
(2008) 10 BOM CK 0102

In the Bombay High Court

Case No : Criminal Writ Petition No. 1337 of 2008

Maria Monica Susairaj

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 14-10-2008

Acts Referred:

Constitution of India, 1950 — Article 21, 227(2), 227(3)
Criminal Procedure Code, 1973 (CrPC) — Section 154, 154(I), 158, 161, 161(3)
Evidence Act, 1872 — Section 74, 74(1), 76
Penal Code, 1860 (IPC) — Section 201, 302, 34
Right to Information Act, 2005 — Section 8

Citation : (2009) CriLJ 2075

Hon'ble Judges : Bilal Nazki, J;A.A. Kumbhakoni, J

Bench : Division Bench

Advocate : Niteen Pradhan, S.D. Khot and Ameeta Kuttikrishnan, for the Appellant; S.R. Borulkar and P.S. Hingorani, APP, for the Respondent

Judgement

A.A. Kumbhakoni, J.—Rule. Rule made returnable forthwith. By consent of parties heard for final disposal at the admission stage itself in view of the nature of controversy raised in this petition, which raises a very short but interesting issue dealt with hereunder.

2. Miss. Maria Susairaj, the petitioner ? a lady, is a co-accused in a murder case with accusations attracting basically Sections 302, 201 and 34 of Indian Penal Code vide C.R. No. 347 of 2008. The alleged incident wherein a male person died, took place on 7th May 2008. The petitioner as also the co-accused, another male person, were arrested on 21st August 2008.

3. According to the prosecution, the petitioner volunteered to make a confessional statement. The petitioner was produced before the Judicial Magistrate, who recorded the alleged confessional statement of the petitioner on 27th/28th May 2008 u/s 164 of the Code of Criminal Procedure 1973 (hereinafter referred to as ?the Code? for the sake of brevity).

4. When the investigation was going on, the petitioner filed an application seeking bail u/s 439 of the Code. The prosecution filed a reply thereto wherein, along with other grounds, the prosecution also relied and/or referred to the aforesaid alleged confessional statement of the petitioner to oppose the grant of bail to the Petitioner.

5. The reliance placed by the prosecution on the confessional statement of the petitioner for opposing grant of bail to the petitioner, prompted the petitioner to file an application dated 12th June 2008 giving rise to this writ petition. The petitioner filed this Miscellaneous Application N.973 of 2008 in her Bail Application No. 1196 of 2008 and thereby sought for a direction against the prosecution to furnish a copy of the aforesaid alleged confessional statement recorded u/s 164 of the Code by the Judicial Magistrate on 27th/28th May 2008, to effectively prosecute her bail application. We will set out and deal with the contentions raised therein at an appropriate stage hereinafter.

6. The aforesaid application of the petitioner seeking a copy of her alleged confessional statement was opposed by the prosecution by filing a reply dated 17th June 2008. The contents thereof also will be set out and dealt with herein at an appropriate place.

7. The learned Lower Court heard both sides and was pleased to reject the aforesaid application of the petitioner by his order dated 19th June 2008. Therefore the petitioner has filed this petition being aggrieved and dissatisfied by the aforesaid order dated 19th June 2008 of the learned Special Judge (CR No. 50), Greater Mumbai whereby the application of the petitioner bearing No. 973 of 2008 in Bail Application No. 1196 of 2008 has been rejected.

8. When the matter was placed before us on 16th July 2008 we passed an interim order directing the learned Sessions Judge to dispose off the bail application of the Petitioner on merits. We also directed the prosecution to produce copy of the statement of the petitioner recorded u/s 164 of the Cr.P.C. before the learned Sessions Judge for only his perusal. We have been informed that accordingly the copy of the statement of the petitioner was produced before the learned Sessions Judge for perusal.

9. The bail application of the petitioner was heard and the learned Additional Sessions Judge, Greater Mumbai, by his order dated 25th July 2008, was pleased to reject the same. In view of rejection of the bail application of the petitioner, the petitioner with the leave by us on 28th July 2008, has amended the writ petition. The Petitioner has produced a copy of the aforesaid order dated 25th July 2008 whereby the bail application was rejected and has added certain grounds in the memo of petition as additional grounds, in support of the basic claim of the petitioner for a copy of her alleged confessional statement, at this stage itself. This order of rejection of bail application of the petitioner does refer to the confessional statement of the petitioner as one of the aspects considered for deciding the issue of grant of bail to the petitioner.

10. We make it clear that by this judgement and order we are considering only and only the claim of the petitioner for supply of copy of her alleged confessional statement at the stage at which it was sought for i.e. before filing of the charge sheet and when the investigation is in progress. Therefore, we are not setting out herein the details about the case of the prosecution leading to the arrest of the petitioner etc.. It is made abundantly clear at the threshold itself that the observations made herein are, therefore, restricted only and only to such entitlement of the petitioner claimed by her and that the same should not be considered as reflection of our opinion anything beyond the issue raised before us.

