V.K. SASIKALA A

v.

STATE REP. BY SUPERINTENDENT OF POLICE

(Criminal Appeal No. 1497 of 2012)

SEPTEMBER 27, 2012 B

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Criminal Jurisprudence – Criminal Trial – Right of the accused – To demand certified copies/ inspection of unmarked and un-exhibited documents not relied upon by the C *prosecution but in custody of the court – Held: One of the established facets of a just, fair and transparent investigation is the right of an accused to ask for all such documents that he may be entitled to, under the scheme contemplated by CrPC – Absence of any claim on the part of the accused to* D *the said documents at any earlier point of time cannot have the effect of foreclosing such a right of the accused – If in a given situation the accused comes to the Court contending that some papers forwarded to the Court by the investigating agency have not been exhibited by the prosecution as the* E *same favours the accused, the court must concede a right to the accused to have an access to the said documents, if so claimed – In the case at hand, it was the specific contention of accused-appellant that in course of her examination u/s. 313 CrPC a perception had developed that she may be giving* F *incomplete/incorrect answers in response to the questions put to her by the Court and that she needed copies of the documents or at least an opportunity of inspection of the same to enable her to provide effective answers and to appropriately prepare her defence – Any failure on the part of the appellant* G *to put forward her version of the case in her examination u/ s.313 CrPC may have the effect of curtailing her rights in the event she chooses to take up a specific defence and examine defence witnesses – Besides, answers given by the appellant*

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A *in her examination, if incorrect or incomplete, may have the effect of strengthening the prosecution case against her – Appellant accordingly directed to be allowed inspection of the unmarked/ un-exhibited documents in custody of the court in the criminal trial pending against her – Code of Criminal*
B *Procedure, 1973 – ss. 313, 207 and 173 – Constitution of India, 1950 – Article 21.*

Criminal Trial – Investigation – Power and duty of the Investigating Officer (IO) – Held: A duty is cast on the IO to evaluate the two sets of documents and materials collected
C *i.e. those in favour of accused and those in support of the prosecution – However, it is not impossible to visualize a situation where the IO ignores the part of the seized documents which favour the accused and forwards to the Court only those documents which support the prosecution.*
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Code of Criminal Procedure, 1973 – s.313 – Examination of an accused under –Held: Has a fair nexus with the defence that the accused may choose to bring, if the need arises – Such examination not only provides the
E *accused an opportunity to explain the incriminating circumstances appearing against him in the prosecution evidence but also permits him to put forward his own version, if he so chooses, with regard to his involvement or otherwise in the crime alleged against him.*

F **A criminal case was pending against the appellant and three other accused before the trial court under Section 120B IPC and Section 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988. While the examination of appellant under Section 313 CrPC was**
G **midway, she filed an application seeking certified copies of certain unmarked and unexhibited documents in the custody of the court on being so forwarded alongwith the report of investigation under Section 173(5) CrPC. The application was dismissed by the trial court. The order**
H **was upheld by the High Court. The appellant then filed**

another application before the trial court, this time, seeking an inspection of the said unmarked and unexhibited documents. This application too was rejected by the trial court, and again this order was upheld by the High Court.

The orders passed by the High Court upholding the rejection of two separate applications made by the appellant for certified copies / inspection of certain unmarked and unexhibited documents in the trial pending against her, were challenged in the instant appeals. The appellant contended that the conduct of the prosecution in not marking and exhibiting certain documents only indicate that the same do not support the prosecution case and in fact may assist the defence of the accused; that the appellant had sought copies/ inspection of such documents so as to be in a position to assess as to which of the documents can come to the aid of her defence so that the answers given by her in her examination under Section 313 CrPC can be projected without reflecting any inconsistency with the defence that may be adduced and that the right of the appellant to copies or, at least, to an inspection of the documents constituted a part of the larger right of the appellant to a fair trial of the charges levelled against her.

