
(1981) 08 GUJ CK 0023
In the Gujarat High Court

Pravinkumar Lalchand Shah

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 03-08-1981

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 22, 39A
Criminal Procedure Code, 1973 (CrPC) — Section 154, 158, 161, 164, 170
Evidence Act, 1872 — Section 145, 3, 45, 46, 62
Official Secrets Act, 1923 — Section 14
Penal Code, 1860 (IPC) — Section 467, 471

Citation : (1982) 1 GLR 116

Hon'ble Judges : V.V. Bedarkar, J;A.M. Ahmadi, J

Bench : Division Bench

Judgement

V.V. Bedarkar, J.—During the trial of a criminal case wherein the question of handwriting is involved whether the accused are entitled to the copies of the enlarged photographs from the prosecution under the provisions of section 173(5) and section 207 of the Criminal Procedure Code is the question which is involved in nil these misc. criminal applications.

2. The accused, the present applicants, are being prosecuted before the Metropolitan Magistrate, Ahmedabad for the Offences punishable Under Sections 467, 471", etc. of the penal Code. The prosecution relied on the evidence of the handwriting expert because the handwriting expert had given opinion about the handwritings of the accused. At the trial stage the applicants made a request to the Court that because they are not supplied with the enlarged photographs of the disputed and admitted signatures, it would not be possible for them to prepare their defence properly. It was also mentioned that the accused wanted to take help of a private handwriting expert to prepare the defence and also to find out whether the alleged handwritings were forged and also with the help of the private handwriting expert, if necessary, to cross-examine the State handwriting expert. These applications were mainly given on the strength of the provisions contained in section 173 and section 207 of the Criminal P. C. To put it in a nutr

shell by the orders of the Trial Court, it can be said that these applications were rejected on the ground that the enlarged photographs are not covered under the documents which are to be supplied under the provisions of the aforesaid two sections of the Criminal P. C. It was also canvassed before the learned Magistrate that the prosecution did not rely on the enlarged photographs but they merely relied on the opinion, -the report and the reasons given by the handwriting expert and the copy of the opinion and the reasons are already supplied to the accused- It was also submitted that as the prosecution did not have the copies of the enlarged photographs with them and as they did not want to produce them in the Court, the accused could not ask for the enlarged photographs. It was also submitted that if the accused wanted, they could take the photographs from the documents produced in the Court and obtain the opinion of the handwriting expert to prepare for the proper defence. All these arguments weighed with the learned Magistrate and he rejected the applications and therefore the applicants have come to this Court,

3. So far as the first two matters, that is, Misc. Criminal Applications Nos. 689 of 1981 and 757 of 1981 are concerned as this point involved the consideration of the judgment of this Court in Himatlal Ratilal Rajyagor Vs. The State of Gujarat and Others, in the case of Himatlal Ratilal v. State, decided by Justice N. G. Shelat, as he then was, our learned brother Nanavati, J., referred these two matters to Division Bench. We were told that there was another matter, i.e., Misc. Criminal Application No. 812 of 1981, pending in this Court and therefore that is also called before us and we are hearing it. As the point involved is of considerable importance a notice was sent to the Bar Association so that anybody wanting to intervene and assist the Court in deciding the question might have an opportunity to do so. So on behalf of the applicants in these matters, learned advocates M/s. D.C. Trivedi, D.D. Vyas and B.C. Patel have appeared while M/s. D.K. Shah, N.C. Lahiri and A.K. Mankad have appeared as in-terveners to assist the Court. On behalf of the State learned Public Prosecutors M/s. M.B. Shah and J.M. Panchal have argued the matter.

4. In order to appreciate the contentions raised, it will be worthwhile to refer to the provisions of the Criminal P. C. section 173 of the Criminal P. C. reads as follows :

173. (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, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed u/s 158, the report shall, in any case 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.

(4) 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.

(5) When such report is in respect of a case to which Section 170 applies, the police officer shall 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;

(b) the statement recorded u/s 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject matter of the proceedings or that its disclosure to the accused is not essential in the interests 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.

(7) 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).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under Sub-section (2) has been forwarded to the Magistrate and, whereupon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of Sub-sections (2) to (6) shall, as far as may be,

apply in relation to such report or reports as they apply in relation" to a report forwarded under Sub-section (2).

5. In this section 173 Sub-section (5) is important. This Sub-section (requires that the police has to forward the documents mentioned in Sub-clauses (a) and (b). section 207 of the Criminal Procedure Code reads as follows:

207. 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, 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 be allowed to inspect it either personally or through pleader in Court.

6. The important part of this section is Sub-section (v) which refers to any other document or relevant extract thereof forwarded to the Magistrate with the police report under Sub-section (5) of section 173. It was submitted on behalf of the State that under Sub-section (v) of section 207, the Magistrate has to furnish without delay to the accused, free of cost, a copy of any other document or relevant extract thereof forwarded to the Magistrate with the police report under Sub-section (5) of section 173. It is therefore submitted that if the police have not forwarded any document to the Magistrate under Sub-section (5) of section 173, then the question of furnishing to the accused, free of cost, a copy of such a document would never arise. It is the submission that the enlarged photographs are not sent by the police to the Magistrate under Sub-section (5) of section 173 and therefore this provision would not apply. We shall have, therefore, to consider whether the Court would be required to supply copies of only those documents which are forwarded to it under Sub-section (5) of section 173 of the Code. In order to appreciate the submission we have to see whether the Court