11. Though the original application of the petitioner under consideration was for seeking a copy of the confessional statement for prosecuting her bail application effectively and though pending hearing and final disposal of this writ petition the bail application itself has been finally rejected, the learned Counsel appearing on behalf of the petitioner sought for this judgement and order as, according to him, the issue raised in this writ petition, so far has neither been considered by this Court nor by the Supreme Court at any time and that therefore, there is need for an authoritative pronouncement by us in that regard. We are, therefore, venturing to decide the following issue:

(i) Whether an accused is entitled to a copy of his/her Confessional Statement recorded u/s 164 of the Code of Criminal Procedure 1973 by the Judicial Magistrate at any stage before filing of charge sheet ?

12. The contentions raised on behalf of the petitioner not only in the application in issue but also in the present petition as well as during the course of arguments advanced are as under:

In the reply filed by the prosecution opposing the bail application filed by the petitioner u/s 439 of the Code, a reference is made to the alleged confession of the petitioner. The hearing of bail application is a trial within trial and that the petitioner is also facing an additional trial at the hands of media, which has led to a societal bias castigating the petitioner as a person with shameless character and departures tendencies. The petitioner has found from the news paper reports that a copy of the confessional statement, at least major and material portions thereof, has landed on the tables of newspaper reporters and on 31st May 2008 itself, the news papers have reported the alleged extracts of the alleged confessional statement of the petitioner. On the other hand, the petitioner who is supposed to be the author of it has not been supplied with a copy thereof. In the submission of the petitioner, the contents of the confessional statement so reported by the press, was not what the petitioner had told the Magistrate during the course of recording of her alleged confession u/s 164 of the Code.

There is no bar either in the said Code or in the Criminal Manual prepared by the Bombay High Court under Article 227(2) and (3) of the Constitution of India, for supply of such a confessional statement to the petitioner at a stage before filing

of the charge sheet. In any case, according to the petitioner, in law a confessional statement recorded u/s 164 of the Code is a public document in terms of Section 74 of the Indian Evidence Act and, therefore, the petitioner is entitled to a certified copy of it u/s 76 of the Indian Evidence Act.

In any case, in order to stop the character assassination of the petitioner by the media by publishing incorrect and untrue versions as the extracts of the confession so allegedly made by the petitioner, a copy thereof be given to the petitioner. According to the petitioner, failure to supply such a copy to the petitioner, will result into great prejudice being caused to the petitioner in defending her case and in seeking bail at this stage, as the petitioner will be handicapped while dealing with the case of the prosecution making allegations against the Petitioner on the basis of her alleged confessional statement.

According to the learned Counsel for the petitioner, the contents of the alleged confessional statement of the petitioner have direct effect of degree of culpability of the Petitioner, which is a relevant factor for consideration of bail application filed by the petitioner u/s 439 of the Code. In his submission, it will make a qualitative difference in as much as if, according to the prosecution, the petitioner has confessed only to the crime u/s 201 of the Indian Penal Code, then she will be entitled to a bail, she having not confessed to any act or deed attracting Section 302 of the Indian Penal Code. In his submission, if the press reports are incorrect, it was the duty of the public officer concerned with the investigation of the crime, to provide appropriate clarification by making public statements pointing out the incorrect press reporting attributing the same to the alleged confessional statement of the petitioner. According to the learned Counsel appearing for the petitioner, it was the public duty cast on the investigating agency to do so as the investigating agency was duty bound not only to investigate into the crime but also to ensure that an innocent is not falsely implicated.

13. The submissions of the petitioner have been opposed on behalf of the prosecution who, in reply filed before the Lower Court, has raised following points:

The confessional statement is a part of Police papers and, therefore, like any other police papers relating to the investigation, it's copy cannot be given to the petitioner at this stage of investigation;

The petitioner is highly educated and is fully aware of what she has confessed. Moreover, the petitioner in her own handwriting has made appropriate endorsement on her confessional statement after reading it herself;

In the confessional statement the petitioner has disclosed, directly and indirectly, information about other important witnesses in respect of which the investigation is still going on;

If, before completion of investigation a copy of confessional statement of the

petitioner is provided to her, unnecessarily, information given by her in it and names of the important witnesses & evidence will be disclosed and it will cause adverse effect on the pending investigation that is at present going on;

At an appropriate stage when the charge sheet will be filed, the accused/petitioner will be supplied with requisite documents in terms of Sections 173(5), (7) and 207 of the Code;

The Investigating Officers have strong objection for supplying such copy to the petitioner at this stage of investigation as the same will adversely affect it.

It is the submission of learned Public Prosecutor that if we consider the scheme of the Code in its proper perspective, the accused is not entitled to obtain copies of papers of investigation as of right, till proceedings reach the stage of Section 207 of the Code. Moreover, Section 164 of the Code does not contemplate that a copy of such confessional statement be given to the accused. The guideline No. 21 framed by the Criminal Manual permits only the Police to take copies of such statements and not the accused. Even under Right to Information Act, the case will fall u/s 8 which deals with exemption from disclosure of such information. In his submission, the documents collected during investigation have potential links to the evidence of crime which, if disclosed before conclusion of investigation, will materially hamper further investigation.