Disposing of the appeals, the Court

HELD:1.1. Section 173(5) CrPC makes it incumbent on the Investigating agency to forward/transmit to the concerned court all documents/statements etc. on which the prosecution proposes to rely in the course of the trial. Section 173(5), however, is subject to the provisions of Section 173(6) which confers a power on the investigating officer to request the concerned court to exclude any part of the statement or documents forwarded under Section 173(5) from the copies to be granted to the accused. [Para 11] [658-D-F]

A 1.2. While the first proviso to Section 207 CrPC empowers the court to exclude from the copies to be furnished to the accused such portions as may be covered by Section 173(6), the second proviso to Section 207 empowers the court to provide to the accused an B inspection of the documents instead of copies thereof, if, in the opinion of the court it is not practicable to furnish to the accused, the copies of the documents because of the voluminous content thereof. [Para 12] [659-D-E]

C 1.3. Though it is only such reports which support the prosecution case that are required to be forwarded to the Court under Section 173(5) CrPC in every situation where some of the seized papers and documents do not support the prosecution case and, on the contrary, supports the accused, a duty is cast on the Investigating D Officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. However, it is not impossible to visualize a situation where the Investigating Officer ignores the part of the seized documents which favour E the accused and forwards to the Court only those documents which support the prosecution. [Para 14] [660-G-H; 661-A]

1.4. In the case herein, evidently the unmarked and F unexhibited documents of the case that are being demanded by the accused had been forwarded to the Court under Section 173 (5) but are not being relied upon by the prosecution. The said unmarked and unexhibited documents are presently in the custody of the Court. G [Para 14] [661-C-E]

2.1. It is the responsibility of the investigating agency as well as that of the courts to ensure that every investigation is fair and does not erode the freedom of an individual except in accordance with law. One of the H established facets of a just, fair and transparent

investigation is the right of an accused to ask for all such documents that he may be entitled to under the scheme contemplated by the Code of Criminal Procedure. [Para 15] [662-B-D]

2.2. A perception of possible prejudice, if the documents or at least an inspection thereof is denied, looms large. The absence of any claim on the part of the accused to the said documents at any earlier point of time cannot have the effect of foreclosing such a right of the accused. Absence of such a claim, till the time when raised, can be understood and explained in several reasonable and acceptable ways. Individual notion of prejudice, difficulty or handicap in putting forward a defence would vary from person to person and there can be no uniform yardstick to measure such perceptions. If the appellant has perceived certain difficulties in answering or explaining some part of the evidence brought by the prosecution on the basis of specific documents and seeks to ascertain if the allegedly incriminating documents can be better explained by reference to some other documents which are in the court's custody, an opportunity must be given to the accused to satisfy herself in this regard. It is not for the prosecution or for the Court to comprehend the prejudice that is likely to be caused to the accused. The perception of prejudice is for the accused to develop and if the same is founded on a reasonable basis it is the duty of the Court as well as the prosecution to ensure that the accused should not be made to labour under any such perception and the same must be put to rest at the earliest. Such a view is an inalienable attribute of the process of a fair trial that Article 21 guarantees to every accused. [Para 16] [666-B-G]

2.3. It is not the stage of making of the request; the efflux of time that has occurred or the prior conduct of the accused that is material. What is of significance is if

A in a given situation the accused comes to the court contending that some papers forwarded to the Court by the investigating agency have not been exhibited by the prosecution as the same favours the accused the court must concede a right to the accused to have an access B to the said documents, if so claimed. This is the core issue in the case which must be answered affirmatively. It is difficult to agree with the view taken by the High Court that the accused must be made to await the conclusion of the trial to test the plea of prejudice that he may have C raised. Such a plea must be answered at the earliest and certainly before the conclusion of the trial, even though it may be raised by the accused belately. This is how the scales of justice in our Criminal Jurisprudence have to be balanced. [Para 17] [667-B-E]

D *Sidhartha Vashisht alias Manu Sharma vs. State (NCT) of Delhi* (2010) 6 SCC 1: 2010 (4) SCR 103 – relied on.

Sanatan Naskar and another vs. State of West Bengal (2010) 8 SCC 249 – cited.

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3.1. There is yet another possible dimension of the case. It is the specific contention of the accused in both the applications dated 29.3.2012 (for certified copies of the unmarked documents) and 18.4.2012 (for inspection) that it is in the course of the examination of the accused F under Section 313 CrPC that a perception had developed that the accused may be giving incomplete/ incorrect answers in response to the questions put to her by the Court and that she needs copies of the documents or at least an opportunity of inspection of the same to enable G her to provide effective answers and to appropriately prepare her defence. The examination of an accused under Section 313 Cr.P.C. not only provides the accused an opportunity to explain the incriminating circumstances appearing against him in the prosecution evidence but H such examination also permits him to put forward his