has any other power to insist on the prosecution to send some other copies which the Court considered necessary from the nature of the dispute or the range of evidence which should be laid by the prosecution in the case. As considered earlier, under Sub-section (5) of section 173 of the Code, the police officer is required to forward to the Magistrate "all documents and relevant extracts thereof on which the prosecution proposes to rely." We would emphasise only this portion because Sub-section (v) of section 207 is not very important nor the aspect about the police having already sent other documents is relevant for our purposes. The question to be considered is, if the documents asked for by the accused can be brought within the provisions of Sub-section (5) of section 173, then it can well be said that the police shall have to forward to the Magistrate the documents which are asked for by the accused and for that, it will be necessary to consider whether they are the documents on which the prosecution proposes to rely. If the prosecution proposes to rely on the documents, then the documents should be sent to the Court and the copies of those documents should be made available to the accused. So the dispute is centred round the words "on which the prosecution proposes to rely." It was very strenuously argued before us on behalf of the State that if the prosecution does not propose to rely on the enlarged photographs, then the accused are not entitled to the enlarged photographs and it has been emphatically submitted before this Court as well as in the Trial Court that the prosecution did not propose to rely on the enlarged photographs because they did not want to produce those enlarged photographs in evidence. On this hyper-technical interpretation of the words and taking an attitude of showing that the prosecution does not rely on the enlarged photographs, the State insists on dismissal of the applications.

7. It cannot be gainsaid that the Court is not precluded from investigating into the matter whether the prosecution relies on a particular document or not. In order not to supply the document and consequently the copies thereof, the prosecution may say that it does not rely on a particular document. But the Court shall have to see whether that document is necessarily interlinked with the prosecution evidence on which the prosecution proposes to rely. It is submitted on behalf of the applicants that in order to facilitate the accused to prepare their proper defence, it may be necessary for them to take advice of an expert so as to be able to confront the opinion of the State expert with the opinion of the private expert and also to find out whether the opinion given by the State expert is proper or not. It was submitted that the private handwriting expert cannot give opinion without the enlarged photographs of admitted and disputed writings and hence the accused would not be able to prepare his defence properly in absence of such photographs. As against this it was submitted on behalf of the State that the documents are in the Court and if the accused wanted they could take the photographs, enlarge them and consult their own expert. This is certainly an attractive suggestion but the question to be considered is whether this would be meeting the requirements of section 173(5) or section 207 of the

Criminal P. C. which are enacted with a view to facilitating the accused to effectively prepare his own defence. In order to understand the necessity for proposing these amendments, it will be worthwhile to refer to the previous enactments and also the necessity to make this change. So far as giving of copies is concerned, the amendment was carried out by Act 26 of 1955 so far as section 173 is concerned. Prior to 1955 section 173 of the Criminal Procedure Code was to the following effect :

173. (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) A copy of any report forwarded under this section shall, on application, be furnished to the accused before the commencement of the inquiry or trial.

Provided that the same shall be paid for unless the Magistrate for some special reason thinks fit to furnish it free of cost.

So this provision did not contain a requirement of sending the copies to the Court or supplying the copies to the accused except furnishing of copies of any report forwarded u/s 173(old) to the accused before commencement of the trial and it was left at the discretion of the Magistrate to give that copy free of cost for some special reasons thought fit by the learned Magistrate. This Sub-section (4) of section 173 was substituted by Sub-sections (4) & (5) by Act 26 of 1955. Before the amendment of the Criminal Procedure Code in 1973, Sub-section (s (4) and (5) which were added to section 173 were as follows:

(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 (1) 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 under Sub-section (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 the 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.

In this Sub-section (4) the important Words are "and all other documents or relevant extracts thereof, on which the prosecution proposes to rely". These words were exactly the same which are found in Sub-section (5)(a) of the amended section 173. So it can well be said that the provision brought out in 1955 is practically the same except for some small changes so far as the present Code is concerned. It will therefore be necessary to consider what was the intention of the Legislature in making these changes. In paragraph 17 of the Joint Committee Report, it has been observed as follows :

They consider that it is very necessary, in order to give the accused all possible help in defending himself that he should be aware of all the statements, reports, confessions, etc., before the commencement of the trial.

So the Joint Committee thought that this provision was necessary with a view to giving the accused all possible help in defending himself and therefore it was found necessary that he should be made aware of all the statements, reports, confessions, etc., before the commencement of the trial. Now whether the consideration of necessary help to the accused for defending himself can be left to the sweet will of the prosecution or should be open for the Court to consider if proper reference is made, is a moot question. Whether from the documents supplied to him the accused can properly prepare for his defence or not would be a point to be considered by the Court on the strength of the reference made to it by the respective parties. In that circumstance the accused can tell the Court that absence of a particular document would not afford him at all the opportunities to prepare properly for his defence. At that stage the prosecuting

agency also can show to the Court that all the possible materials for formulating the defence for the accused have been supplied and whatever the accused now asked is not necessary for preparing the proper defence and also that the prosecution does not propose to rely on it. If the Court is satisfied that the documents are not necessary for preparing the proper defence, then the Court may consider that the documents will not be necessary.-But notwithstanding the assertion of the prosecution that it does not propose to rely on that document, the Court comes to the conclusion that on the material date available before it without a particular document the accused cannot prepare his defence properly, then would it not have the authority to direct the prosecution to produce the document? The answer is very simple. The Court's power for this can be exercised in view of Sub-section (5) of section 173 meaning thereby that if the Court finds that all the documents which the police have sent do not contain the document necessary for preparing proper defence of the accused, then it can call for the document because it can be considered that it would be a document on which the prosecution proposes to rely. Likewise u/s 91 of the Cr.P.C. the Court has the power to summon a person to produce a document or a thing. According to this provision, if any Court considers that production of any document or other thing is necessary or desirable for the purpose of any inquiry, trial or other proceedings under this Code before such Court, then the Court may issue a summons to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order. So this authority is there with the Court. The question to be considered is whether that particular document is a document which can be considered to be such on which the prosecution proposes to rely.