In as much as, the allegations pertaining the trial by media are concerned, in the submission of the learned public prosecutor, even the Supreme Court has observed and held that the trial by press is very antithesis of the Rule of law and that pending investigation, publication of articles is deprecated. The request of the petitioner for these and such other reasons is strongly opposed by the prosecution.

14. The Lower Court after considering these and such other submissions on behalf of both the sides, while rejecting the request of the petitioner, has observed that the publication of defamatory news in the newspaper is something with which the Court is not concerned at this stage and that the petitioner was at liberty to adopt any other remedy in that regard. It is observed that in the Code there is no provision to furnish copies of the statement of witnesses as also of the confessional statement of the accused, to the accused when the investigation is in progress. In the Criminal Manual also there is no such provision. The object in not supplying the copy at this stage is to facilitate the Police to decide as to the further line of investigation and that such copy, if so supplied, the petitioner or her well wishers may try to destroy/tamper with the evidence and thereby hamper the investigation. It is further held that after completion of the investigation the petitioner will be entitled to get such a copy along with other documents and if at that time such copy is not supplied to her, she can take recourse to legal provisions for getting it.

15. The learned Counsel appearing on behalf of the petitioner relied on a set of judgements to which detail reference need not be made by us for the simple

reason that this set of judgements holds that the statement recorded u/s 164 of the Code by a Magistrate is a public document and that the accused is entitled for a copy thereof. These judgements also conclude that statements recorded u/s 161 of the Code, FIR recorded u/s 154 of the Code and report u/s 202 of the Code are also public documents and that an accused is entitled to a copy thereof. These judgements, in our view, will not assist in any manner the petitioner any further in her case and claim copy of her confessional statement at the stage when the investigation is incomplete and that the charge sheet is not yet filed. None of these judgements on which reliance is placed by the petitioner even remotely or indirectly suggest that the petitioner is so entitled, as claimed by her in the application under consideration. The prosecution in the present case is also not disputing the entitlement of the petitioner to such a copy at a stage on and after filling of the charge sheet. Therefore, we refrain ourselves from dealing with the judgements so relied on behalf of the petitioner.

16. At the further outset we make it abundantly clear that there is no issue before us as to whether the petitioner is entitled to the copy of alleged confessional statement or not. Certainly, the petitioner is entitled to such a copy. But the issue is at what stage is the petitioner entitled to such a copy. More particularly, as the aforesaid issue under consideration reflects, the question is:

Is the petitioner is entitled to a copy of her confessional statement recorded u/s 164 of the Code, that too as of right, at any stage before filing of the charge sheet ?

17. The perusal of the Code will demonstrate that there is no provision in the Code which either specifically entitles the petitioner or specifically prohibits the prosecution or for that matter, the Court, from supply of copy of confessional statement to an accused, when the investigation is pending, at any stage before filing of the charge sheet. The provisions of Sections 207 and 208 of the Code deal with the supply of copies of statements and documents to the accused. In this case, the provisions of Section 208 has no applicability as Section 208 deals with a case instituted otherwise than on police report, unlike the present one. For us, the relevant provision is Section 207 which deals with the proceedings initiated on police report as in the present case the proceedings have been initiated on Police report. This Section 207 reads thus:

207. Supply to the accused of copy of police report and other documents.

In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:

i) the police report; ii) the first information report recorded u/s 154; iii) the statements recorded under Sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under Sub-section (6) of Section 173; iv) the confessions and statements,

if any, recorded u/s 164;

v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under Sub-section (5) of Section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in Clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in Clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

18. The Criminal Procedure Code (V of 1898) contained a similar provision that provided for supply of such documents in the following terms contemplated by Section 173 thereof:

173. Report of police officer.

(1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in-charge of the police-station shall(a) forward to a Magistrate empowered to take cognizance of the offence, on a police report, a report in the form prescribed by the State Government setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused if arrested has been forwarded in custody, or has been released on his bond, and, if so, whether with or without sureties, and (b) communicate, in such manner as may be prescribed by the State Government the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.

(2) Where a superior officer of police has been appointed u/s 158, the report shall in any cases in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in- charge of the police station to make further investigation.