own version, if he so chooses, with regard to his involvement or otherwise in the crime alleged against him. Viewed from the latter point of view, the examination of an accused under Section 313 Cr.P.C. does have a fair nexus with the defence that he may choose to bring, if the need arises. Any failure on the part of the accused to put forward his version of the case in his examination under Section 313 Cr.P.C. may have the effect of curtailing his rights in the event the accused chooses to take up a specific defence and examine defence witnesses. Besides, the answers given by the accused in his examination, if incorrect or incomplete, may also jeopardise him as such incorrect or incomplete answers may have the effect of strengthening the prosecution case against the accused. [Paras 18, 19] [667-E-G; 668-A-D]

3.2. In view of the avowed purport and object of the examination of an accused under Section 313 CrPC, the appellant cannot be denied access to the documents in respect of which prayers have been made in the applications dated 29.3.2012 (for certified copies of the unmarked documents) and dated 18.4.2012 (for inspection) before the trial Court. While the anxiety to bring the trial to its earliest conclusion has to be shared, it is fundamental that in the process, none of the well entrenched principles of law that have been laboriously built by illuminating judicial precedents is sacrificed or compromised. In no circumstance, the cause of justice can be made to suffer, though, undoubtedly, it is highly desirable that the finality of any trial is achieved in the quickest possible time. In order to balance the need to bring the prosecution in the present case to its earliest conclusion and at the same time to protect and preserve the right of the accused to a fair trial, and to take care of the conflicting interests that had surfaced in the present case, the appellant is directed to be allowed an inspection

A **of the unmarked and unexhibited documents referred to by her in the application dated 29.3.2012. [Para 20] [670-A-E]**

Manu Sao vs. State of Bihar **(2010) 12 SCC 310 – relied on.**

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Case Law Reference:

2010 (4) SCR 103	**relied on**	**Para 9**
(2010) 8 SCC 249	**cited**	**Para 9**
C **(2010) 12 SCC 310**	**relied on**	**Para 19**

CRIMINAL APPELATE JURISDICTION : Criminal Appeal No. 1497 of 2012.

From the Judgment & Order dated 28.5.2012 of the High D Court of Karnataka at Bangalore in Criminal Petition No. 2483 of 2012.

WITH

Crl.A.No. 1498/2012

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Shekhar Naphade, V. Giri, Rakesh Dwivedi, R. Venkataramani, T.R. Andhiyarujina, Shunmugasundaram, Senthil, Mani Shankar, A. Ashokan, M.P. Parthiban, S.R. Setia, B. Balaji, V.G. Pragasam, S.J. Aristotle, Prabu Rama F Subramanian, Soumik Ghosal for the appearing parties.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. Two orders of the High Court of Karnataka dated 16th G April, 2012 and 28th May, 2012 upholding the rejection of two separate applications made by the appellant herein for certified copies or in the alternative for inspection of certain unmarked and unexhibited documents in a trial pending against her is the subject matter of challenge in the appeals under consideration.

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The facts leading to the applications filed before the learned trial court and the grounds of rejection being largely similar both the appeals were heard analogously.

3. A convenient staring point for the required narration of the relevant facts could be the order of this court dated 18th November, 2003 passed in Transfer Petitions (Criminal) Nos.77-78 of 2003 (*K. Anbazhagan* vs. *Superintendent of Police and others*[1]). By the aforesaid order dated 18th November, 2003 this court had transferred the proceeding in CC No.7 of 1997 from the court of the 11th Additional Sessions Judge (Special Court No.1), Chennai to a Special Court in Bangalore to be constituted by the State of Karnataka in consultation with the Chief Justice of the High Court of Karnataka. The appellant before us is the second accused in the aforesaid transferred proceeding which has been registered as Spl. CC.No.208 of 2004 and is presently pending in the court of the 36th Additional Sessions Judge and Special Judge, Bangalore. It may also be noticed that along with CC No.7 of 1997 there was another proceeding i.e. CC No. 2 of 2001 pending in the file of the same court, i.e. 11th Additional Sessions Judge (Special Court No.1), Chennai against the same accused which was also transferred to the Special Court in Bangalore by the order dated 18th November, 2003. However, the said proceeding would not be of any relevance at the present stage as the chargesheet in the said case has since been withdrawn and the matter stands closed.