8. It was the submission on behalf of the State, as stated earlier, that the in-1982 Cri. L- J./49 IV sistence of the accused on the enlarged photographs is not proper because the prosecution does not propose to rely on them. Arguments are advanced before us on the strength of evidence led in the Trial Court wherein at one stage the handwriting expert said that when he formed an opinion and gave the report with reasons, he had referred to the enlarged photographs and from that he has based an opinion about the particular handwriting before him. It is also stated before us that in answer to the question by the Court, the handwriting expert stated that he could have given the opinion without the enlarged photographs. Now whether he could have given the opinion without the enlarged photographs is something which has been brought from him in a hypothetical way because according to the submissions made before us it was a clear case of the handwriting expert that he had referred to the enlarged photographs for forming the opinion. So first of all we shall have to see whether for giving an opinion and also for forming an opinion about the particular handwriting by the prosecution or defence advocate or the defence expert, or for the assessment of the Court it would be necessary to have the enlarged photographs. For that it will be worthwhile to refer to opinions of some experts

who have written books on such subjects. The book "Questioned Documents" by Albert S. Osborn, second edition, in Chapter V at page 39 mentions that photographs are useful in nearly, every questioned document investigation and in many cases it is impossible without them to present the facts to a court and jury in an effective, convincing manner. It further mentions that photographs often make clear what otherwise may be hidden or indistinct, and this fact alone is sufficient reason for their use. It is further observed at page 40 last paragraph that the most important reason for making photographs of a disputed document is that by this means the writing in question can be accurately enlarged so that every quality and characteristic of it can be clearly and properly interpreted whether the facts so shown point to genuineness or to forgery.

9. Hanna F. Sulner in the book "Disputed Documents", 1966 Edition, in Chapter 4 has observed : "the only proper presentation of proof and the best way to demonstrate the expert's reasoning is through the use of a photo enlargement chart representing his opinion." It is further observed at page 32: "it is sufficient to say that any attorney involved in a case requiring the type of demonstrative evidence described before, should seek the service of a competent document expert who is familiar with the various techniques and modern methods of photographing documents or portions of a document." It is further observed in the last paragraph at page 32 that "in most of the questioned document problems it is not only advisable, but imperative to use charts with photo-enlargements because without them it is almost impossible to present the facts to the court and jury in a convincing and effective manner."

10. In the book "Law of Disputed and Forged Documents" by J. Newton Baker, 1955 Edition, in Chapter VII, Section 71 at page 117, it has been observed :

The enlarged photograph provides invaluable assistance in the comparison of the various signatures, especially when the proportions of the writing are so enlarged that the faintest lines or marks, or erasures or additions, which otherwise could not be seen or were so hidden as to escape casual observation, can be appreciated." It is further observed : "To proceed with the trial of a disputed signature without specially prepared and sufficient photographs is plain indiscretion and wilful stupidity that usually proves very costly, and the attorney of experience has seen reason to regret having done so.

11. In the book "Scientific Evidence in Criminal Cases" by Andre A. Moons-ens, Ray Edward Moses and Fred E. In-bay, 1973 Edition, Item No. 6 in Chapter 2 at page 40 reference to scientific reports, it has been observed : "Unless adequate resources are available to the defendant, the State should not have exclusive pretrial rights to scientific data solely on the strength of the theory that it was the product of analysis and interpretation by the State's employees in the State's laboratories." At page 41 it has been observed : "In these situations, to deny the defence pretrial access to the State expert's report is to deny it any pretrial discovery, for its experts have nothing to examine unless the defence has had the opportunity timewise, and has been farsighted enough to show good

cause why its expert should be allowed to participate in the State-conducted examination." It is further observed that "not only should an effort be made to discover the expert's reports, but the discovery motion should also request photographs, notes, diagrams, tape recordings and sketches the expert may have made during his examination. These can be evaluated by a defense expert." It has been further observed in the last paragraph at page 41 that "State fingerprint experts who will testify as to the identity of latent prints, typically use enlarged photographs which should be examined by the defense prior to trial." Though all the references made to the books by the experts on this subject clearly show that in order to appreciate the handwriting, help of enlarged photographs is a must, even otherwise common practice at the Court has clearly shown that in order to come to a proper conclusion about the handwriting, assistance from enlarged photographs is always necessary. If the prosecuting agency has all the resources available to it and can get the opinion of an expert, will it be sufficient to merely throw the opinion and -reasons of the expert at the accused when the opinion of the prosecution expert is formed after referring to the enlarged photographs which would clearly show the distinguishing feature? Can that be denied to the accused if the intent of the Legislature by amending the provisions of section 173 of the Code was to make all possible data available to the defence for the proper preparation of the case of the accused before the commencement of the trial? That is the point that has to be considered. It was argued on behalf of the State that the accused could get the photographs either by getting the original before the Trial Court and getting the photograph or by paying the amount for the requisite copies. We are here concerned with the important aspect of the availability of all the materials to the accused for his proper defence even before the commencement of the trial. It may be that sometime before the trial starts the prosecution would realise as to on what material the evidence of a particular witness is based and if he is an expert witness, what he has followed and on what he has relied. If he had got some advantage of referring to some material for coming to his conclusion and if that is found when the trial is proceeding, would it debar the defence from raising a point that in order to prepare for proper defence, the copies of the enlarged photographs on which the expert has relied should be given? If that opportunity is available to the accused, the accused can show the photographs to a private handwriting expert and get proper help. It may be that¹ the accused person who is able to spend may call a private handwriting expert in the Court and get the copies prepared but it would be too much to expect that the expert would come to the Court and by looking merely to the documents would be in a position to give an opinion and also instruct the advocate of the accused to put questions to challenge the opinion given by the State handwriting expert or there may be cases where the advocate of the accused having sympathy for the accused may himself prepare with the help of the expert's aid and books by properly studying the handwriting. In both the cases the enlarged photographs would be quite necessary. It cannot be said by the State that the persons who can afford the photographs only will be having that benefit by making payment and those who