(3) Whenever it appears from a report forwarded under this Section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(4) After forwarding a report under this section, the officer in charge of the police station shall, before the commencement of the inquiry or trial, furnish or cause to be furnished to the accused free of cost, a copy of the report forwarded under Sub-section (I) and of the first information report recorded u/s 154 and of all other documents or relevant extracts thereof, on which the prosecution proposes to rely, including the statements and confessions, if any, recorded u/s 164 and

the statements recorded u/s (3) of Section 161 of all the persons whom the prosecution proposes to examine as its witnesses;

(5) Notwithstanding anything contained in Sub-section (4), if the police officer is of opinion that any part of any statement recorded under Sub-section (3) of Section 161 is not relevant to the subject matter of the inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, he shall exclude such part from the copy of the statement furnished to the accused and in such a case, he shall make a report to magistrate stating his reasons for excluding such part;

Provided that at the commencement of the inquiry or trial, the Magistrate shall, after perusing the part so excluded and considering the report of the police officer, pass such orders as he thinks fit and if he so directs, a copy of the part so excluded or such portion thereof, as he thinks proper, shall be furnished to the accused.

19. A perusal of both the aforesaid provisions demonstrate that the Magistrate is duty bound to furnish the accused, free of cost, copy of various documents including police report and the confessions, if any, recorded u/s 164 of the Code. The police report is defined by the Code as under:

2. Definitions.-In this Code, unless the context otherwise requires,

(r) ?police report? means a report forwarded by a police officer to a Magistrate under Sub-section (2) of Section 173? The relevant portion of Section 173 of the Code reads thus:

173. Report of police officer on completion of investigation.

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2)(i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody u/s 170.

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

20. If we consider the scheme of the Code in its entirety in as much as stage of investigation in the context of supply of copies of documents to the accused is concerned, it becomes clear that the stage for supply of documents to the accused, reaches only after a police report u/s 173 of the Code is forwarded to the Magistrate empowered to take cognizance of the offence in issue. An occasion to submit such a police report under Sub-section 2 of Section 173 r/w Section 2(r) of the Code arises only and only upon completion of investigation. Thus, if considered in this proper perspective, the stages contemplated by the Code are:

- i. completion of the investigation;
- ii. submission of police report to the Magistrate;
- iii. supply of documents which will include police report as also confessional statement, if any, recorded u/s 164 of the Code.

In our view, there does not appear to be any scope for interpreting the provisions of the Code to change the chronology and/or sequence in which these steps are to be taken. In other words, the Code does not permit expressly or even by implication change of sequence in which these steps are to be taken. True it is that there is no express prohibition contained in the Code for altering the sequence in which such steps are to be taken.

A perusal of Criminal Manual prepared by this Court after obtaining the approval of the Governor under Article 227(3) of the Constitution of India shows that there is no provision contained therein which will assist us in answering the issue either way. True it is, that even in this Criminal Manual there is no express prohibition for supply of copy of confessional statement to an accused at any stage before filing of the charge sheet i.e. before reaching the stage contemplated by aforesaid Section 207 of the Code.

21. A Full Bench of Madras High Court had an occasion to deal with this issue in the case of *State of Madras v. G. Krishnan* reported in AIR 1961 Mad 1992. The question which was considered by the Full Bench of Madras High Court was framed as under:

Whether statements recorded u/s 164 Cr.P.C. fall u/s 74(1)(iii) of the Indian Evidence Act, and if so, whether the accused will be entitled to copies of the same u/s 76 of the Evidence Act, at any stage of investigation even before the filing of the charge sheet and whether there are any provisions in the Criminal Procedure Code or any other law prohibiting the granting of copies at the stages mentioned above.

22. The aforesaid issue has been answered after great deal of discussion in paragraph 31 and 32 of the judgement with the following observations:

(31) ...Therefore, Section 173(4), Cr.P.C. Should be construed as impliedly prohibiting the grant of copies earlier than the time prescribed by it. That prohibition will become ineffective if an unlimited right u/s 76 of the Indian Evidence Act is recognised. Therefore, the implied prohibition enacted by Section 173(4) would itself imply a repeal or an abrogation in part of the right under the former section. This is no new principle. When two statutes though expressed in affirmative language are contrary in matter, the latter or special would abrogate the earlier or general.

(32)...The introduction of the amendment specifically providing for the grant of copies, should, on the principle of the cases cited above, be held as impliedly taking away the right of the person u/s 76 of the Evidence Act. This would be in accord with the general scheme of Ch.XIV, Cr.P.C. It would, therefore, follow that the accused would have no right to obtain copies of the statement u/s 164 Cr.P.C. Before a charge-sheet is filed, notwithstanding Section 76 of the Indian Evidence Act.