4. The transfer of CC No.7 of 1997 and CC No. 2 of 2001 from the court at Chennai was sought by one Shri K. Anbazhagan, General Secretary of DMK Party, a recognised political party in the State of Tamil Nadu. In case No.CC No. 7 of 1997 then pending in the competent court at Chennai allegations of commission of offences under Section 120B of the Indian Penal Code and Section 13(2) read with Section 13(1) (e) of the Prevention of Corruption Act, 1988 were made

1. (2004) 3 SCC 767.

A against the present appellant who was arrayed as the second accused in the case and also against one Smt. J. Jayalalitha, who was arrayed as the first accused. There were two other accused in the aforesaid proceeding, namely, accused No.3 and 4, who are relatives of the present appellant, i.e., accused B No.2. The offences alleged arose out of certain acts and omissions attributed to the accused during the period 1991-1996 when the first accused was the Chief Minister of the State which office she had demitted after the General Elections held in the State in 1996. According to the petitioner in the Transfer C Petitions, chargesheet in the aforesaid case had been filed on 21st October, 1997 and more than 250 prosecution witnesses had been examined by the end of August, 2000. The accused No.1, once again, became the Chief Minister of the State following the General Elections held in May, 2001. Though the D appointment of the first accused as the Chief Minister was nullified by this court and the accused ceased to be Chief Minister, w.e.f., 21st September, 2001, she was elected to the State assembly in a by-election held on 21st February, 2002 and was, once again, sworn in as the Chief Minister of the State on 2nd March, 2002. It was stated in the Transfer Petitions that, E thereafter, the course of trial of CC.No.7 of 1997 took a peculiar turn and a large number of prosecution witnesses (76 in all) who had been discharged were recalled without any objection of the public prosecutor. 64 of such witnesses resiled from their earlier versions tendered in court. It was also alleged that none of F these witnesses were declared hostile by the public prosecutor. Furthermore, according to the petitioner, the presence of the first accused in court for her examination under Section 313 Cr.P.C. was dispensed with and, instead, a questionnaire was sent to the first accused to which she had responded. It is in G these circumstances that the Transfer Petitions were filed before this Court.

5. Transfer Petitions Nos.77-78 of 2003 were allowed by the order of this court dated 18th November, 2003 with certain H directions. To recapitulate the said directions, Paragraph 34 of

the judgment of this court may be extracted: A'

"34. In the result, we deem it expedient for the ends of justice to allow these petitions. The only point that remains to be considered now is to which State the cases should be transferred. We are of the view that for the convenience B of the parties the State of Karnataka would be most convenient due to its nearness to Tamil Nadu. Accordingly, the petitions are allowed. CC No. 7 of 1997 and CC No. 2 of 2001 pending on the file of the XIth Additional Sessions Judge (Special Court No. 1), Chennai in the State of Tamil Nadu shall stand transferred with the C following directions:

(*a*) The State of Karnataka in consultation with the Chief Justice of the High Court of Karnataka shall constitute a Special Court under the Prevention of D Corruption Act, 1988 to whom CC No. 7 of 1997 and CC No. 2 of 2001 pending on the file of the XIth Additional Sessions Judge (Special Court No. 1), Chennai in the State of Tamil Nadu shall stand transferred. The Special Court to have its sitting in E Bangalore.

(*b*) As the matter is pending since 1997 the State of Karnataka shall appoint a Special Judge within a month from the date of receipt of this order and the trial before the Special Judge shall commence F as soon as possible and will then proceed from day to day till completion.

(*c*) The State of Karnataka in consultation with the Chief Justice of the High Court of Karnataka shall G appoint a senior lawyer having experience in criminal trials as Public Prosecutor to conduct these cases. The Public Prosecutor so appointed shall be entitled to assistance of another lawyer of his choice. The fees and all other expenses of the H

A Public Prosecutor and the Assistant shall be paid by the State of Karnataka who will thereafter be entitled to get the same reimbursed from the State of Tamil Nadu. The Public Prosecutor to be appointed within six weeks from today.

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(*d*) The investigating agency is directed to render all assistance to the Public Prosecutor and his Assistant.

(*e*) The Special Judge so appointed to proceed C with the cases from such stage as he deems fit and proper and in accordance with law.