cannot afford it would be deprived of that opportunity. This aspect can never lie in the mouth of a State, as the legislature has enacted the statute in the form of section 173 of Criminal P. C. with the object of giving the accused a proper opportunity for preparing his defence.

12. But when this question arises, we have before us a judgment of this Court to which we have already referred to and that is 12 Guj LR 167:1971 Cri LJ 165) in the case of Himatlal Ratilal (*supra*). Therein it has been observed by this Court that the grounds on which any opinion is based and the opinion which a handwriting expert may ultimately give are both relevant u/s 45 of the Evidence Act in any such inquiry and if the prosecution were to rely upon any such opinion as a piece of evidence against the accused in any criminal trial, that has to be supplied to the accused u/s 173(4) of the Code. But in that very judgment it has been observed:

However, photographic enlargements of the disputed and admitted writings of the accused would not be covered within the meaning of "and of all other documents or relevant extracts thereof, on which the prosecution proposes to rely" for the reason that what the prosecution relies upon are the original documents before the Court which are said to have been forged and all that the accused are entitled to claim is only the copies thereof. The photographic enlargements are taken by the handwriting expert with a view to facilitate his work in arriving at the correct opinion in respect of those writings and they cannot, therefore, be treated as the document on which the prosecution can be said to rely for the case against the accused. The accused cannot claim as of right any such photographic enlargements of such writings made by the handwriting expert for giving an opinion in respect thereof.

As this is the pronouncement by this Court, Messrs. M, B. Shah and J. M. Panchal, the learned Public Prosecutors stated that the proposition of law propounded by this Court being quite correct, we should not try to consider it in a different way. In this judgment it was observed that it would be sufficient if the accused were given the copies of the forged documents. With respect to the learned Judge we may observe that whenever the question of forgery arises, it is a question of making out the handwriting or signature of somebody else and creating a forged document and using it. Whether those particular writings are forged or genuine is a question to be considered. So far as the statement obtained by the police or any other document is concerned, mere copy of it prepared in the handwriting of somebody else is sufficient because it conveys the contents of the statement or document in original. But so far as a forged writing is concerned, if the opinion is to be given on the mode, pressure, habit of writing, etc. by looking to the original writing in an enlarged form, can it be said that a mere copy of the writing would give the accused an idea as to what he has to meet with? It can never. It is well nigh impossible for the prosecution to supply the exact mode of the original writing and the original signatures. So the only possibility is by giving the photographs and as considered earlier from the

opinion of the experts so far as the handwritings are concerned, a naked eye will not be able to do proper investigation into the mode of writing and it would be very difficult for coming to any conclusion about the document being forged or otherwise. For that, scientific help of the enlarged photographs is necessary and if that is available to the prosecution, can it be denied to the defence? So one thing can be said that mere supply of the copy of the document which is a disputed document would not meet the requirements because the prosecution relies on the original document and its copy written by somebody or prepared by somebody would not give a fair chance to the accused in a trial as it would not be the exact reproduction to test the peculiarity of the writing.

13. It should be noted that under the old Criminal Procedure Code to which we have already referred to, the accused were not entitled to any copies. We have also considered that with the laudable object of making available to the accused a fair chance of preparing his defence, section 173(4) and (5) are added in the statute by Amending Act 26 of 1955. The object of this amendment was firstly to avoid delay and to expedite the trial and secondly that before the commencement of the trial the accused must have the clear picture of his case. So far as the Sessions cases are concerned or the warrant trials are concerned prior to the amendment, there were two stages. Before the committal order, evidence was led by the prosecution before the committal court and the defence was entitled to cross-examine if at all necessary. But that required the prosecution to lay on the table the entire case on which the prosecution relies against the accused. This was known to the accused before the commencement of the sessions trial. Likewise there was trial before the framing of the charge so far as the complaints, warrant cases based on police reports were concerned. That position has continued so far as the private complaints are concerned wherein the copies would not be available. But in those cases also before the charge is framed, the accused would know what is the case of the prosecution. For cases based on police report, in order to avoid this duplicity and in order to make available to the accused the material on which the prosecution relies, the procedure is changed. In those trials if the expert came with the enlarged photographs, they were available to the accused for observation and if the expert relies on the enlarged photographs, can it not be said that the prosecution relies on the document? The close examination of the enlarged photographs is the only mode on which the expert relies for forming his opinion. If these things are considered, then it can well be said that they are the documents necessary for the defence and therefore strict hyper-technical way of interpreting the words of section 173(5)(a) or section 207(v) would not be meeting the spirit of the enactments. In the case of *Willie (William) Slaney Vs. The State of Madhya Pradesh*, , Bose J. observed:

The Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines

that accord with our notions of natural justice.

