Supreme Court of India
Mukund Lal & Anr vs Union Of India & Anr on 14 October, 1988
Equivalent citations: 1989 AIR 144, 1988 SCR Supl. (3) 524
Author: M Thakkar
Bench: Thakkar, M.P. (J)

PETITIONER:
MUKUND LAL & ANR.

Vs.

RESPONDENT:
UNION OF INDIA & ANR.

DATE OF JUDGMENT14/10/1988

BENCH:
THAKKAR, M.P. (J)
BENCH:
THAKKAR, M.P. (J)
RAY, B.C. (J)

CITATION:
1989 AIR 144 1988 SCR Supl. (3) 524
1989 SCC Supl. (1) 622 JT 1988 (4) 143
1988 SCALE (2)1001

ACT:
Criminal Procedure Code, 1973: Section 172(3)--Constitutional validity of--Case diary and entries therein--Only Court entitled to call for and examine--Accused not entitled to call for diary.
%
Constitution of India, 1950: Article 32--Constitutional validity of Section 172(3) Cr. P. C. 1973.

HEADNOTE:
Section 172(3) of the Criminal Procedure Code, 1973 provides that neither the accused nor his agents shall be entitled to call for the case diary, nor shall they be entitled to see them merely because they are referred to by the Court, but if they are used by the Police Officers to refresh his memory or if the Court uses them for the purpose of contradicting such Police Officer, the provisions of section 161 or 145 as the case may be of the Indian Evidence Act, 1872 shall apply.

The petitioners challenged the constitutional validity of the aforesaid provision in the High Court but the High Court repelled the same on the ground that the embargo placed by section 172(3) Cr.P.C. on the right of the accused

or his representative in calling for the diary or seeing any part of it is only a partial one and not absolute, that a safeguard has already been provided in the .Section itself to protect the right of the accused. that in the inquiry or trial everything which may appear against the accused has to be established and brought before the Court by evidence other than the diary, and the accused can have the benefit of examining the witnesses and the Court has power to call for the diary and use it. It accordingly held that Section 172(3) cannot, therefore, be said to be unconstitutional.

The High Court having repulsed the challenge, the accused who were the petitioners in the High Court again approached this Court in writ petitions under Art. 32 , reiterating the challenge on the premise that the High Court had erred in sustaining the validity of the said provision.

Dismissing the petitions, the Court.

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HELD: 1. Section 1-72 embodies a composite scheme. The duty cast under clauses (1) and the rider added by clause (3) thereof form integral part of the scheme. Clause (3) cannot be struck down in isolation whilst retaining clause (1). The legislature in its wisdom has cast this obligation only subject to the rider clause (3) cannot be viewed in isolation. [530D-E]

2. The provision embodied in sub-section (3) of section 172 of the Cr.P.C. cannot be characterised as unreasonable or arbitrary. [528E-F]

3. Under sub-section (2) of section 172 Cr.P.C. the Court itself has the unfettered power to examine the entries in the diaries. This is a very important safeguard. The Legislature has reposed complete trust in the court which is conducting the inquiry of the trial. It has empowered the court to call for any such relevant case diary, if there is any inconsistency or contradiction arising in the context of the case diary the Court can use the entries for the purpose of contradicting the Police Officer as provided in sub-section (3) of section 172 of the Cr.P.C. [528F-G]

4. The public interest requirement from the stand point of the need to ensure a fair trial for an accused is more than sufficiently met by the power conferred on the court, which is the ultimate custodian of the interest of justice and can always be trusted to be vigilant to ensure that the interest of accused persons standing the trial, is fully safeguarded. [529H; 530A]

5. There would be no prejudice or failure of justice to the accused person since the court can be trusted to look into the police diary for the purpose of protecting his interest. Therefore. the public interest requirement from the perspective of safeguarding the interest of all persons standing trial, is not compromised. [530B]

Mohinder Singh v. Emperor, AIR 1932 (Lahore) page 103(104); Birajman Mandir v. Prem Narain Shukla & Ors ., AIR

1965 (Allahabad) p. 494; Raj Narain's, case [1975] 3 SCR p.333 and S.P. Gupta's, case [1982] 2 SCR p. 365 (at pp. 622, 624), referred to.