(*f*) The Public Prosecutor will be at liberty to apply that the witnesses who have been recalled and D cross-examined by the accused and who have resiled from their previous statement, may be again recalled. The Public Prosecutor would be at liberty to apply to the court to have these witnesses declared hostile and to seek permission to cross-E examine them. Any such application if made to the Special Court shall be allowed. The Public Prosecutor will also be at liberty to apply that action in perjury to be taken against some or all such witnesses. Any such application(s) will be undoubtedly considered on its merit(s).

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(*g*) The State of Tamil Nadu shall ensure that all documents and records are forthwith transferred to the Special Court on its constitution. The State of Tamil Nadu shall also ensure that the witnesses are G produced before the Special Court whenever they are required to attend that court.

(*h*) In case any witness asks for protection, the State of Karnataka shall provide protection to that witness.

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(*i*) The Special Judge shall after completion of evidence put to all the accused all relevant evidence and documents appearing against them whilst recording their statement under Section 313. All the accused shall personally appear in court, on the day they are called upon to do so, for answering questions under Section 313 of the Criminal Procedure Code.

These petitions are allowed in the above terms."

6. Though a detailed recital will not be necessary it appears that notwithstanding the above directions of this court not much progress has been achieved to bring to trial in Special CC No. 208 of 2004 to its logical conclusion. Soon after the proceedings were transferred to the Special Court at Bangalore an order dated 27th June, 2005 was passed by the learned trial court for clubbing of the two cases. This order came to be challenged before this court by the petitioner in the Transfer Petitions, i.e. Shri K. Anbazihagan and until the Special Leave Petition filed (SLP No.3828/2005) was disposed of on 22nd January, 2010 the criminal proceedings had remained stayed. It also appears that from time to time applications had been filed before the learned trial court by one or the accused raising different interlocutory issues and also seeking to vindicate different facets of the right of the accused to a free and fair trial. Such applications, inter alia, were for translation of depositions of prosecution witnesses running into thousands of pages; for corrections in such translations; for appointment or assistance of an interpreter and such are the incidental matters. The orders passed by the trial court on all such applications invariably came to be challenged before the High Court and even before this court. On several of such occasions the trial came to be halted due to interim orders passed by different courts. Consequently, as on date the examination of the appellant (accused No.2) under Section 313 Cr.P.C. is going on, the same having commenced on 18th February, 2012. While such

A examination of the appellant was midway and she had answered over 500 questions out of the contemplated double the number, an application dated 16th April, 2012 was filed by the appellant before the learned trial court seeking certified copies of certain unmarked and unexhibited documents which B were claimed to be in the custody of the court on being so forwarded alongwith the report of investigation under Section 173(5) Cr.P.C. The learned trial court dismissed the said application by its order 3rd April, 2012, whereafter, the High Court of Karnataka was approached by means of Criminal C Petition No.1840 of 2012. The petition having been dismissed by the High Court on 16th April, 2012, the appellant forthwith filed another application before the learned trial court, this time, seeking an inspection of the said unmarked and unexhibited documents in respect of which the earlier application was filed D but rejected. This application was also rejected by the learned trial court by its order dated 21st April, 2012 which led to the inception of Criminal Petition No.2483 of 2012 in the High Court which was dismissed on 28th May, 2002 . The said order dated 28th May, 2012 as well as the earlier order dated 16th April, E 2012 of the High Court have been challenged before this court in the present appeals.

7. A reading of the orders passed by the learned trial court on the applications filed by the present appellant as well as the two separate orders passed by the High Court affirming the F orders of the trial court would go to show that the grounds that found favour with the learned courts to reject the prayer made by the appellant are largely similar. It is the view of the learned trial court as well as the High Court that in the present case the charges against the appellant were framed way back in the G year 2007. At the time of the framing of the charge the court is required to satisfy itself that all papers, documents and statements required to be furnished to the accused under Section 207 Cr.P.C. have been so furnished. No grievance in this regard was raised by the appellant or any of the accused. H The issue was also not raised at any point of time in the course