This, therefore, clarifies as to what is the necessity for considering the privilege or right of the accused even in a procedural law. We are considering this because it was attempted to be argued that the provisions of the Criminal Procedure Code being merely procedural, there is no substantive right in the accused and therefore it does not cut at the root of the ultimate finding of a Court. This argument is based on the question whether the Court has in the ultimate analysis reached a correct finding where the trial is still proceeding and the accused has come to vindicate his right in order to get the copies necessary for his defence. We are observing this because from this judgment it has been attempted to be shown to us that the Court has also observed that except where there is something so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice, the matter resolves itself to a question of prejudice. Some violations of the Code will be so obvious that they will speak for themselves and other violations will not be so obvious and it may be possible to show that having regard to all that occurred no prejudice was occasioned or that there was no reasonable probability of prejudice. The question here is still not so ripe as to consider whether any prejudice has been caused to the accused or not. Here is the question of considering the right to the accused to get a particular copy in order to formulate his defence properly. In the case of *Narayan Rao Vs. The State of Andhra Pradesh*, , the question of not supplying the copies to the accused was considered and therein it was observed that non-compliance of the provisions of section 173(4) has not the result of vitiating the proceedings and the subsequent trial. In that case some copies were not given to the accused and the trial proceeded and then a grievance was made. Considering the amended provisions the Supreme Court observed as follows (at pp. 740-41):

In order to simplify commitment proceedings preceding the trial of accused persons by a Court of Session, section 207 was added by way of amendment of the Code in 1955. From Sub-sections (3) and (4) of that section it is clear that in cases exclusively triable by a Court of Session, it is the duty of the Magistrate while holding a preliminary inquiry, to satisfy himself that the documents referred in section 173 have been furnished to the accused and if he found that the police officers concerned had not carried out his duty in that behalf, the Magistrate should see to it that that is done.

(Emphasis supplied).

It was submitted on behalf of the State that this judgment merely shows that the Magistrate is to see that the documents referred to u/s 173 have been furnished to the accused. It is therefore the submission that if the prosecution does not rely on the documents themselves, those documents will not be the documents referred to in section 173 and therefore the documents are not required to be given to the accused. We have to appreciate that u/s 207 of the Cr.P.C. 1973, the Magistrate has to supply those documents. But prior to that the Magistrate had to be satisfied and in this very Supreme Court judgment it has been observed

that if the Magistrate finds that some documents are not supplied, then the Magistrate should see to it that it is done. Those powers of the Magistrate or the Court still continue and if the Court finds that the police officer has not sent the requisite document required u/s 173(5)(a), then it can certainly direct their production. This we have already considered. But the important observations of the Supreme Court in Narayan Rao's case *supra*) are as follows:

The provisions contained in section 173(4) and section 207(3) have been introduced by the Amending Act of 1955, in order to simplify the procedure in respect of inquiries leading up to a Sessions trial, and at the same time, to safeguard the interests of accused persons by enjoining upon police officers concerned and Magistrates before whom such proceedings are brought, to see that all the documents, necessary to give the accused persons all the information for the proper conduct of their defence are furnished.

(Emphasis supplied)

The portion which we have emphasised would clearly show that the Court has not merely to be satisfied by referring to only the documents sent by the police along with the report but the Court has to see that the accused persons must have all the information for the proper conduct of their defence. If it can well be said that the necessity of enlarged photographs is there for the defence of the accused, then that cannot be denied to him. We have already considered from the books referred to above that necessity of enlarged photographs is there not only for the expert to reach an opinion but it would be also necessary for the Court to come to a proper conclusion about the writings. It does not require to be stressed that the opinion of a handwriting expert is merely an opinion evidence and it is not conclusive. It merely corroborates the evidence led by the witnesses who are familiar with the writings. But in order to come to the conclusion whether the disputed writing is forged or otherwise the prosecution as well as the defence and the Court will be required to look to the writing and especially the Court shall have to form its own opinion, In order to form this opinion it has been considered by the experts that the presence of enlarged photographs would be of greater assistance and if that is necessary for the Court; can it be said that they are not the documents which are required to be produced in the Court? In the case of *The State (Delhi Administration) Vs. Pali Ram*, , the Supreme Court has observed (at p. 25 of Cri LJ):

It is not the province of the expert to act as Judge or Jury. The real function of the expert is to put before the Court all the materials, together with reasons which induce him to come to the conclusion, so that the Court, although not an expert, may form its own judgment by its own observation of those materials.... Ordinarily, it is not proper for the Court to ask the expert to give his finding upon any of the issues, whether of law or of fact, because, strictly speaking, such issues are for the Court or Jury to determine. The handwriting expert's function is to opine after a scientific comparison of the disputed writing with the proved or admitted writing with regard to the points of similarity and dissimilarity in the

two sets of writings.