JUDGMENT:

CRIMINAL ORIGINAL JURISDICTlON: Writ Petition (Criminal) Nos. 49 and 129 of 1987.

(Under Article 32 of the Constitution of India ) .

PG NO 526 Nand Lal, Mrs. Bagga and S.K. Bagga for the Petitioner. The Judgment of the Court was delivered by THAKKAR, J. Constitutional validity of a part of a provision enjoining a police officer engaged in an investigation under Chapter XII of the Code of Criminal Procedure (Cr.P.C.) has been called into question. The provision which so enjoins an investigation officer is embodied in Section 172, Clause (1) whereof imposes the duty. It is a part of this provision namely clause (3) which is the target of the challenge made by one of the two accused in a Criminal case. The High Court having repulsed the challenge, the accused have approached this Court by way of the present petition in order to reiterate the challenge on the premise that the High Court had erred in sustaining the validity of the impugned provision. The analysis of Section 172, Clause (3) whereof has given rise to the challenge to its constitutionally reveals:

(1) That it embodies a complete scheme relating to the matter of maintaining a diary.

(2) Clause (1) imposes the obligation to do so and provides for the contents thereof.

(3) The Court is empowered to call for such diaries to aid it in (1) Section 172(3)--"Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or the be entitled to see them merely because they are referred to by the Court: but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the urpose of contradicting such police officer. the provision of Section 161 or 145 as the case may be. of the Indian Evidence Act, 1872 shall apply."

(2) Section 161--"Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon".

(3) Section 145--"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, called to those parts of it which are to be used for the purpose of contradicting him."

PG NO 527 inquiry or trial subject to the rider that it can not be used as evidence thereat.

(4) Merely because the Court calls for the diary, the accused (or his agent) can not claim the right to peruse it. (5) The accused can peruse that particular part 2 of the diary in the context of Section 161 of the Indian Evidence Act or Section 145 thereof in case:

(a) if it is used by the police officer concerned to refresh his memory;

or

(b) if the Court uses it for contradicting the police official concerned.

The High Court has repelled the plea by recourse to the reasoning reflected in the relevant passage extracted hereinbelow:

"So far as Section 172(3) iS concerned, the embargo on the right of the accused or his representative in calling for the diary or seeing any part of it is only a partial one and not absolute because if a part of the diary has been used by the police officer to refresh his memory or the court uses it for the purpose of contradicting such police officer, the provisions of Section 161 and 145 of the Indian Evidence Act,will be applicable. So far as the other parts are concerned, the accused need not necessarily have a right of access to them because in a criminal trial or enquiry, whatever is sought to be proved against the accused, will have to be proved by the evidence other than the diary itself and the diary can only be used for a very limited purpose by the Court or the police officer as stated above. Even then, a safeguard has already been provided in the Section itself to protect the right of the accused. The investigating Officer deposes before the Court on the basis of the entries in the diary. If the accused or his counsel thinks that he is stating something against the diary or is trying to hide something which may be in the diary he can put question in that respect to the Investigating Officer, and if the accused or his counsel has any doubt about the veracity of the statement made by the Investigation Officer, PG NO 528 he may always request the court to look into the diary and verify the facts and, this right of the accused can always be safeguarded. It is true that it is for the court to decide whether the facts stated are borne out by the diary or not, but then this much reliance has always to be placed on the court and it has to be trusted as it is trusted in the case under Section 123 of the Evidence Act in order to decide whether any privilege can be claimed with respect to the documents in question. Even according to the authorities relied upon by the learned counsel for the petitioner pertaining to Section 123 of the Evidence Act, it is the right of the court to decide whether the privileged document contains any material affecting the public interest or a particular affair of the State, which need not be disclosed.

When in the enquiry or trial, everything which may appear against the accused has to be established and brought before the Court by evidence other than the diary and the accused can have the benefit of cross-examining he witnesses and the court has power to call for the diary and use it, of course not as evidence but in aid of the enquiry or trial, I am clearly of the opinion, that the provisions under Section 172(3) Cr.P.C. cannot be said to be unconstitutional."

