body was of Nilesh Rayani. In the meanwhile, P.S.I. Shri B.J. Solanki as well as other police officers and police personnel had also come and hence, he had instructed Shri B.J. Solanki to go to the police station and in case any informant comes to lodge a complaint in connection with the incident, to register the complaint as an offence. Shri Solanki had accordingly gone to the police station. In the meanwhile, Kana Hirji had come there. He was also informed to lodge a complaint in case he was aware of anything in relation to the incident. Thereafter, he received a call on the mobile phone from Vinubhai Shingala that he would show him where Ramji Markana was and that he should come towards the bus stand. Therefore, he along with the police personnel proceeded towards the bus stand in a Government jeep. In the meanwhile, while going to the bus stand, they came across Vinubhai Shingala's vehicle near Charoli Darwaja, and they stopped them (i.e. the deponent). They alighted from the car and came towards them (the deponent) and said that this person who is Jayesh alias Pancha Mulji would show them where Ramji was. Therefore, he asked Jayeshbhai to sit in their vehicle and as instructed by him, they had proceeded towards the Town Hall. Vinubhai's car also followed them and they went to the Town Hall where Ramji Markana was hiding inside and was sitting in the dark. He (the deponent) asked Ramji Markana to come to the police station to lodge his complaint, however, he (Ramji Markana) had seated himself inside Vinubhai's car and they went to the police station. At this stage, Ramji Markana had said that he wants to go for treatment and that information regarding the incident would be given by Jayesh Panchabhai who was also with him. He (the deponent) had insisted on recording his information, however, Ramji Markana had said that he immediately wants to go to the hospital. He (the deponent), therefore, asked him to go to the Gondal Government Hospital. However, Ramji Markana said that he wanted to go to Rajkot. Jayesh Mulji was dropped at the police station for recording the complaint, at which point of time, P.S.I. Shri Solanki was present and he (the deponent) had instructed him to record the complaint. At that time, Vinubhai had said that they wanted to go to Rajkot for treatment and requested for protection. Hence, he (the deponent) had asked P.S.I. Shri Solanki to do the needful, but Shri Solanki had told him that he should go with them. Hence, he instructed P.S.I. Shri Solanki to record the complaint and he went along with Ramji Markana who was sitting in Vinubhai's car and had proceeded to go to Rajkot for treatment, to give them protection. When they reached Biliyala Patiya, Vinubhai had said that they would no longer need protection, hence, he had

returned from Gondal. Meanwhile, an offence had been registered in connection with this case and he had taken charge of the investigation.

4. It is interalia deposed by the said witness that upon his arrival at Gondal, he was given an order to carry out investigation for the offence registered vide Gondal City Police Station I - 25/2004 and upon receipt of the said order, he commenced investigation. It appears that during the course of his cross-examination (at page 6) this witness had deposed that the investigating officer has not recorded his statement as regards the proceeding carried out by him prior to taking charge of the investigation and that he had not volunteered to give such statement.

During the course of cross-examination of the said witness by the learned advocate for the accused No. 1 to 5 and 7, in reply to a query as to whether he has made any note as regards the proceeding carried out by him prior to investigation, he has replied that he had recorded the same in the case diary. Other than that, no note is required to be made for keeping the same with the case papers; hence, no such note has been prepared by him. He has stated that he is aware that the case diary is not required to be given to the accused. He has not kept a separate copy of the earlier proceeding with the case papers for the purpose of giving the same to the accused. He has also stated that he has not referred to the case diary prior to giving his testimony and that he does not want to refer to the case diary.

At this stage of the evidence of the said witness, the defence Counsel presented an application below Exhibit 505, requesting that a copy of the case diary be supplied to the accused. The said application was resisted by the prosecution on the ground that as per the statutory provisions as well as settled position of law, it was not permissible to give a copy of the case diary to the accused. By the impugned order dated 26th August 2009, the learned Additional Sessions Judge, Gondal, rejected the application. Being aggrieved, the petitioner has moved the present petition seeking the reliefs noted hereinabove.

5. Mr. Bhargav Bhatt, learned advocate for the petitioner has invited the attention of the Court to the contents of paragraph 2.3 of the petition wherein certain aspects which according to the petitioner came to be revealed by prosecution witness No. 44 in his deposition. Paragraph 2.3 is reproduced hereunder for ready reference:

(i) He had made examination of utility vehicle bearing No. GJ-3Y-6667 having mark of fire arms shots.

He was informed by PSO that one dead body is lying near Mamlatdar office.

He had talked with one guard over there, who had not identified the dead body.

He had received information from one Kanabhai Hirjibhai, who had identified dead body.

He was having conversation with PSI, B.G. Solanki and other Police Officers and he has also advised one Kana Hirji to file complaint.

He was having telephonic conversation with one Vinubhai Shingala.

He was having conversation with Jayesh alias Pancha Mulji (original complainant), who had taken this witness to a place called Town Hall.

There he was having conversation with one Ramji Markana. He had left original informant to police station and accompanied Vinubhai as well as Ramjibhai to give protection as they were intending to go to Rajkot for medical treatment.

He returned from half way as said Vinubhai has told that he no longer need protection.

6. The learned advocate for the petitioner has submitted that through the testimony of the said prosecution witness, substantial evidence has come on record which would not fall within the ambit of "case diary" as contemplated under the Code of Criminal Procedure, 1973 (the Code) as well as the Gujarat Police Manual. Referring to the provisions of Section 172 of the Code, which provides for "Diary of proceeding in investigation", it is contended that entries in the case diary are required to be made by the police officer who is making an investigation under Chapter XII of the Code. It is submitted that the police officer is required to enter only his proceeding in the investigation in the diary and nothing else. It is submitted that the opening words of Sub-section (1) of Section 172 stipulate the scope and framework of "case diary" and that the entries made therein are required to be confined to the statement of affairs recorded by the investigating officer in his capacity as such. It is contended that anything done, recorded or reduced in writing or summarized, prior to the commencement of the investigation cannot form part of the case diary within the meaning of Section 172 of the Code. Attention is invited to the deposition of prosecution witness No. 44 to point out that from the evidence of the said witness it is clear that he has narrated certain circumstances that had occurred prior to the commencement of the investigation as contemplated u/s 157 of the Code. It is submitted that all such statements would not form part of the case diary and would fall within the ambit of Section 145 of the Indian Evidence Act, 1872 (hereinafter referred to as "the Evidence Act"). It is accordingly contended that the portion of the diary wherein those circumstances have been noted down cannot be considered or regarded as forming part of the case diary and as such, the accused are entitled to a copy of the said portion of the case diary to contradict the witness, particularly with those statements that have been deposed by the said witness in his examination in-chief.