23. Reliance is placed on behalf of the petitioner on the judgement of Supreme Court delivered in case of Sunita Devi Vs. State of Bihar and Another, which reads thus:

This extract is taken from Sunita Devi Vs. State of Bihar and Another, :

27. The supervision notes can in no count be called. They are not a part of the papers which are supplied to the accused. Moreover, the informant is not entitled to the copy of the supervision notes. The supervision notes are recorded by the supervising officer. The documents in terms of Sections 207 and 208 are supplied to make the accused aware of the materials which are sought to be utilised 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. The effect of non-supply of copies has been considered by this Court in Noor Khan v. State of Rajasthan and Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble . It was held that non-supply is not necessarily prejudicial to the accused. The court has to give a definite finding about the prejudice or otherwise. The supervision notes cannot be utilised by the prosecution as a piece of material or evidence against the accused. At the same time the accused cannot make any reference to them for any purpose. If any reference is made before any court to the supervision notes, as has been noted above, they are not to be taken note of by the court concerned. As many instances have come to light when the parties, as in the present case, make reference to the supervision notes, the inevitable conclusion is that they have unauthorised access to the official records. We, therefore, direct the Chief Secretary of each State and Union Territory and the Director Generals of Police concerned to ensure that the supervision notes are not made available to any person and to ensure that

confidentiality of the supervision notes is protected. If it comes to light that any official is involved in enabling any person to get the same, appropriate action should be taken against such official. Due care and caution should be taken to see that while supplying police papers supervision notes are not given.

A perusal of the aforesaid paragraph also indicates that an accused is entitled to supply of copies or documents to meet the case of prosecution at the trial. It further holds that while supplying police papers supervision notes are not given to the accused. In our view, this judgement will not assist the petitioner in any manner whatsoever as there is no dispute amongst the parties that the petitioner is entitled to a copy of confessional statement so as to meet the case of prosecution at the trial. The dispute is as to whether before trial i.e. before even filing of charge sheet, whether the petitioner is entitled to it.

24. On the contrary the Supreme Court in the judgement delivered in case of Naresh Kumar Yadav Vs. Ravindra Kumar and Others, has observed in paragraph 14 as under:

This extract is taken from Naresh Kumar Yadav Vs. Ravindra Kumar and Others, , at page 640:

14. Further, it is baffling to note that the accused and the informant referred to particular portions of the case diary. At the stage the bail applications were heard by the High Court, legally they could not have been in a position to have access to the same. The papers which are to be supplied to the accused have been statutorily prescribed. The courts should take serious note when the accused or the informant refers to the case diary to buttress a stand. The contents of the above paragraph, on the contrary, show that at the stage of entertaining the bail applications the accused is legally not entitled to have any access to the case diary. Before filing the charge sheet, obviously, a confession of an accused recorded u/s 164 by a Magistrate forms part of the case diary or the police papers. This judgement, therefore, on the contrary, if considered in its proper perspective, will suggest that the petitioner is not entitled to her confessional statement at the stage of consideration of her bail application filed before filing of the charge sheet.

25. The learned Counsel appearing on behalf of the petitioner, to get over the aforesaid judgement of the Full Bench of Madras High Court submitted that the aforesaid judgement of the Full Bench was delivered interpreting the provisions of the Criminal Procedure Code 1898 and that the now the provisions of the Code are in force and not of the Criminal Procedure Code 1898. He further contended that the observations so made and the conclusions so drawn by the Full Bench need to be considered in the light of the subsequent development of law in interpreting the Article 21 of the Constitution. He placed reliance on the judgement of the Supreme Court delivered in the case of Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, . It is also further submitted that keeping in view Article 21 of the Constitution of India, it will not be legal and proper to

read into law an implied prohibition for supply of such a copy to the petitioner as held and observed by the Full Bench. It is contended that only and only by an express provision of law alone that a bar can be imposed on the supply of such a copy to the petitioner at such a stage in issue and not otherwise.

26. With respect to the Full Bench Judgement of Madras High Court (*supra*), we are inclined to agree with the view so expressed by it, but only partly. In our view, the Full Bench has correctly considered the effect of Section 173(4) of the Code of 1898 on the entitlement of an accused for such a copy u/s 76 of the Indian Evidence Act at any stage prior to filing of charge sheet but only to the limited extent that is set out hereinafter. In our view, the provisions of Section 173(4) of the Code of 1898 impliedly take away the right of an accused u/s 76 of the Indian Evidence Act, in as much as, the right of an accused is concerned to claim certified copy of his/her confessional statement recorded by the Magistrate, before filing of charge sheet. In other words, an accused cannot, as of right, seek and obtain a certified copy of his/her confessional statement recorded by Magistrate at any stage before filing of the charge sheet.

However, with utmost respect, we hold that it will not be correct to read some kind of a prohibition in law for providing such a certified copy to the accused at any stage before filing of the charge sheet. Only because an accused is not entitled, as a legal right, to the certified copy of his/her confessional statement recorded by the Magistrate at a stage earlier to the filing of charge sheet, does not necessarily mean that the prosecution or the Magistrate is prohibited by law from supplying such a copy to the accused.

Non entitlement as of a legal right does not always in law necessarily means a prohibition in law. An express or implied prohibition in law takes away a legal right to do something that is so prohibited. However the converse of it is not necessarily and always that something one cannot do as of a legal right is something that is prohibited by law.