of examination of any of the prosecution witnesses (over 250 witnesses had been examined). It has also been expressed by the High Court that though the appellant had answered over 532 questions in her examination under Section 313 Cr.P.C. no grievance was raised or any prejudice claimed by the appellant at any earlier point of time. It is also the view of the High Court that non furnishing of the copies of the documents or not conceding to the prayer for inspection will not automatically render the prosecution bad in law in as much as the effect of such action must result in prejudice to the accused which question can well be decided when the matter is being considered on merits. The High Court also took the view that the documents, copies or inspection of which was sought, being unmarked and unexhibited documents, objections can always be raised if the accused is to be questioned in connection with such documents in her examination under section 313 Cr.P.C. In addition to the above, the High Court was of the view that this court having passed clear directions in its order dated 18th November, 2003 that the criminal proceedings against the accused should be brought to its earliest conclusion by conducting the trial on day to day basis, the filing of the applications for certified copies/inspection of the unmarked and unexhibited documents constitute another attempt on the part of the appellant to over reach the order of this court and delay the trial. It is the correctness of the reasons assigned by the High Court for ultimate conclusions reached by it that has been assailed before us in the present appeals.

8. We have heard Shri Shekhar Naphade and Shri V.Giri, learned senior counsel for the appellant and Shri Rakesh Dwivedi, learned senior counsel for the respondent. We have also heard Shri T.R. Andhiyarujina, learned senior counsel appearing for the applicant Shri K.Anbazhagan, General Secretary, DMK Party, who has sought impleadment in the present proceedings. The learned senior counsel had been heard, primarily, on the prayer for impleadment, in the course of which, naturally, he was permitted to traverse the relevant

A facts of the case. Upon hearing the learned senior counsel we do not consider it necessary to pass any specific order on the impleadment application as we are finally disposing both the appeals by the present order.

B 9. Learned counsel for the appellant have vehemently contended that from the objections filed to the applications seeking certified copies or an inspection of the unmarked and unexhibited documents as well as from the orders of the learned trial courtpassed on the said applications it is clear that out of the papers forwarded to the court under Section 173(5) Cr.P.C. C alongwith the report of investigation some documents have been marked and exhibited by the prosecution while some other documents have not been so utilised. As all such documents had been forwarded to the court upon completion of investigation the unmarked and unexhibited documents are D in the custody of the court. According to the learned counsel, the appellant in her application to the learned trial court (IA No.711/2012) had set out a complete list of the unmarked documents mentioning the particulars of the search lists by which the documents were seized in the course of investigation. E Learned counsel has further argued that the conduct of the prosecution in not marking and exhibiting the said documents can only indicate that the same do not support the prosecution case and in fact may assist the defence of the accused. As the answers to the questions put to the accused under Section 313 F are capable of being relied upon against or in favour of the accused, the appellant had sought copies/inspection of such documents so as to be in a position to assess as to which of the documents can come to the aid of her defence so that the answers given by her in her examination under Section 313 G Cr.P.C. can be projected without reflecting any inconsistency with the defence that may be adduced. The attention of the court has also been drawn to an affidavit filed by the petitioner pinpointing as to how some of the documents could be relevant to certain specific questions put to the appellant in the course H of her examination under Section 313 Cr.P.C. In fact, according

to the learned counsel the right of the appellant to copies or, at least, to an inspection of the documents constitute a part of the larger right of the appellant to a fair trial of the charges levelled against her. Reliance has been placed on the decisions of this court in *Sidhartha Vashisht alias Manu Sharma vs. State (NCT) of Delhi*[2], *Sanatan Naskar and another vs. State of West Bengal*[3] and *Manu Sao vs. State of Bihar*[4].

10. On the other hand, learned counsel for the State has contended that when the documents copies or inspection of which has been sought are not being relied on by the prosecution, in any manner, to bring home the charge against the appellant it is not open for the appellant to insist on any right to the copies of such documents or to inspect the same. It is urged that the documents relevant to the charge had been furnished to the appellant under Section 207at the appropriate stage of the proceeding and also that such documents had been duly considered at the time of framing of charges. No issue in this regard was raised by the appellant at any earlier point of time. In fact, though different objections to various other facets of the trial were raised by the appellant from time to time by filing repeated/successive applications it is only when the examination of the appellant under Section 313 Cr.P.C. had reached a fairly advanced stage that the present applications have been filed. Both the applications, therefore, are in utter abuse of the process of law and being calculated only to delay the trial the same have been rightly rejected by the learned trial courtwhich orders have been affirmed by the High Court. Learned counsel has also pointed out that the contention to the effect that the documents are required to enable the appellant to prepare her defence is wholly untenable as the said stage would arise only after the examination of all the accused under Section 313 Cr.P.C. is complete.