7. Referring to the provisions of Sections 154 and 157 of the Code, it is submitted that u/s 154, every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, is required to be reduced to writing by him and is also required to be signed by the informant, and u/s 157, if, from information received or otherwise, an officer in

charge of a police station has reason to suspect commission of an offence which he is empowered u/s 156 to investigate, he is required to forthwith send a report of the same to the Magistrate empowered to take cognizance of such offence upon a police report and then proceed to investigate either in person or to depute one of his subordinate officers as laid down therein, to proceed to the spot, to investigate the facts and circumstances of the case, and if necessary, to take measures for the discovery and arrest of the offender. It is argued that it is only pursuant to an information as contemplated u/s 154 of the Code, viz. information relating to commission of a cognizable offence, that investigation would commence and any action taken prior thereto would not fall within the ambit of investigation as contemplated under the Code and therefore, the proceedings thereof are not required to be entered in the case diary, and if entered, would not form part of the case diary so as to entitle prosecution to claim privilege under Sub-section (3) of Section 172 of the Code. It is argued that Chapter XII of the Code refers to investigation pursuant to a cognizable offence whereas in the facts of the present case, at the time when the said witness arrived at the scene of incident, no information regarding commission of a cognizable offence had been received by him. Hence, the investigation carried out by him at the relevant time, if at all can be said to be an investigation, cannot be said to be an investigation as contemplated under Chapter XII of the Code, but would fall within the ambit of Section 64 of the Bombay Police Act. In support of his submissions the learned advocate for the petitioner has placed reliance upon the decision of the Supreme Court in *State of Haryana and others Vs. Ch. Bhajan Lal and others*, and more particularly to paragraphs 52, 53 and 54 thereof.

8. The learned advocate for the petitioner has invited the attention of the Court to the provisions of Rule 240 of the Gujarat Police Manual, which provides for "Case Diary of the Investigating Police Officer" and more particularly to Sub-rule (7) thereof which inter alia provides that "With regard to the contents of the diary, it should not be necessary to issue any directions, since Section 172, Criminal Procedure Code expressly lays down the matters to be contained in it. These should be the time at which the information reached the investigating officer or, in the case of an officer deputed to make an investigation, the date and substance of the order of the officer in charge of the Police Station, the time at which he began and closed his investigation, the places visited by him and a statement of the circumstances ascertained in the investigation." Attention is also invited to Sub-rule (8) of Rule 240, which provides that as a guide to writing up the case diary, reference may be made to the model in Appendix XXII. Referring to Appendix XXII which provides for the format of guidelines of the case diary, it is pointed out that the same starts with recording of first information report. It is submitted that the Code as well as the Police Manual Rules all envisage the starting point of investigation to be the registration of the offence as a first information report. It is accordingly contended that any proceeding carried out prior to the registration of an offence would not form part

of the investigation as contemplated under the provisions of the Code, and as such, if such proceeding is noted in the case diary, it would not form part of the case diary as envisaged u/s 172 of the Code. It is urged that the statements of facts recorded by the investigating officer in the diary maintained by him u/s 172 of the Code, relating to the proceedings prior to his entering into investigation, cannot be denied to the accused under the garb of Section 172(3) inasmuch as the same cannot be regarded as part of the case diary within the meaning of Section 172 of the Code. It is also submitted that all the proceedings under the Code contemplate investigation being carried out by an investigating officer, who would be a person who has been entrusted with the investigation u/s 157 of the Code, and any inquiry made prior to entrustment of such investigation cannot be said to have been made by such person in his capacity as an Investigating Officer, and as such the same would not fall within the ambit of investigation as envisaged under the provisions of the Code. It is submitted that the steps taken prior to registration of offence would only be an inquiry, of which report is required to be made to the P.S.O. and a copy thereof is required to be supplied to the accused.

9. Next it is submitted that in the present case, there is a considerable time-span between the incident in question and the registration of the offence, hence, the contents of the case diary prior to the commencement of investigation which have been referred to by prosecution witness No. 44 in his deposition are of great significance so far as the defence of the petitioner is concerned. It is contended that not providing the accused with copies of the entries made in the case diary adversely affects his defence of delayed first information report and the deliberations made prior to lodging the first information report, which facts are spelt out in the diary and as such are relevant for the purpose of cross-examination. It is submitted that by referring to the said facts and not providing a copy thereof to the petitioner, the right of the petitioner to cross-examine the said witness as contemplated u/s 145 of the Evidence Act and to impeach his credibility u/s 155(3) of the Evidence Act is directly affected. It is contended that in the facts of the present case, the prosecution wants to rely upon circumstances prior to the registration of the first information report and wants to deprive the accused of the right to cross-examine the witness in the context of such circumstances. It is contended that the right of the accused to confront the witness with his previous statement has been denied on the ground that it is part of the case diary. It is urged that when the investigation itself cannot be stated to have commenced, there is no question of recording any proceeding in the case diary u/s 172 of the Code, hence non-providing of the entries made by the witness in the case diary prior to registration of first information report cannot be said to be a fair prosecution. It is argued that relevant circumstances for examining this witness and other witnesses have been withheld from the accused and thereby, the accused has been deprived of his right to cross examine the witness qua the said circumstances.

10. Next it is contended that in any case, the question which requires to be

considered is as to what is the prejudice caused to the prosecution if a copy of the extract of the case diary containing the entries made prior to registration of the FIR is given to the accused and why does the prosecution want to withhold such document when they want to rely upon it. It is contended that the witness has deliberately not referred to the contents of the case diary for the purpose of refreshing his memory only with a view to deprive the accused of his right to have a copy of the case diary so as to cross-examine the said witness with respect to the evidence led by him. It is submitted that such conduct on the part of the prosecution amounts to an unfair trial. Referring to the provisions of Section 145 of the Evidence Act, which provides for "Cross-examination as to previous Statements in writing", it is submitted that to confront the said witness as to the previous statement made by him, the accused needs to have access to the particular report, notes or writing. It is submitted that it is the duty of the Court to peruse the case diary and find out as to what is the prejudice in supplying that portion of the case diary to the petitioner. It is urged that in any case the Trial Court at least ought to have perused the case diary to verify the veracity of the testimony of the said witness in the context of the entries made therein. It is further submitted that under the provisions of Sub-section (3) of Section 155 of the Evidence Act, for the purpose of impeaching the credit of the witness, the petitioner requires copies of the former statements made by the said witness so as to contradict any part of his evidence which is inconsistent with the same. Thus, non-supplying of the said portion of the case diary, adversely affects the right of the petitioner u/s 155(3) of the Evidence Act.