These observations clearly show that the expert has to put before the Court all the materials together with the reasons which induce him to come to the conclusion. What are those materials? Can it be said that a mere piece of paper on which he has given the opinion and reasons for it, is the material, or the basic material on which he has based his opinion like the enlarged photographs? If the expert has based his opinion on the strength of enlarged photographs, mere reproduction of the reasons would not be sufficient. The Court also would not be able to appreciate whether the expert has given proper opinion or not without referring to the enlarged photographs and finding out the points of similarity or dissimilarity, whatever they may be. So it is very clear that in order to appreciate the handwriting, enlarged photographs would be necessary and even if the prosecution does not produce them or merely says orally that they do not propose to rely on them, can it not be said that they are the documents on which the expert relied to come to the conclusion and therefore they are the documents on which the prosecution relies?

14. It was submitted on behalf of the State that so far as the giving of copies is concerned, no principle of jurisprudence is involved. A faint reliance was placed on the judgment of the Supreme Court in Narayan Rao's case *supra*). But that was a question of prejudice but there also the Supreme Court has observed that the documents are necessary for proper conduct of the defence of the accused. Here it is not the question of prejudice because the accused have come with a grievance at the initial stage. The trial has not concluded and therefore if at this stage the Court finds that it is necessary for the proper defence of the accused that the enlarged photographs should be supplied, then other questions of prejudice etc. would not arise. Reliance was placed on *Bashir Hussain Peshimam Vs. Gulam Mohomed Ismail Peshimam and Others*, in the case of *Bashir Hussain v. Gulam Mohomed Ismail*, by the State to canvass a point that so far as giving of the copies is concerned, principle of jurisprudence is not involved. In the case before the Bombay High Court there was a question of supplying copies of the statements in a private complaint. So far as the Criminal Procedure Code is concerned, the copies of the statements and the documents on which the prosecution relies are to be supplied in a case filed on the police report. When that insistence was made, the Bombay High Court negated it by observing that section 173(4) applies only when investigation is made by a police officer and that too under Chapter XIV of the Code. It was further observed that section 173(4) is purely procedural and only directory. It does not also enact any fundamental principle of criminal jurisprudence as such and hence it cannot be argued that such copies should be made available to the accused on a principle analogous to the one contained in the section. It was further observed that a warrant case instituted on a private complaint is governed by the procedure Under Sections 252 to 259 and as these sections do not contain any provision similar to section 173(4) for furnishing such copies, the accused is not entitled to get such copies. These observations are made because there was insistence

before the Court that even in a case where Chapter XIV does not apply and even if it is a case not based on the police report, on the analogy of section 173(4) the copies should be given. This was negatived. Not only that but in that case Mr. Jethamalani, the learned Counsel who appeared for the defence, wanted to make the provisions all embracing by submitting that the prosecution must supply the copies of statements of all persons whom the prosecution did not propose to examine during the trial because that referred to the provisions which were not contained in the Code and still an analogy was being attempted to be applied. The Bombay High Court has observed that section 173(4) is purely procedural and it does not also enact any fundamental principle of criminal jurisprudence. But in the case before us section 173(4) clearly applies. A fine distinction has been attempted to be made that if these principles (propounded by the Bombay High Court) are applied, then because u/s 173(5)(a) the police is required to forward only those documents on which the prosecution proposes to rely and if u/s 207(v) the Court has to give copy of any other document or relevant extract thereof forwarded to the Magistrate with the police report under Sub-section (5) of section 173, then if the documents are not forwarded, the strict compliance would not require giving the copies of the enlarged photographs. But we feel that this is too technical an argument because we propose to consider "all documents on which the prosecution proposes to rely" in a broader amplitude with a view to appreciating the availability of the material to the accused for his proper defence. The basic principle of criminal jurisprudence is of fair trial. From the documents supplied to the accused by the prosecution, there must be a guarantee of a fair trial inasmuch as the accused should be informed of all the materials on which the prosecution relies and also all the materials which are to be employed by the prosecution against the accused so that he can prepare his proper defence. In such a case the fundamental principle of criminal jurisprudence is certainly involved. But in spite of this judgment of the Bombay High Court in the case of Bashir Hussain (supra) which showed that "in any case instituted on a private complaint not covered by Chapter XIV, the accused is not entitled to copies, the same Bombay High Court in the case of Govind Raghunath Sawant v. B. A. Kakade, reported in (1975) 77 Bom LR 214, considered that the copies should be given to the accused for the offences under the Railway Property (Unlawful Possession) Act, 1966. The judgment in Bashir Hussain's case supra) is of a single Judge. Likewise the judgment in Govind Raghunath Sawant's case supra) is also of a single Judge. In that case the accused applied for the copies of the statements of the witnesses and the application was rejected by the Presidency Magistrate on the ground that cases under the Railway Property (Unlawful Possession) Act, 1966 involved the procedure u/s 252 of the Cr.P.C. and onwards and not u/s 251"-A of the Criminal P. C. and hence copies of documents referred to u/s 173(4) of the Cr.P.C. could not be claimed as of right by the accused. The Bombay High Court held that even though there may be no statutory or technical reason why the prosecuting authority should suo motu supply copies to the accused or produce them in Court, yet, for protection and enforcement of fundamental right of defence under Article 22(1) of the Constitution of India and