2. (2010) 6 SCC 1.
3. (2010) 8 SCC 249.
4. (2011) 7 SCC 310

A 11. The parameters governing the process of investigation of a criminal charge; the duties of the investigating agency and the role of the courts after the process of investigation is over and a report thereof is submitted to the court is exhaustively laid down in the different Chapters of the Code of Criminal B Procedure, 1973 (Cr.P.C.). Though the power of the investigating agency is large and expansive and the courts have a minimum role in this regard there are inbuilt provisions in the Code to ensure that investigation of a criminal offence is conducted keeping in mind the rights of an accused to a fair C process of investigation. The mandatory duty cast on the investigating agency to maintain a case diary of every investigation on a day to day basis and the power of the court under Section 172 (2) and the plenary power conferred in the High Courts by Article 226 the Constitution are adequate D safeguards to ensure the conduct of a fair investigation. Without dilating on the said aspect of the matter what has to be taken note of now are the provisions of the Code that deal with a situation/stage after completion of the investigation of a case. In this regard the provisions of Section 173 (5) may be specifically noted. The said provision makes it incumbent on E the Investigating agency to forward/transmit to the concerned court all documents/statements etc. on which the prosecution proposes to rely in the course of the trial. Section 173(5), however, is subject to the provisions of Section 173(6) which confers a power on the investigating officer to request the F concerned court to exclude any part of the statement or documents forwarded under Section 173(5) from the copies to be granted to the accused. The court having jurisdiction to deal with the matter, on receipt of the report and the accompanying documents under Section 173, is next required to decide as G to whether cognizance of the offence alleged is to be taken in which event summons for the appearance of the accused before the court is to be issued. On such appearance, under Section 207 Cr.P.C., the concerned court is required to furnish to the accused copies of the following documents:

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(i) The police report;

(ii) The first information report recorded under section 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 under section 164;

(v) Any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173.

12. While the first proviso to Section 207 empowers the court to exclude from the copies to be furnished to the accused such portions as may be covered by Section 173(6), the second proviso to Section 207 empowers the court to provide to the accused an inspection of the documents instead of copies thereof, if, in the opinion of the court it is not practicable to furnish to the accused the copies of the documents because of the voluminous content thereof. We would like to emphasise, at this stage, that while referring to the aforesaid provisions of the Code, we have deliberately used the expressions "court" instead of the expression "Magistrate" as under various special enactments the requirement of commitment of a case to a higher court (court of Sessions) by the Magistrate as mandated by the Code has been dispensed with and the special courts constituted under a special statute have been empowered to receive the report of the investigation along with the relevant documents directly from the investigating agency and thereafter to take cognizance of the offence, if so required.

A 13. It is in the context of the above principles of law and the provisions of the Code that the rights of the appellant will have to be adjudicated upon by us in the present case. It is not in dispute that after the appearance of the accused in the Court of the Special Judge a large number of documents forwarded B to the Court by the Investigating Officer along with his report, had been furnished to the accused. Thereafter, charges against the accused had been framed way back in the year 2007 and presently the trial has reached the stage of examination of the second accused, i.e. appellant under the provisions of Section C 313 Cr.P.C. At no earlier point of time (before the examination of the second accused under Section 313 Cr.P.C.) the accused had pointed out that there are documents in the Court which have been forwarded to it under Section 173 (5) and which have not been relied upon by the prosecution. It is only at such an advanced stage of the trial that the accused, after pointing D out the said facts, had claimed an entitlement to copies of the said documents or at least an inspection of the same on the ground that the said documents favour the accused.

14. Seizure of a large number of documents in the course E of investigation of a criminal case is a common feature. After completion of the process of investigation and before submission of the report to the Court under Section 173 Cr.P.C., a fair amount of application of mind on the part of the investigating agency is inbuilt in the Code. Such application of F mind is both with regard to the specific offence(s) that the Investigating Officer may consider to have been committed by the accused and also the identity and particulars of the specific documents and records, seized in the course of investigation, which supports the conclusion of the Investigating Officer with G regard to the offence(s) allegedly committed. Though it is only such reports which support the prosecution case that are required to be forwarded to the Court under Section 173 (5) in every situation where some of the seized papers and documents do not support the prosecution case and, on the H contrary, supports the accused, a duty is cast on the