11. The next submission advanced by the learned advocate for the petitioner is that u/s 123 of the Evidence Act, it is only if a document is a document as described thereunder that the prosecution can withhold the same. It is contended that in the facts of the present case, the document in question does not fall within the ambit of Section 123 of the Evidence Act; hence, the prosecution has no right to deny the petitioner the right to avail a copy of the same.

12. Inviting attention to the impugned order passed by the learned Additional Sessions Judge, it is submitted that the findings recorded by the learned Judge are not in consonance with the provisions of Sections 154 and 172 of the Code. It is submitted that there are two factors of utmost importance, which the learned Judge ought to have kept in mind while considering the application made by the petitioner. The first factor is as to whether any prejudice is caused to the prosecution by supplying the document asked by the accused and the second factor is the right of the accused to have a fair trial. It is submitted that, in the facts of the present case, no prejudice would be caused to the prosecution if a copy of the proceedings made by the said witness prior to his entering into investigation of the offence are supplied to the accused. It is submitted that the interest of justice requires that the portion of the case diary containing the statements and proceedings prior to entering into investigation by the said witness be provided to the petitioner so as to enable him to exercise his right u/s

145 and 155 of the Evidence Act. Hence, the learned Judge was not justified in rejecting the application of the petitioner.

13. The petition is strongly resisted by Mr. P.M. Thakkar, learned Senior Advocate with Mr. H.N. Joshi, learned advocate for the first informant. A preliminary contention is raised that a perusal of the application Exhibit 505 made by the petitioner does not indicate as to under which provision the same has been made, to submit that the conduct of a criminal trial is strictly governed by the provisions of the Code and the trial Court is bound by the same. It is submitted that it is not clear as to which power of the Sessions Court has been invoked by the petitioner and as to what is the jurisdictional error committed by the learned Judge so as to call for interference by this Court in the midst of the trial. Attention is invited to the judgment dated 29th January 2008 of the Supreme Court (Annexure "F" to the application), to point out that the Supreme Court had directed that the trial be conducted on day to day basis and, if possible, conclude the same within the next six months from the date of production of a certified copy of the judgment.

14. On merits, it is submitted that any application made during the course of trial should find support from the provisions of the Code, whereas the present application does not indicate the provisions of law under which it is made and as to what was the power that the learned Judge was required to exercise. Attention is invited to the provisions of Section 207 of the Code, to submit that the only documents which are required to be supplied to the accused are the documents enumerated thereunder. It is submitted that the document demanded by the petitioner does not fall within any of the categories enumerated thereunder, hence, the accused has no right to demand a copy of the same. Referring to the provisions of Section 173 of the Code, it is pointed out that it is the only other provision which provides for furnishing documents to the accused. Attention is invited to Sub-section (5) of Section 173 to submit that when the police officer has submitted a report under Sub-section (2) of Section 173 in respect of a case to which Section 170 applies, he is required to forward to the Magistrate along with the report (a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation; and (b) the statements recorded u/s 161 of the Code of all the persons whom the prosecution proposes to examine as its witnesses. Referring to Sub-section (6) of Section 173, it is pointed out that if the police officer is of the opinion that any part of such statement is not relevant to the subject matter of the proceedings or that its disclosure to the accused is not essential in the interest of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request. Attention is also invited to Sub-section (7), which provides that, where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in Sub-section (5), to submit that not every document

has to be provided to the accused, but it is only those documents on which prosecution seeks to rely upon which are required to be provided. It is contended that the principle behind the said provision is that if the prosecution is going to rely upon it, the document is required to be provided. It is contended that it is the choice of the prosecution as to which document it wants to rely upon as the total burden is upon the prosecution to prove the case against the accused beyond any reasonable doubt. It is submitted that it is subject to the provisions of Section 173 of the Code that the documents are required to be provided u/s 207.

15. Inviting attention to the provisions of Section 172 of the Code, it is submitted that the said provision imposes an obligation upon investigating officer to maintain a diary of the day to day proceeding in the investigation. Referring to Sub-section (1) of Section 172, it is submitted that the investigating officer is required to record the time at which the information reached him and the time at which he began and closed the investigation. It is submitted that Section 172 of the Code has been liberally worded with a view to ensure that the police officer does not find an excuse for not entering something in his diary on the ground that a first information report has not been registered.

16. Referring to the provisions of Section 2(h) of the Code, which defines "investigation", it is submitted that the said definition is an inclusive definition and as such, can include more than what is stated in the said definition. It is submitted that every step in aid of detection of crime would form part of the investigation, which is a common sense approach. It is submitted that in Section 172 of the Code, investigation is used in a broader sense encompassing everything that a police officer does in aid of the investigation and should begin from the time he receives information, cryptic or otherwise, and till the investigation closes. It is contended that the operation of Sub-section (3) of Section 172 of the Code cannot be limited only to the investigation carried out subsequent to the registering of the first information report. It is submitted that it is settled legal position as held by the Apex Court as well as this Court that a first information report is not a sine qua non or precondition for starting an investigation and that investigation can also be started without recording the first information report. Reliance is placed upon the decision of the Privy Council in *King Emperor v. Khwaja Nazir Ahmad* LXXI Indian Appeals 203, for the proposition that the receipt and recording of an information is not a condition precedent for setting in motion a criminal investigation. Reliance is placed upon a decision of the Apex Court in *The State of Uttar Pradesh Vs. Bhagwant Kishore Joshi*, wherein it has been held that though ordinarily investigation is undertaken on information received by a police officer, the receipt of information is not a condition precedent for investigation. It is further held that Section 157 prescribes the procedure in the matter of such an investigation which can be initiated either on information or otherwise and that it is clear from the said provision that an officer in charge of a police station can start investigation either on information or otherwise. The learned senior advocate has also placed

reliance upon the following observations of this Court in an unreported decision in the case of Vinubhai Bhikhabhai Patel and Ors. v. State of Gujarat rendered on 30th September 2009 SCAN 1369 of 2009 wherein this Court had placed reliance upon various decisions for the proposition that registration of an FIR is not a sine qua non for setting in motion of a criminal investigation:

The Apex Court in Ch. Razik Ram Vs. Ch. Jaswant Singh Chouhan and Others, has held that while it is true that the receipt and registration of an F.I.R. is not the sine qua non to the setting in motion of the machinery of criminal investigation, the Investigating Officer must follow the procedure laid down in Part V. In State of Bihar and Another Vs. P.P. Sharma, IAS and Another, it has been held that in cases of cognizable offences receipt or recording of a first information report is not a condition precedent to setting in motion of criminal investigation. Section 157 provides the procedure for investigation. If the police officer in charge of the police station, on receipt of information or otherwise, has reason to suspect the commission of a cognizable offence and is empowered to investigate into, he shall proceed in person or shall depute one of his subordinate officers not below the rank of the prescribed officer to the spot to investigate the facts and circumstances and if necessary to take measures for the discovery and arrest of the offender. In Jamla Hursing Meda (supra) a Division Bench of this Court has held thus: "The absence of First Information Report may cast a cloud of suspicion and tend to weaken the prosecution case in given facts. However, there is no rule that in absence of First Information Report, the prosecution case must be rejected in toto or that it must be thrown over board. The reason is that First Information Report is never treated as a substantive piece of evidence and it can be used either for corroborating or contradicting the maker of it." In Apren Joseph (supra) the Supreme Court has placed reliance upon the decision of the Privy Council in AIR 1945 18 (Privy Council) wherein it has been observed that the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation.