also on ground of ordinary principles of natural justice it is the moral and ethical duty of the prosecutor to at least produce before the Court the statements of the witness whom he wants to examine when the accused applies for such production. We must say that we are not considering this aspect on the moral and ethical duty. But we are considering it as the substantive right of the accused and trying to appreciate whether this particular demand of the accused is supported by the principles of criminal jurisprudence. The Bombay High Court considered the impact of Article 22(1) of the Constitution of India on the defence of an accused. The Bombay High Court considered that this is not merely a technical or formal matter or ritual matter; it has to be real. The defence of the accused must be backed by adequate instructions from the client, which can be taken only if the prosecuting machinery enables the defence counsel to know in advance what it has against the accused. This would be all the more applicable when the provisions permit the accused to have the copies of all the documents on which the prosecution proposes to rely. Article 22(1) of the Constitution provides that the accused shall not be denied the right to consult, and to be defended by a legal practitioner of his choice. The Bombay High Court in the above referred judgment in the case of Govind Raghunath Sawant (supra) observed that though in a particular case the mandatory provision of section 173(4) of the Cr.P.C. may not be applicable if the accused wants to defend himself with the assistance of counsel and even though the counsel feels it necessary to have statements of the witness for cross-examination u/s 145 of the Evidence Act, the prosecution cannot withhold production of such statements in Court and the Court should not feel powerless and impotent to compel production of such statements. If in the case before the Bombay High Court where provisions of section 173(4) were not applicable and still the Bombay High Court considered it necessary from the broad aspect of considering the defence of the accused that the copy should be made available, there is all the more reason in the instant case to interpret section 173(5) and section 207(v) in a manner which would be advancing the cause of justice so far as the defence of the accused is concerned. So the above referred judgment of the Bombay High Court considered the impact of section 173(4) on a broader canvass and in a different tone from the one in which the decision in the case of Bashir Hussain (supra) was given. We for ourselves think that so far as the present dispute before us is concerned the requirement of documents on which the prosecution relies would also cover the enlarged photographs on the basis of which the examiner of questioned document of the State has based his opinion. This we consider from the point of view of the substantial assistance to the accused persons in their own defence. In the case of Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, , the Supreme Court, in paragraph 56, observed:

The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It

must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it should be no procedure at all and the requirement of Article 21 would not be satisfied.

Article 21 of the Constitution of India protects the life and personal liberty of an individual by providing that no person shall be deprived of his life or personal liberty except according to procedure established by law. So the importance of procedure established by law is also enshrined in Article 21 of the Constitution. The Criminal Procedure Code has provided for the procedure about a criminal trial having safeguards for the accused persons in their defence. After 1955 a step in advance was taken in facilitating the accused to formulate his defence properly by providing for giving of the copies of the documents on which the prosecution relied. This privilege given to the accused cannot be made redundant by refusing those documents, i. e., the enlarged photographs on which the ultimate finding of the document produced by the prosecution, i. e., the reasons of the expert, rests. If the opinion of the expert is based on the strength of observation of enlarged photograph, can it be said that the right given to the accused was protected by refusing a copy of it? If the prosecution can have the same right, denial of that right to the accused would be making the provisions of section 173(5) nugatory. In the case of Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Satyen Bhowmick and Others, , the Supreme Court has observed that the Court has now widened the horizon of the concept of liberty, as contained in Article 21 so as to give the word "procedure" a very wide connotation. Then the above referred passage from Maneka Gandhi's case supra) was reproduced. In the case of Satyen Bhowmick (supra) the Supreme Court considered the provision of Section 14 of the Official Secrets Act. It was observed that Section 14 did not in any way deprive the valuable rights of the accused to get copies of the statements of witnesses recorded by the police or the documents obtained by the police during the investigation, etc. and while considering this aspect, the Supreme Court considered that if Section 14 of the Official Secrets Act is considered to deprive the accused of getting any copies of the statement of witnesses, then it would be difficult to uphold the constitutional validity of Section 14 , as the procedure would become extremely unreasonable, harsh and prejudicial to the accused as a result of which the case would have been tried according to a procedure which will not be in consonance with the provisions of Article 21 of the Constitution. Of course, therein there was a case of providing copies to the accused tried under the particular Act but the provisions of the Criminal Procedure Code were made applicable and even in such a case the copies were considered essential.

15. In the case of Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, , the Supreme Court considered Article 39A of the Constitution. This was considered from the point of view of free legal service as an unalienable element of "reasonable, fair and just" procedure. Therein it has been observed that the right to free legal services is clearly an essential ingredient of "reasonable, fair and just" procedure for a person accused of an offence and it

must be held implicit in the guarantee of Article 21. It has been further observed that it is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required. Article 39A of the Constitution is in Part IV pertaining to Directive Principles of State Policy. The first line of Article 39A is very important. According to that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity,... Thereafter there is the pronouncement about free legal aid by suitable legislation or schemes. But the first part of Article 39A clearly says that operation of the legal system must promote justice on a basis of equal opportunity. This is what we are endeavouring to emphasise. In the present case before us, prosecution has all the materials available to it to get the opinion of the handwriting expert on the strength of the enlarged photographs. If that is denied to the accused, can it be said that the operation of the legal system would promote justice on the basis of equal opportunity? In order to follow Article 39A in its true spirit, the opportunity must be equal to the accused as well as to the prosecution and if provisions like section 173(5) require the police or the State to give copies of the material documents to the accused, the accused cannot avail that opportunity properly, if the basis on which the prosecution based the opinion of the handwriting expert would not be available to the accused. As considered by the Supreme Court in the case of Hussainara Khatoon (supra) merely because an accused person cannot afford money, he should not be deprived of the opportunity for securing justice. The argument advanced by the State that the documents may be available to the accused for defence if he spends for getting the enlarged photographs can never be appreciated.