27. In our view, it is always for the prosecution i.e. the investigation team of the police to take a decision in this regard. If the investigating team of the police is of the view that supply of copy of such a confessional statement of the accused, at a stage prior to the filing of the charge sheet to the accused, is going to hamper in any manner whatsoever further investigation, then, in that case, such a copy cannot be supplied to the accused. On the other hand, if the investigating agency is of the view that supply of such a copy to the accused at a particular stage of investigation is not going to hamper in any manner further investigation, then it is open for the investigation to supply such a copy to the accused. In such an eventuality, with the no objection from the investigating agency, it will be open for the concerned Magistrate also to supply a certified copy of such a confessional statement to the accused at any stage of investigation, before filing of the charge sheet. We have come to such a conclusion particularly because in our view there is no absolute prohibition in any law, much less the Code or even the Criminal Manual, for supply of such a copy at such a stage, albeit with no

objection to that effect from the investigating agency or the prosecution. However, absence of prohibition also cannot be read as a right conferred on the accused to seek and get such a copy at any stage before the stage as contemplated by Section 207 of the Code is reached, as neither the Code nor the Criminal Manual cloth the accused with any such legal right.

28. We do not find any substance in the contention of the learned Counsel appearing on behalf of the petitioner that the Full Bench judgement interprets the submitted that the aforesaid judgement of the Full Bench was delivered interpreting the provisions of the Criminal Procedure Code 1898 and that the now the provisions of the Code are in force and therefore the ratio of the Full Bench needs a re-look in the light of the provisions of the Code. This is precisely because if we compare the scheme of the Criminal Procedure Code 1898 with the scheme of the Code in regard to the issue under consideration it will be clear that both the scheme do not at all defer from each other. The aforesaid sequence in which the aforesaid three steps are to be taken under the old Code and the Code is identical. The provisions of the Code do not at all differ from that of the Criminal Procedure Code 1898 in any manner whatsoever in regard to the controversy before us. We therefore find no reason, on this ground alone, to take a view different than the one taken by the aforesaid Full Bench in regard to the issue before us, of course with the aforesaid variation set out hereinabove. 27. The learned Counsel appearing on behalf of the petitioner has placed heavy reliance on the judgement delivered by House of Lords in the case of *Renolds v. Times News Papers Limited* reported in 1999 (4) All ER 609. In the submission of the learned Counsel for the petitioner if the reports that have appeared in the newspaper attributing various statements to the accused supposedly made by her during the course of her alleged confession, if are not correct, the investigating agency was duty bound to clarify the same. His grievance was that some English newspapers have reported that during the course of confession before the Magistrate the petitioner has admitted of having sex with the victim before he was killed and also with the co-accused after the offence was committed when the dead body of the victim was laying around. According to the learned Counsel appearing for the petitioner, the petitioner has not made any such statement during the course of her confession and that because of attribution of such statements to the petitioner falsely, the media has indulged into character assassination of the petitioner and violation of her right of privacy.

29. In as much as, trial by media is concerned, with great restraint we refrain ourselves from making any observation in that regard in this particular case, though we are tempted to do so, principally because the trial of the case by the First Court is yet to begin and it is our apprehension that our observations made in that regard may also influence such a trial. We are also therefore not dealing with various contentions raised in this regard by both sides by placing reliance on various judgements of our courts as also foreign judgements. However, for ventilating the grievance so made, as set out by the petitioner hereinabove, to a limited extent at this stage, we need to make some observations and issue some

directions which we will do hereunder.

30. In a democratic society public must have access to information. There can be no manner of doubt that but for "investigative journalism" misdeeds and mischief's committed in the corridors of powers would never see the light of the day. Over a period of time it is now proved that "investigative journalism" is a very valuable and inseparable facet of the freedom of press. In a democratic country one of the pillars of the freedom is the freedom of press. However, to be deserving of this freedom, the press must also demonstrate, from its, so to say: work behavior and conduct, that it is worthy of such freedom. It is only and only "a responsible press" which can claim not only freedom but also an immunity from being compelled to divulge the source of its information. In our view, it will be too risky to permit media to have a wide and sweeping pre-trial publicity of any case, whether criminal or civil, virtually developing "a trial by court" into "a trial by media", especially on the basis of undisclosed sources of information.

31. In our view, it may not be proper to consider views expressed in foreign judgements as to the effect of the pre-trial publicity of a case on its "fair trial" by courts, as most of the observations from these judgements are made keeping in mind the justice delivery system from those countries involving "trial by jury" (2001) 1 WLR 198,; (1981) AC 1096; (1996) 2 WLR 464; (2001) 1 WLR 1983; (2003) 1 AC 641; 1980 JC 111; 1980 JC 103 . The absence of "trial by jury", in our country certainly makes the difference. Consequently, the concepts and tests such as "STUURMEN TEST", "STRASBOURG JURISPRUDENCE" etc. will not have any applicability in our country. 28. We find great substance in the submissions made on behalf of the petitioner that since it is a public duty of the investigating agency not only to investigate the crime but also to ensure that an innocent is not falsely implicated, they are bound to provide appropriate clarification by issuing requisite public statement in regard to a publication based on a misinformation creating a misunderstanding. We may not comment upon the articles that have appeared in the newspapers in regard to the confessional statement of the petitioner as to which of them if compared with the confessional statement of the petitioner, are true and which of them are false but in our view, the investigating agency could not sit with crossed legs and folded arms allowing the media to have a "free for all" kind of attitude for the character assassination of the petitioner. The investigating agency may not disclose to the media the nature of investigation which is so far carried out or its proposed course of action as the same is likely to affect the further course of investigation. Such disclosure may also result into awakening of persons involved in the crime and result into the destruction and/or tempering of evidence as also influencing the witnesses to the crime. Nevertheless, the investigating agency is bound to take steps to clarify the incorrect reporting of a confessional statement of an accused by issuing an appropriate clarifications promptly, especially when, on factually incorrect allegations, it results into character assassination of an accused , who in law is to be presumed to be innocent till on full-fledged trial is found guilty.