17. Next it is contended that it may not be necessary to deal with the expression "investigation" as the bar under Sub-section (3) of Section 172 operates on its own. Referring to the provisions of Sub-section (3) of Section 172 of the Code, it is submitted that the accused is entitled to call for the case diary only under the eventualities stipulated thereunder, that is, if they are used by the police officer who made them to refresh his memory or if the Court uses them for the purpose of contradicting such police officer. It is submitted that there is no compulsion to travel beyond the plain language of the statute and that the only two situations when the accused can ask to see the case diary, are the situations set out under Sub-section (3) of Section 172 and no other. It is submitted that if for any reason the contents of the case diary are required to be verified, the Court can always peruse the case diary and contradict the witness hence, the interest of the accused is duly taken care of. It is submitted that while construing the provisions of Section 172, there is no need for the court to re-write the statute by introducing a third circumstance, namely, that if prior to registration of first

information report, any entries are made in the case diary, the same should be supplied to the accused, in addition to the two circumstances stipulated in the said provision. In support of his submissions, the learned senior advocate has placed reliance upon the decision of the Apex Court in *Shamshul Kanwar Vs. State of U.P.*, and more particularly to the contents of paragraph 20 thereof, for the proposition that the use of the entries made in the case diary contrary to the two situations enumerated under Sub-section (3) of Section 172 is impermissible. Reliance is placed upon the decision of the Apex Court in *Malkiat Singh and Others Vs. State of Punjab*, for the proposition that the case diary is only a record of day to day investigation of the investigating officer to ascertain the statements of circumstances ascertained through the investigation. Under Sub-section (2) of Section 172, the Court is entitled at the trial or inquiry to use the case diary not as evidence in the case, but as an aid to it in the inquiry or trial. Neither the accused nor his agent, by operation of Sub-section (3) shall be entitled to call for the diary nor shall he be entitled to use it as evidence merely because the court referred to it. Reliance is also placed upon the decisions of the Apex Court in *Sidharth Vs. State of Bihar*, and in *State of NCT of Delhi Vs. Ravi Kant Sharma and Others*, It is submitted that the moment the investigating officer receives an information; all steps taken by him pursuant thereto are in aid of investigation. It is urged that any departure in the consistent practice of not giving the case diary to the accused is not called for especially when the Supreme Court has set down a time limit for the conduct of the trial. It is urged that there being no merit in the petition, the same be dismissed.

18. This Court has also heard Mr. H.L. Jani, learned Additional Public Prosecutor for the respondent - State of Gujarat who has more or less reiterated the submissions advanced by the learned advocate for the first informant.

19. In rejoinder, Mr. Bhargav Bhatt, learned advocate for the petitioner has submitted that one of the issues which is required to be addressed is as to whether at the relevant time when the entries were made in the case diary, the said witness was an investigating officer as contemplated under the Code. It is submitted that, from the facts of the case, it is apparent that at the relevant time, the said prosecution witness was only making inquiry at the instance of the P.S.O., and that, he had not been deputed to make investigation as contemplated u/s 157(1) of the Code. It is submitted that the said witness has recorded certain conversations, acts and omissions prior to registration of the first information report and that he himself is a witness to the past incident, namely, the conduct of the first informant after the happening of the event. It is submitted that the statements of Ramjibhai, Vinubhai etc. as recorded by the said witness prior to the registration of the first information report would be a relevant circumstance for the defence of the accused. It is contended that PW-44 is therefore, a witness of facts as some information would have been revealed to him by the said witnesses. It is submitted that the accused should not be denied a copy of the said proceedings if the same find favour with him to build up his defence. Reliance is placed upon a decision of the House of Lords in *Conway v. Rimmer*

and Anr. 1968 A.C. 910, for the proposition that what has to be weighed is the confidentiality of the documents vis-à-vis the right of the accused to a fair trial. In the said decision, it had been held that the documents should be produced for inspection by the House of Lords, and if it was then found that disclosure would not be prejudicial to the public interest or that any possibility of such prejudice was insufficient to justify them being withheld, disclosure should be ordered. Adverting to the facts of the present case, it is submitted that no prejudice would be caused to the prosecution if a copy of the extract of the case diary as prayed for by the petitioner is supplied to him. It is urged that considering the nature of the entries made in the case diary prior to the commencement of investigation, at least the trial Court ought to have perused the case diary for the purpose of ascertaining the veracity of the evidence led by the said witness as well as to examine as to whether disclosure of the contents of the case diary would be prejudicial to public interest so as to attract the bar u/s 123 of the Evidence Act. It is contended that Section 172 of the Code lies in a narrow periphery and has to be read with Section 123 of the Evidence Act and as the document in question does not fall within the ambit of Section 123 of the Evidence Act, the prosecution is not justified in not supplying a copy of the same to the petitioner.

20. As regards the submission advanced by the learned senior advocate for the first informant that it was not clear as to under which statutory provision the application had been made, it is submitted that Section 162 of the Evidence Act and Section 91 of the Code cover every document which is necessary or desirable for the purpose of trial or any other proceeding under the Code. It is submitted that in the circumstances, merely non-stating the statutory provision in the application does not vitiate the proceedings. It is further pointed out that even otherwise, the application of the petitioner has not been rejected by the trial Court on the ground of maintainability, but on the ground that the same cannot be made available to him in view of the bar of Section 172(3) of the Code.