16. A faint attempt was made to strictly interpret the provisions of section 173(5) by saying that it refers to documents, mainly statements recorded by the police and also documents on which the prosecution proposes to rely and therefore it would not cover the enlarged photographs on which the opinion was based. u/s 3 of the Evidence Act "document" is defined and in the illustrations words printed, lithographed or photographed are considered as documents. Further under the provisions of Section 62 of the Evidence Act, Explanation 2, where a number of documents are all made by one uniform process as in the case of... photography, each is primary evidence of the contents of the rest. So if reliance is placed on the photograph, it would be primary evidence. It is not that only the negative of the photograph would be the primary evidence but if the reliance is placed on the positive, it is discernible to the eye and from that the opinion is given it also forms part of the evidence on which the prosecution can be said to rely. Mr. J. M. Panchal, the learned Public Prosecutor, wanted to make a fine distinction about the expert evidence on the strength of Section 45 of the Evidence Act. According to him this provision makes the opinion upon the point of identity of handwriting given by the handwriting expert relevant and those

persons who gave evidence are experts. It is therefore his submission that only the opinion given by the expert would be sufficient and that would be the relevant evidence and therefore there would not arise any question of the photographs on the strength on which he based his opinion. Technically the argument advanced by Mr. Panchal on the strength of Section 45 of the Evidence Act would show that mere opinion given by the expert would be sufficient and if this argument is taken to its logical end, the reasons for arriving at the opinion also would not be considered necessary. But this stretching of Section 45 is not proper because this Court in (1973) 14 GLR 807 in the case of *Chimanlal Bhogilal Shah v. State of Gujarat*, has observed that if the prosecution relies on the opinion of the handwriting expert, the accused is entitled to know in "advance the reasons of the handwriting expert for giving such an opinion. If the accused is not supplied with the copy of the reasons, he would not be in a position to confront the Handwriting Expert properly at the time of the trial. u/s 46 of the Evidence Act, facts, not otherwise relevant, are relevant they support or are inconsistent with the opinion of experts when such opinions are relevant. It cannot be gainsaid that the opinion of the expert is supported by his reasons which are based on examination of the enlarged photographs. Therefore, if the principles embodied in *Chimanlal Bhogilal Shah's* case supra) are considered properly, then the accused cannot defend effectually without the basis on which the expert proposes to support his opinion or finding, meaning thereby, the photographs. So even this argument attempted to be advanced on behalf of the State would not be available. It was submitted on behalf of the State that this is too early a stage for the defence to make a grievance because the trial has not proceeded and it has not shown whether the accused has in any way been deprived of the opportunity to defend himself properly. On the contrary, this argument, if accepted, would create a hurdle in the way of defence because then after the trial the question of prejudice shall have to be examined while this is before the case proceeds any further and the accused wants the copies of the enlarged photographs just to get sufficient help for his defence from the opinion of the expert who would be in a position to help the accused if the enlarged photographs of the handwriting are available for his examination. Therefore it is the basic requirement according to the accused which will further his chance of defending himself properly and that is rightly submitted. So it is not that this is a very early stage. The question of prejudice quite often comes up in some cases where the person goes to the trial unmindful of the consequences of his carelessness or neglect in asserting his own right. Under the civil proceedings when a suit is filed on the strength of a plaint, the copy of the plaint is always required to be served to the defendant. If the advocate engaged by the defendant at the initial stages insists on the plaint he is entitled to it. But if without getting the copy he permits the whole suit to be prosecuted, if he attempts to defend the defendant in the case without a copy of the plaint and gets a decision, then it cannot lie in his mouth to say that the entire proceeding is vitiated because he was not given a copy of the plaint about which he never made a complaint. Here the grievance is made at the early stage and if that

grievance is found to be justified inasmuch as the absence of the enlarged photographs would deprive the accused of making out a proper ground for his defence for obtaining the expert advice which has been available to the prosecution, then it will not be in consonance with the criminal jurisprudence which insists on equal opportunity both to the accused as well as the prosecution.

17. In view of the decisions quoted above, we feel that it should not be the prosecution alone who should have the benefit of scientific method and we feel that the accused also must have that benefit and in order to have that benefit and to give him fair opportunity of defending himself, we consider that the enlarged photographs are a must and we also consider that because the State handwriting expert has based his opinion and the reasons for his conclusion after perusing the enlarged photographs and also that because the enlarged photographs will be necessary to aid the accused and also the Court for coming to the proper conclusion about the handwriting, those enlarged photographs can be said to be the documents on which the prosecution proposes to rely and therefore we think that those documents must be available to the accused before the State handwriting expert steps into the witness box or at least to be available to the accused free of cost during the trial to get help from his expert, We are conscious that the duty of giving copies to the accused is now on the Court and a time may come when the Court will be required to give copies but the Court will be doing it with the assistance of the State and the State should never consider the question of expenses while affording an opportunity to the accused to defend himself properly. We are observing this mainly because at some stage during the trial in the lower Court it was stated that the enlarged photographs would cost as much as Rs. 2,000 and the State would be required to spend for that. This can never be a consideration before a Court when the question of sufficient opportunity to the accused to defend himself is involved. Nor should the Court deter from coming to a judicious conclusion on the point of dispute merely because the agency of the Court would be required to supply those copies. The entire endeavour shall have to be made by the State to facilitate the observance of the procedure enacted by the Criminal Procedure Code with its proper interpretation made by the Courts from time to time.

18. In view of the discussions made above, we allow the applications and hold that the accused persons are entitled to the enlarged photographs of the disputed as well as specimen handwriting and signatures. Rule in all these applications is made absolute. We are thankful to all the advocates who have helped us in deciding this matter.