32. The learned Counsel for the petitioner made a grievance that the contents of the confessional statement were known only and only firstly to the accused secondly to the Magistrate ? his concerned staff and thirdly to the Police. If, therefore, these contents have reached the media, certainly it will have to be presumed that it did not reach the media through the Magistrate ? his staff. The accused/petitioner could not have disclosed it to media firstly because the petitioner/accused did not have any access to the media before the media published the alleged portions of the confessional statement and Secondly the accused/petitioner would not have disclosed such portions of her confessional statement, if any, which would paint her dirty image in the public. This obviously leaves only the police as the only one who was having access to both, the alleged confessional statement of the petitioner/accused on one hand and the media on the other hand. In the submission of learned Counsel, therefore, it was only the police who has leaked to the media only some selective pieces in a distorted manner of the alleged confessional statements.

33. The learned Public Prosecutor stoutly denied these allegations on the ground that the reports about the confessional statement of the petitioner have appeared in the media on 31st May 2008, whereas, the police received copy of the confessional statement on 31st May 2008 itself. He further contended that the confessional statement recorded by the Magistrate in his chambers and not in the open Court and that the police also was not aware of its contents before the police on 31st received a copy of the same. In his submissions, since the police got the copy only on 31st May 2008, it was just not possible for the police to brief the media about the same a day earlier i.e. on 30th May 2008 so that the same could appear in the newspapers on 31st May 2008. The learned Public Prosecutor submitted that the police was unable to tell the Court as to how the media could have an access to such a confessional statement even before police could have a copy thereof.

34. We only note with emphatic disapproval that in the present case it is very disturbing to know that the media can even claim to have an access to a confessional statement of the petitioner before even the ink of it could dry, especially when the same was recorded by a judicial magistrate in his chambers. In our view, it will not be proper on our part to go into all this controversy, at this stage of the proceedings. It is also not possible for us to go into this controversy as to who leaked the contents of the confessional statement to the media, when and how was it done. In the writ jurisdiction in which we are entertaining the aforesaid issue under consideration, it is just not permissible nor is it possible for us to pronounce upon such a factual controversy and we, therefore, do not venture to do so.

35. In the light of aforesaid discussion, we hold as under:

A) There is no prohibition in law to supply a copy or a certified copy of a confessional statement of an accused, to the accused, at any stage before filing of charge sheet;

B) However, the accused has no legal right to seek a copy or a certified copy of his/her confessional statement at any stage before filing of the charge sheet;

C) It is entirely within the discretion of the investigating agency or prosecution as to whether to supply and/or permit supply of copy of a confessional statement to an accused before filing of charge sheet. If the investigating agency is of the view that such a supply of copy at such stage to an accused is not going to adversely affect its investigation, it will be open for the investigating agency to supply and/or permit supply of such a copy at such a stage to the accused. However if the investigating agency is of the view that such a supply of copy at such stage to an accused is going to adversely affect its investigation, it will be open for the investigating agency not to supply and/or not to permit supply of such a copy at such a stage to the accused. In such an eventuality such a copy shall not be supplied to the accused at such a stage. The discretion of the investigating agency or the prosecution in the aforesaid limited regard is not justiciable ;

D) In case, even before filling a charge-sheet, if the media gets an access to a confessional statement of an accused or even without getting such an access reports incorrectly anything as a part of confessional statement made by an accused, which results into character assassination of an accused (who till conviction is presumed to be innocent in law), it is bounden duty of the investigating agency to issue appropriate clarification to the media and it is the corresponding duty of the media to clarify the position at least to the extent that what was reported by the media to be a confessional statement of an accused is not correct;

36. With the aforesaid findings and conclusions that we have drawn, we partly allow this writ petition to the following extent:

(a) The request of the petitioner to set aside the order dated 19th June 2008 passed by the Special Judge, Mumbai in Miscellaneous Application No. 973 of 2008 filed in Bail Application No. 1196 of 2008 is rejected and the said order is confirmed;

(b) The request of the petitioner to direct furnishing a copy of her confessional statement recorded by the learned Metropolitan Magistrate, 9th Court, Bandra in CR No. 94 of 2008, registered at CID, Unit-VIII, Bandra to the petitioner before filling of charge sheet is rejected;

(c) The respondent is directed to issue appropriate clarification in regard to factually incorrect, if any, alleged confessional statement made by the petitioner, which if at all have appeared in the media, within two weeks from today;

(d) We trust and hope that the media will publish appropriate clarification in this regard at the earliest;

(e) Rule made absolute accordingly in the above terms. No orders as to costs.