21. Next it is submitted that Article 21 of the Constitution of India entitles the accused to seek production of any document which he thinks is relevant for the purpose of his defence. The learned advocate has also placed reliance upon extracts from H.M. Seervai's "Constitutional Law of India" and more particularly to paragraphs 11.444, 11.445 and 11.450 thereof to submit that public policy may dictate that certain relevant evidence should be excluded in a criminal trial, but the higher public policy requires that the relevant evidence should not be excluded if such evidence is necessary to prove the innocence of an accused; then such higher public policy must prevail. It is submitted that in the facts of the present case, the extracts of the case diary wherein the proceeding prior to the registration of the first information report has been recorded is necessary for the accused to prove his innocence, hence, in view of the right conferred on the accused under Article 21 of the Constitution of India, the petitioner is entitled to supply of a copy of the same. It is further submitted that under the provisions of Section 172(3) of the Code the accused has been denied access to the contents of the case diary but it is always permissible for the trial Court to peruse the

same and ascertain the veracity of the testimony of the Investigating Officer to protect the interest of the accused. However, in the present case the trial Court has also not perused the case diary at any point of time till the recording of the testimony of the witness was concluded and as such the right of the accused has been seriously prejudiced.

22. Approaching the issue involved in the present case step by step, the first issue to be examined is as to whether the petitioner-accused is entitled to production of the case diary as prayed for in the application Exhibit-505. In this regard, it may be pertinent to refer to the provisions of Section 172 of the Code, which read thus:

172. Diary of proceedings in investigation.- (1) Every police officer making an investigation under this Chapter shall day by day enter his proceeding in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court ; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply.

23. On a plain reading of the aforesaid provision it is manifest that the case diary is only a record of day-to-day investigation of the Investigating Officer to ascertain the statement of circumstances ascertained through the investigation. Under Sub-section (2) the Court is entitled at the trial or enquiry to use the diary not as evidence in the case, but as aid to it in the inquiry or trial. Neither the accused, nor his agent, by operation of Sub-section (3), shall be entitled to call for the diary, nor shall he be entitled to use it as evidence merely because the Court referred to it. The only right given thereunder is that if the police officer who made the entries uses it to refresh his memory or if the Court uses for the purpose of contradicting such witness, by operation of Section 161 of the Code and Section 145 of the Evidence Act, it shall be used for the purpose of contradicting the witness i.e., the Investigating Officer or to explain it in re-examination by the prosecution, with the permission of the Court. It is, therefore, clear that unless the investigating officer or the Court uses it either to refresh the memory or for contradicting the investigating officer as to previous statement u/s 161, that too after drawing his attention thereto as enjoined u/s 145 of the Evidence Act, the entries cannot be used by the accused as evidence.

See Malkiat Singh and Others Vs. State of Punjab,

24. Apart from the decision referred to hereinabove, the law in this regard is well settled by various other decisions of the Supreme Court as well as High Courts. The Full Court of the Allahabad High Court in Queen-Empress v. Mannu ILR (1897) All 390 held that the plain meaning of Section 172 is that the special diary, no matter what it may contain, is absolutely privileged, unless it is used to enable the police officer who made it to refresh his memory or is used for the purpose of contradicting him.

25. In State of Bihar and Another Vs. P.P. Sharma, IAS and Another, the Supreme Court held that the only duty cast on the investigating officer is to maintain a diary of his investigation which is known as "Case Diary" u/s 172 of the code. The entries in the case diary are not evidence nor can they be used by the accused or the Court unless the case comes u/s 172(3) of the Code. The Court is entitled for perusal to enable it to find out if the investigation has been conducted on the right lines so that appropriate directions, if need be given and may also provide materials showing the necessity to summon witnesses not mentioned in the list supplied by the prosecution or to bring on record other relevant material which in the opinion of the Court will help it to arrive at a proper decision in terms of Section 172(3) of the Code. The said position has been reiterated by the Supreme Court in Sidharth Vs. State of Bihar,

26. In view of the principles enunciated by the Supreme Court in the decisions cited hereinabove, an accused would be entitled to be provided with a copy of the case diary only in the eventualities mentioned in Sub-section (3) of Section 172 of the Code viz., only if the police officer who made the entries in the case diary uses it to refresh his memory or if the Court uses it for the purpose of contradicting such police officer in the inquiry or trial. The learned Counsel for the informant is therefore, justified in contending that in addition to the aforesaid two categories the Court should not add a third category, under Sub-section (3) of Section 172, viz. that the part of the case diary wherein the police officer has recorded his proceeding prior to the registration of the first information report should be provided to the accused.

27. The core issue raised by the learned advocate for the petitioner is that an investigation would not commence till the first information report is registered, hence any proceeding prior to registration of the FIR would not be a proceeding in the investigation so as to form part of the case diary, hence, any entry made prior to registration of the offence would not attract the bar under Sub-section (3) of Section 172 of the Code. The moot question that arises for consideration is whether the entries made in the case diary prior to registration of the first information report would form part of the case diary so as to attract the bar u/s 172(3) of the Code.

28. A perusal of the provisions of Section 172 of the Code makes it apparent that what is required to be recorded in the case diary is the proceeding of the

Investigating Officer in the investigation. Hence it would be necessary to examine the scope and ambit of the expression "investigation" as contemplated under the provisions of the Code. Sub-section (h) of Section 2 defines "investigation" to include all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf. In this regard it may be pertinent to refer to the decision of a Division Bench of this Court in *Lok Adhikar Sangh Vs. State of Gujarat and Another*, wherein the Court has examined the provisions of Section 2(h) of the Code, and held thus:

[11] xxx In order to appreciate the contention, it would be appropriate to refer some of the provisions of Code of Criminal Procedure. "Inquiry" defined u/s 2(g) of the Cr.P.C., which means every enquiry other than trial, conducted under the Code by Magistrate or the Court must be distinguished from "Investigation" under Chapter XII. An enquiry is normally conducted by a Magistrate or Court whereas "Investigation" is conducted by a Police Officer or any person other than a Magistrate or Court. The definition of the word "investigation" u/s 2(h) is not exhaustive, it includes all proceedings under the Code for the collection of evidence conducted by Police Officer or by any person other than a Magistrate, who is authorized by Magistrate in this behalf. Investigation usually commence with the information relating to commission of offence given to the Officer-in-charge of the investigation u/s 154 of the Code. Section 155 provides that if the information is of commission of non-cognizable offence, the Police Officer will enter the substance of the information in the prescribed register and refer the informant to the Magistrate. Section 156 empowers the Police to investigate only cognizable offence, except on direction by the Magistrate. Section 157(1) requires an officer in-charge of a Police station who "from information received or otherwise." has reason to suspect the commission of an offence that is a cognizable offence, which he is empowered to investigate u/s 156 to forthwith send a report to a Magistrate empowered to take cognizance of such offence upon a police report and either to proceed in person or depute anyone of his subordinate officers not being below such rank as the State Government may, by general or special order prescribe in this behalf, to proceed to the spot to investigate the facts and circumstances of the case and if necessary, to take measures for the discovery and arrest of the offender. This provision is qualified by a proviso which is in two parts. As per Clause (a) the officer-in-charge of the police station need not proceed in person or depute a subordinate officer to conduct an investigation on the spot of the information as to the commission of any such offence if given against any person by name and the offence is not of serious nature. As per Clause (b) if it appears to the officer-In-charge of the police station that there is no sufficient ground for entering into investigation, he shall not investigate and as required by Clause (2), he shall send a report to Magistrate with reasons for not complying with the requirement of Sub-section (i) and further in addition, he will forthwith, notify to the informant that he will not investigate or cause the case to be investigated. Thus, the Police Officer has