We fully endorse the reasoning of the High Court and concur with its conclusion. We are of the opinion that the provision embodied in sub-section (3) of Section 172 of the Cr.P.C. cannot be

characterised as unreasonable or arbitrary. Under sub-section(2) of section 172 Cr.P.C. the Court itself has the unfettered power to examine the entries in the diaries. This is a very important safeguard. The Legislature has reposed complete trust in the court which is conducting the inquiry or the trial. It has empowered the court to call for any such relevant case diary, if there is any inconsistency or contradiction arising in the context of the case dairy the Court can use the entries for the purpose of contradicting the Police Officer as provided in sub-section (3) of Section 172 of the Cr.P.C. Ultimately there can be no better custodian or guardian of the interest of justice than the Court trying the case. No court will deny to itself the power to make use of the entries in the diary to the advantage of the accused by contradicting the police officer with reference to the contents of the diaries. In view of this safeguard, the charge of unreasonableness or arbitrariness cannot stand scrutiny. The PG NO 529 petitioners claim an unfetterred right to make roving inspection of the entries in the case diary regardless of whether these entries are used by the police officer concerned to refresh his memory or regardless of the fact whether the court has used these entries for the purpose of contradicting such police-officer. It cannot be said that unless such unfetterred right is conferred and recognised, the embargo engrafted in sub-section(3) of section 172 of the Cr.P.C. would fail to meet the test of reasonableness. For instance in the case diary there might be a note as regards the identity of the informant who gave some information which resulted in investigation into a particular aspect. Public Interest demands that such an entry is not made available to the accused for it might endanger the safety of the informants and it might deter the informants from giving any information to assist the investigating agency, as observed in Mohinder Singh v. Emperor, AIR 1932 (Lahore) page 103 (104):

"The accused has no right to insist upon a police witness referring to his diary in order to elicit information which is privileged. The contents of the diary are not at the disposal of the defence and cannot be used except strictly in accordance with the provisions of Sections 162 and 172. Section 172 shows that witness may refresh his memory by reference to them but such use is at the discretion of the witness and the Judge, whose duty it is to ensure that the privilege attaching to them by statute is strictly enforced."

and also as observed in Mahabirji Birajman Mandir v Prem Narain Shukla & Ors, A.I.R. 1965 (Allahabad) p. 494.

"The case diary contains not only the statements of witnesses recorded under s. 161 Cr. P.C. and the site plan or other documents prepared by the Investigating Officer, but also reports or observations of the Investigating Officer or his superiors. These reports are of a confidential nature and privilege can he claimed thereof. Further, the disclosure of the contents of such reports cannot help any of the parties to the litigation . as the report invariably contains the opinion of such officers and their opinion is inadmissible in evidence."

The public interest requirement from the stand point of the need to ensure a fair trial for an accused is more than sufficiently met by the power conferred on the court, which is the ultimate custodian of the interest of justice and can PG NO 530 always be trusted to be vigilant to ensure that the interest of accused persons standing the trial, is fully safeguarded. This is a factor which must be accorded its due weight. There would be no prejudice or failure of justice to the accused person since the court

can be trusted to look into the police diary for the purpose of protecting his interest. Therefore, the public interest requirement from the perspective of safeguarding the interest of all persons standing trial, is not compromised. On the other hand the public interest requirement from the perspective of enabling the investigation agency to investigate the crime against the society in order that the interest of the community to ensure that a culprit is traced and brought to book is also safeguarded. The argument inspired by the observations in Raj Narain 's case [1975] 3 S.C.R. p. 333 and S P Gupta's case [1982] 2 S.C.R. p. 365 (at pp. 622, 624) in the context of claim for privilege in regard to section 123 of Evidence Act, which have no direct bearing, is also effectively answered in the light of the foregoing discussion as the`Public Interest' aspect is also taken care of. In the ultimate analysis, it is not possible to sustain the plea of the petitioners, which is rooted in the mistrust of the court itself, that the provision is unreasonable and arbitrary. There is also another dimension of the issue. Section 172 embodies a composite scheme. The duty cast under Clause (1) and the rider added by Clause 1(3) thereof from integral part of the scheme. Clause (3) cannot be struck down in isolation whilst retaining Clause (1). The legislature in its wisdom has cast this obligation only subject to the rider. Clause (3) cannot be viewed in isolation. Under the circumstances, we concur with the view of the High Court and repulse the challenge. These are the reasons which impelled us to dismiss the petitions.

N.V.K. Petitions dismissed.