Bilal Nazki, J.—I have read the opinion of my brother, Justice Ashutosh Kumbhakoni, and I am in agreement with the conclusions drawn by him.

2. This case has thrown open certain other issues which are being experienced by the Courts often these days. Gone are the days when it was said that the newspapers are read by only 2% of the population of the country. We are in the midst of a media explosion, and we have numerous television channels running 24 hours a day, reaching to practically every household in the country.

3. If we take the facts as revealed to us regarding the investigation of this case, it will be clear that the petitioner made a statement on 27th/28th of May, 2008 u/s 164 of the Code of Criminal Procedure before a Judicial Magistrate. It was an in camera statement, and even the policemen were not present when the statement was being recorded. But, of course, a copy was handed over to them thereafter. A copy was not given to the accused, who is the author of the statement, but reports regarding this statement appeared in the press on 31st May, 2008. I wonder, if a statement recorded during investigation by police or Magistrate is available to the press, why should it not be given to the accused !

4. On a perusal of the press report and the statement, which was shown to us during the hearing of the petition, we found that the press report was not exactly correct as far as contents of the statement of the petitioner were concerned. When a statement, which is attributed to an accused, gets wide publicity in the print media as well the electronic media, it creates impressions and perceptions about the guilt or innocence of an accused.

5. The subject of trial by media has remained an issue before the Courts in England and before the Courts in the United States of America. But the laws or the precedents of those countries may not help us, as we are working in different environment, different conditions and different set of institutions and persons. It is also established in various countries that trial by media interferes in the judicial process and in the administration of justice, and, therefore, such a behaviour is even being punished for contempt of Court. Presently, I would not like to delve on that subject, but what makes us very concerned is about the fair outcome of the trials or what makes us concerned is that the chance of interference in trials may lead to injustice, and if it does not lead to injustice, it may lead to erosion of credibility of the Courts. If the reports in the media are responsible for creation of a perception in large number of people in the country that a particular person is guilty or he is innocent, and ultimately, when the matter goes to the trial, if the result is opposed to the perceptions of people, generally, they tend to believe that the Court was not fair.

6. The Courts do not have access to people at large. The number of people who watch T.V. Channels is unimaginable in this country of One Billion population. As against this, what percentage of these people watch or pursue a trial when it is conducted in a Court of law, and how many of these people actually read the

judgment which is finally delivered by a judge ? The judges are not expected to decide the matters on the perception of the people at large. The judges are not concerned whether the people want a person to be convicted or acquitted. The judges work within a system, and within the system, they are also subject to law, and if law permits a conviction in a given case, it will be handed down, and if law does not permit conviction in a given case, the accused have to be acquitted

7. We are not against freedom of the press: We, in fact, believe that the press and the judiciary, both, should be independent and free. Both should not have any fetters, but the more freedom you have, the more the responsibilities, and, therefore, both these institutions are required to have self-imposed restriction. We hope that the press, while reporting a crime or an investigation, would not tilt its reports either towards the guilt of an accused or towards his innocence, because if there is tilt, it creates perceptions in the minds of the people, and those perceptions may not be right, and ultimate decision of the Court going against such perceptions may affect the credibility of the Courts.

8. It is our duty, as a Court of law, to protect everybody's freedom, especially the press freedom. Similarly, it is necessary for the press to ponder over their role, and try to protect the credibility of the Courts, because if people lose faith in the Courts, they lose faith in the judicial system. Then alternative dispute resolution methods will come, and those alternative dispute resolution systems need not be legal, need not be within the parameters of law.

9. During the investigation, if the police want to apprise people with respect to the investigation of a case in which people are generally interested, they cannot be faulted; but the information must not be tailored: the information must be specific, and it must be factually correct. Generally, what we see in newspapers or TV channels is that sometimes, information is given by police officers directly, and on various occasions, we have seen the reports reporting news from ? informed sources? or ?sources close to the investigating agency?. This information may be or may not be accurate. Therefore, the police have a responsibility to ensure that any information given to the media should be accurate and not false. Sometimes, half truths are given, which create an impression which is different from the impression that an investigating officer himself has about the culpability of a particular person.

10. In these circumstances, we would suggest to the Police Department to lay down norms for its officers regarding sharing of information to the press with regard to the investigation of a particular case. We would appreciate if the Police Department creates a system, by which a responsible police officer shares information, rather than each of the investigating officers, as we consider it also a duty of the police to inform the public of the progress in a crime investigation.