to satisfy himself and form opinion only on the basis of the allegations made in the First Information Report as to whether those allegations constitute a cognizable offence warranting an investigation. The Police Officer at this stage, cannot embark upon an enquiry as to whether the information laid, is reliable and genuine. In-charge of the police station is under statutory obligations to register a case and then proceed with investigation if he has reason to suspect the commission of cognizable offence. If he forms the opinion that there is no sufficient ground to enter into investigation, he must follow the procedures provided u/s 157(2) of the Cr.P.C., i.e., sending the report to Magistrate with reasons and to inform the informant. This will give an opportunity to the informant to file a complaint and ask for direction to Police for investigation u/s 156(3) of non-cognizable offence. If the procedure under Clause (2) is not followed, it must be presumed that the Police Officer has proceeded with the investigation considering the case to be of cognizable offence.

[12] It is significant to notice the use of expression "information" u/s 154(1) and 157(1) of the Cr.P.C. The information may be oral or written, the only requirement is that on receipt it must be reduced to writing. There is no requirement of registration of such First Information Report. The other requirement is that on receipt of an information, In-charge of the police station should form an opinion that he suspects commission of cognizable offence. The expression "reason to suspect" employed u/s 157(1) has to be governed and dictated by the allegations made in the First Information Report, and at that stage the question of adequate proof and the involvement of any accused named in the crime does not arise. Thus, the process of collection of evidence under the Code, in pursuance of information with respect to commission of crime, regarding which no report is sent to the Magistrate and the informant is informed as required by Section 157(2) fall within the definition of "investigation" u/s 2(h) of the Code, irrespective of the fact that formally such F.I.R. has been registered or not.

Thus, as held by the Division Bench, the process of collection of evidence under the Code pursuant to information with respect to commission of a crime irrespective of the fact that a formal first information report has been registered or not, would fall within the definition of "investigation" as contemplated u/s 2(h) of the Code.

29. Examining the facts of the present case in the light of the decision cited hereinabove, the evidence of the prosecution witness No. 44 discloses that he was discharging duties as a Police Inspector at Gondal City Police Station since the year 2004. On 8th February 2004, the P.S.O. informed him about the incident and he immediately reached the scene of offence. Hence, it is apparent that the concerned police officer had reached the scene of incident in connection with the information received by him as regards commission of an offence and he had recorded the proceeding of the investigation made by him, whereas the first information report was registered subsequently. In view of the law laid down by

the Division Bench of this Court in the above referred decision, the proceeding carried out by the Investigating Officer would fall within the ambit of the expression "investigation" as defined u/s 2(h) of the Code, inasmuch as all steps taken by him pursuant to the information regarding commission of an offence would have been carried out by him in his capacity of investigating officer as envisaged under the Code irrespective of the fact that at the relevant time, the first information report had not been registered. In the circumstances, the contention raised on behalf of the petitioner that the portion of the case diary wherein entries prior to the registration of the first information report have been recorded do not form part of the "Case Diary" so as to attract the provisions of Sub-section (3) of Section 172 does not merit acceptance.

30. On behalf of the petitioner it has been contended that certain circumstances as noted hereinabove, have been brought on record by virtue of the testimony of the said witness which would adversely affect the right of the accused and in absence of the copies of the said proceeding being supplied to the accused, the right of the accused to cross-examine the witness u/s 145 of the Evidence Act and to impeach his credibility u/s 155(3) of the Evidence Act, is adversely affected. In this regard, it would be pertinent to refer to the decision of the Supreme Court in *Shamsul Kanwar v. State of U.P.* wherein after referring to the provisions of Section 172 of the Code, the Court observed thus:

This Section firstly lays down that every police officer making an investigation should maintain a diary of his investigation. It is well-known that each State has its own police regulations or otherwise known as police standing orders and some of them provide as to the manner in which such diaries are to be maintained. These diaries are called case diaries or special diaries. The Section itself indicates as to the nature of the entries that have to be made and what is intended to be recorded is what the police officer did, the places where he went and the places which he visited etc. and in general it should contain a statement of the circumstances ascertained through his investigation. Sub-section (2) is to the effect that a criminal court may send for the diaries and may use them not as evidence but only to aid in such inquiry or trial. The aid which the court can receive from the entries in such a diary usually is confined to utilising the information given therein as foundation for questions to be put to the witnesses particularly the police witnesses and the court may, if necessary, in its discretion use the entries to contradict the police officer who made them. Coming to their use by the accused, Sub-section (3) clearly lays down that neither the accused nor his agents shall be entitled to call for such diaries nor he or they may be entitled to see them merely because they are referred to by the courts. But in case the police officer uses the entries to refresh his memory or if the court uses them for the purpose of contradicting such police officer then provisions of Section 161 or Section 145, as the case may be, of the Evidence Act would apply. Section 145 of the Evidence Act provides for cross-examination of a witness as to the previous statements made by him in writing or reduced into writing and if it is intended to contradict him by the writing, his attention must be called to those

parts of it which are to be used for the purpose of contradiction. Section 161 deals with the adverse party's rights as to the production, inspection and cross-examination when a document is used to refresh the memory of the witness. It can therefore be seen that the right of accused to cross-examine the police officer with reference to the entries in the general diary is very much limited in extent and even that limited scope arises only when the court uses the entries to contradict the police officer or when the police officer uses it for refreshing his memory and that again is subject to the limitations of Sections 145 and 161 of the Evidence Act and for that limited purpose only the accused in the discretion of the court may be permitted to peruse the particular entry and in case if the court does not use such entries for the purpose of contradicting the police officer or if the police officer does not use the same for refreshing his memory, then the question of accused getting any right to use the entries even to that limited extent does not arise. The accused person is not entitled to require a police officer to refresh his memory during his examination in court by referring to the diary. At the most the accused can on a reasonable basis seek the court to look into the diary and do the needful within the limits of Section 172 CrPC. However, the court is not bound to compel the police witness to look at the diary in order to refresh his memory nor the accused is entitled to insist that he should do so. If there is such a refusal what inference should be drawn depends on the facts and circumstances of each case. Section 172 does not deal with any recording of statements made by witnesses and what is intended to be recorded is what the police officer did namely the places where he went, the people he visited and what he saw etc. It is Section 161 CrPC which provides for recording of such statements. Assuming that there is failure to keep a diary as required by Section 172 CrPC, the same cannot have the effect of making the evidence of such police officer inadmissible and what inference should be drawn in such a situation depends upon the facts of each case. It is well-settled that the entries of the police diary are neither substantive nor corroborating evidence and they cannot be used by or against any other witness than the police officer and can only be used to the limited extent indicated above. The above-stated principles are reiterated in many decisions rendered by the courts.

On a plain reading of Sub-section (3) of Section 172 of the Code, it is amply clear that the provisions of Section 161 or Section 145, as the case may be, of the Evidence Act, would be applicable to the contents of the case diary only in the contingencies laid down thereunder. Hence, unless the police officer who made the entries in the case diary uses them to refresh his memory or the Court uses them for the purpose of contradicting such police officer, the provisions of Section 161 or Section 145 of the Evidence Act would not be applicable. Section 159 of the Evidence Act which provides for "refreshing memory" inter alia lays down that a witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned. Section 161 of the Evidence Act which provides for the "right of adverse party as to writing used to refresh memory"

lays down that any writing referred to under the provisions of the last two preceding Sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon. Thus, a precondition for invoking Section 161 of the Evidence Act is that the witness, while under examination, must refresh his memory by referring to any writing made by him at the time of the transaction concerning which he is questioned. If the witness does not refresh his memory, the question of showing the writing to the accused u/s 161 to enable him to cross-examine the said witness thereupon, would not arise. Similarly, unless the witness chooses to refresh his memory or the Court uses them to contradict the said witness, the question of invoking Section 145 of the Evidence Act to contradict such witness would not arise. Insofar as impeaching the credit of the witness u/s 155 is concerned, the credit of the witness can be impeached under Sub-section (3) by proof of former statements inconsistent with any part of his evidence, which is liable to be contradicted. In such case also the precondition would be that there should be a former statement of the said witness and unless the witness uses the case diary to refresh his memory or the Court uses the case diary to contradict the said witness there would be no former statement (insofar as the contents of the case diary are concerned) to contradict the witness, hence the provisions of Section 155(3) of the Evidence Act would also not be attracted. Hence, it cannot be said that the right of the petitioner-accused u/s 145 or Section 155(3) of the Evidence Act is in any manner adversely affected by non-supply of the extract of the case diary, as is sought to be contended on behalf of the petitioner.

31. Another contention raised on behalf of the petitioner is that the said witness has prior to the recording of the first information report, recorded the gist of facts, statements and details gathered prior to the registration of the first information report and that the non-supply of the statements of the said witness would adversely affect the right of the accused to raise his defence. In this context, it would be pertinent to refer to the decision of the Apex Court in State of NCT of Delhi Vs. Ravi Kant Sharma and Others, wherein it has been held thus:

Under Section 161 Cr.P.C. the police officer may reduce into writing any statement made to him in the course of examination under that provision and if he does so he shall make separate and true record of the statement of each such person whose statement he records. The provision in other words authorizes the police officer to reduce into writing any statement made by a witness. In a given case the investigating officer may record circumstances ascertained during investigation in the case diary in terms of Section 172 Cr.P.C. It is only when the investigating officer decides to record the statement of witnesses u/s 161 Cr.P.C. that he becomes obliged to make a true record of the statement which obviously will not include the interpretation of the investigating officer of the statements or the gists of statement. XXXXXXX

Thus, the Supreme Court in the said decision has laid down that it is only when the investigating officer decides to record the statement of a witness u/s 161 of

the Code, that he becomes obliged to make a true record of the statement which obviously will not include the interpretation of the investigating officer of the statements or the gist of statements. The Court held that when the gist of the statements had not been produced by the prosecution to prove the guilt of the accused and the gist of the statements were not recorded in terms of Section 161 of the Code, the accused has no right to ask for the gist of such statements recorded u/s 172. From the facts emerging on record, in the present case, neither has the prosecution produced the gist of the statements to prove the guilt of the accused, nor have the statements in the case diary of which production is sought, been recorded in terms of Section 161 of the Code. In the circumstances, the petitioner-accused has no right to ask for the gist of such statements, if any, recorded u/s 172 of the Code.

32. Insofar as the contention that , the prosecution wants to rely upon circumstances prior to the registration of the first information report and wants to deprive the accused of the right to cross-examine the witness in the context of such circumstances is concerned, it may be pertinent to refer to the decision of the Apex Court in Mahabir Singh etc. etc. Vs. State of Haryana, wherein while examining the scope of Section 172 of the Code, the Court in the context of Sub-sections (2) and (3) of Section 172 held thus:

A reading of the said Sub-sections makes the position clear that the discretion given to the court to use such diaries is only for aiding the court to decide on a point. It is made abundantly clear in Sub-section (2) itself that the court is forbidden from using the entries of such diaries as evidence. What cannot be used as evidence against the accused cannot be used in any other manner against him. If the court uses the entries in a case diary for contradicting a police officer it should be done only in the manner provided in Section 145 of the Evidence Act i.e. by giving the author of the statement an opportunity to explain the contradiction, after his attention is called to that part of the statement which is intended to be so used for contradiction.

Thus, if the entries in the case diary cannot be used as evidence against the accused, the question of any prejudice being caused to the accused would not arise.

33. It has also been contended on behalf of the petitioner that non-supply of the portion of the case diary as requested by him deprives him of his right to cross-examine the said witness and is also violative of his right under Article 21 of the Constitution of India. It has been contended that the Court has to weigh the balance as regards the prejudice that may be caused to the prosecution vis-?-vis the right of the accused to a fair trial and to have access to a certain document. It was submitted that no prejudice would be caused to the prosecution if a copy of the proceeding recorded prior to the registration of the first information report is provided to the accused and as such, non-supply of the same is violative of his right under Article 21 of the Constitution of India as the said Article entitles the accused to production of documents which he feels relevant for the purpose of

his defence. Insofar as the question of prejudice is concerned, the Apex Court in *Mukund Lal Vs. Union of India (UOI) and Another*, while examining the constitutional validity of Sub-section (3) of Section 172 of the Code has held thus:

3. xxx xxx We are of the opinion that the provision embodied in Sub-section (3) of Section 172 of the CrPC cannot be characterized as unreasonable or arbitrary. Under Sub-section (2) of Section 172 CrPC, the Court itself has the unfettered power to examine the entries in the diaries. This is a very important safeguard. The legislature has reposed complete trust in the court which is conducting the inquiry or the trial. It has empowered the court to call for any such relevant case diary: if there is any inconsistency or contradiction arising in the context of the case diary, the court can use the entries for the purpose of contradicting the police officer as provided in Sub-section (3) of Section 172 of the CrPC. Ultimately there can be no better custodian or guardian of the interest of justice than the court trying the case. No court will deny to itself the power to make use of the entries in the diary to the advantage of the accused by contradicting the police officer with reference to the contents of the diaries. In view of this safeguard, the charge of unreasonableness or arbitrariness cannot stand scrutiny. The petitioners claim an unfettered right to make roving inspection of the entries in the case diary regardless of whether these entries are used by the police officer concerned to refresh his memory or regardless of the fact whether the court has used these entries for the purpose of contradicting such police officer. It cannot be said that unless such unfettered right is conferred and recognized, the embargo engrafted in Sub-section (3) of Section 172 of the CrPC would fail to meet the test of reasonableness. xxxx xxx

[4] The public interest requirement from the standpoint of the need to ensure a fair trial for an accused is more than sufficiently met by the power conferred on the court, which is the ultimate custodian of the interest of justice and can always be trusted to be vigilant to ensure that the interest of accused persons standing the trial, is fully safeguarded. This is a factor which must be accorded its due weight. There would be no prejudice or failure of justice to the accused person since the court can be trusted to look into the police diary for the purpose of protecting his interest. Therefore, the public interest requirement from the perspective of safeguarding the interest of all persons standing trial, is not compromised. On the other hand, the public interest requirement from the perspective of enabling the investigating agency to investigate the crime against the society in order that the interest of the community to ensure that a culprit is traced and brought to book is also safeguarded. The argument inspired by the observations in *Raj Narain Case* and *S.P. Gupta case* in the context of claim for privilege in regard to Section 123 of Evidence Act, which have no direct bearing, is also effectively answered in the light of the foregoing discussion as the "Public Interest" aspect is also taken care of. Xxx

The Apex Court in the said decision has held that there would be no prejudice or failure of justice to the accused person since the Court can be trusted to look into

the police diary for the purpose of protecting his interest. Therefore, the public interest requirement from the perspective of safeguarding the interest of all persons standing trial is not compromised. In view of the law laid down by the Apex Court in the aforesaid decision, the contention that non-supply of the case diary as prayed for by the petitioner is violative of the petitioner's right under Article 21 of the Constitution does not merit acceptance. The contention that the document in question does not fall within the ambit of Section 123 of the Evidence Act also stands answered by the aforesaid decision of the Apex Court.

34. The question of prejudice due to non-supply of a copy of the case diary is also required to be considered in the context of the right of the accused to avail of a copy of the same. In this regard reference may be made to the decision of the Supreme Court in *Sunita Devi Vs. State of Bihar and Another*, wherein the Court in the context of supervision notes being referred to by the accused persons while seeking bail and also during trial has held that supervision notes are recorded by the supervision officer and are not part of the papers which are supplied to the accused. The documents in terms of Sections 207 and 208 are supplied to make the accused aware of the materials which are sought to be utilized against him. The object is to enable the accused to defend himself properly. The idea behind the supply of copies is to put him on notice of what he has to meet at the trial. Adverting to the facts of the present case, since the extract of the case diary does not form part of the material which is sought to be utilized against the accused, the same does not fall within the categories of the documents which are required to be supplied to the accused. In case any part of the case diary is sought to be utilized against the accused as envisaged under Sub-section (3) of Section 172 of the Code, the said provision itself provides that in that case the provisions of Section 161 or Section 145, as the case may be of the Evidence Act, shall apply.

35. As regards the impugned order passed by the trial Court, as can be seen the trial Court has observed that the prosecution witness No. 44 has clearly stated that he was on duty when on 8th February, 2004 he was informed about the incident by the P.S.O. and thereupon, he reached the spot. The prosecution witness No. 40 - Hasmukhbhai P. Mehta has in his deposition Exhibit 426, stated that on 8.2.2004, some person had informed on telephone that some firing had taken place near J.K. Chowky, however, he had not given the name. He, therefore, informed the higher officer and entered the same vide Entry No. 30 in the Station Diary. The trial Court was of the view that considering the overall facts of the case, it appears that there was firing during the course of the incident and information to that extent was received by the P.S.O. and upon being informed by the P.S.O., the witness Navalsinh B. Jadeja had gone to the spot to carry out investigation. Thus, the police inspector went to investigate upon being informed that there was an incident of shooting and hence, the proceeding taken by him thereafter was during the course of the investigation. The said witness during the course of his deposition, Exhibit 504, had narrated the entire proceeding taken by him during the course of investigation. The

proceeding taken by the said witness as narrated in the deposition can clearly be said to be during the course of investigation and all the proceedings taken by him have been noted down in the case diary. During the course of his cross-examination, he has stated that prior to recording his testimony, he has not referred to the case diary and does not want to call for the case diary to refer to the same. The trial Court was of the view that upon an overall view of the matter, considering the request made on behalf of the accused, in the context of Section 172 of the Code, the same cannot be granted. The trial Court was of the view that the application made by the accused not being in consonance with the provisions of law, it was not possible to grant the same. Considering the impugned order of the trial Court in the light of the discussion hereinabove as well as the law laid down by the Apex Court as well as this Court in the decisions cited hereinabove, no infirmity can be found in the view taken by the trial Court so as to warrant any interference by this Court.

36. For the foregoing reasons, the petition fails and is, accordingly, dismissed. The ad-interim relief granted earlier stands vacated.

37. At this stage, Mr. Bhargav Bhatt, learned advocate for the petitioner has submitted that the interim relief granted earlier by this Court whereby further proceedings of Sessions Case No. 88 of 2006 had been stayed, be extended for a further period of four weeks to enable the petitioner to have further recourse in accordance with law. The said request is strongly opposed by Mr. P.M. Thakkar, learned Senior Advocate for the first informant. It is submitted that the Supreme Court has directed the trial Court that the trial be conducted on day to day basis and, if possible, conclude the same within the next six months from the date of production of a certified copy of the judgment. It is further submitted that, further stay of the proceedings in the midst of the trial would break the rhythm of the Court. Besides no prejudice is likely to be caused to the accused if a limited interim relief is granted directing that the learned Sessions Judge shall not pronounce the judgment for a period of four weeks. In the facts and circumstances of the case, the request to stay proceedings of the Sessions Case No. 88 of 2006 for a further period of four weeks is turned down. However, with a view to protect the interest of the petitioner, it is directed that the trial Court may proceed further with the trial, however, the final judgment may not be pronounced for a period of five weeks from today.