Investigating Officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. However, it is not impossible to visualize a situation whether the Investigating Officer ignores the part of the seized documents which favour the accused and forwards to the Court only those documents which support the prosecution. If such a situation is pointed by the accused and such documents have, in fact, been forwarded to the Court would it not be the duty of the Court to make available such documents to the accused regardless of the fact whether the same may not have been marked and exhibited by the prosecution? What would happen in a situation where such documents are not forwarded by the Investigating Officer to the Court is a question that does not arise in the present case. What has arisen before us is a situation where evidently the unmarked and unexhibited documents of the case that are being demanded by the accused had been forwarded to the Court under Section 173 (5) but are not being relied upon by the prosecution. Though the prosecution has tried to cast some cloud on the issue as to whether the unmarked and unexhibited documents are a part of the report under Section 173 Cr.P.C., it is not denied by the prosecution that the said unmarked and unexhibited documents are presently in the custody of the Court. Besides, the accused in her application before the learned Trial court(IA 711/2012) had furnished specific details of the said documents and had correlated the same with reference to specific seizure lists prepared by the investigating agency. In such circumstances, it can be safely assumed that what has been happened in the present case is that along with the report of investigation a large number of documents have been forwarded to the Court out of which the prosecution has relied only on a part thereof leaving the remainder unmarked and unexhibited.

A B C D E F G

15. In a recent pronouncement in *Siddharth Vashisht @ Manu Sharma V. State (NCT of Delhi) (supra)* to which one of us (Sathasivam, J) was a party, the role of a public prosecutor and his duties of disclosure have received a wide and in-depth

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A consideration of this Court. This Court has held that though the primary duty of a Public Prosecutor is to ensure that an accused is punished, his duties extend to ensuring fairness in the proceedings and also to ensure that all relevant facts and circumstances are brought to the notice of the Court for a just B determination of the truth so that due justice prevails. The fairness of the investigative process so as to maintain the citizens' rights under Articles 19 and 21 and also the active role of the court in a criminal trial have been exhaustively dealt with by this Court. Finally, it was held that it is the responsibility of C the investigating agency as well as that of the courts to ensure that every investigation is fair and does not erode the freedom of an individual except in accordance with law. It was also held that one of the established facets of a just, fair and transparent investigation is the right of an accused to ask for all such documents that he may be entitled to under the scheme D contemplated by the Code of Criminal Procedure. The said scheme was duly considered by this Court in different paragraphs of the report. The views expressed would certainly be useful for reiteration in the context of the facts of the present case:-

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> "216. Under Section 170, the documents during investigation are required to be forwarded to the Magistrate, while in terms of Section 173(5) all documents or relevant extracts and the statement recorded under F Section 161 have to be forwarded to the Magistrate. The investigating officer is entitled to collect all the material, which in his wisdom is required for proving the guilt of the offender. He can record statement in terms of Section 161 and his power to investigate the matter is a very wide one, G which is regulated by the provisions of the Code. The statement recorded under Section 161 is not evidence *per se* under Section 162 of the Code. The right of the ccused to receive the documents/statements submitted before the court is absolute and it must be adhered to by the H prosecution and the court must ensure supply of

documents/statements to the accused in accordance with law. Under the proviso to Section 162(1) the accused has a statutory right of confronting the witnesses with the statements recorded under Section 161 of the Code thus indivisible.

217. Further, Section 91 empowers the court to summon production of any document or thing which the court considers necessary or desirable for the purposes of any investigation, inquiry, trial or another proceeding under the provisions of the Code. Where Section 91 read with Section 243 says that if the accused is called upon to enter his defence and produce his evidence there he has also been given the right to apply to the court for issuance of process for compelling the attendance of any witness for the purpose of examination, cross-examination or the production of any document or other thing for which the court has to pass a reasoned order.

218. The liberty of an accused cannot be interfered with except under due process of law. The expression "due process of law" shall deem to include fairness in trial. The court (*sic* Code) gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution (prosecution and the Prosecutor) to make fair disclosure. *The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in court or not. That document should essentially be furnished to the accused and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused.*

A 219. The role and obligation of the Prosecutor particularly in relation to disclosure cannot be equated under our law to that prevalent under the English system as aforereferred to. But at the same time, the demand for a fair trial cannot be ignored. It may be of different consequences where a B document which has been obtained suspiciously, fraudulently or by causing undue advantage to the accused during investigation such document could be denied in the discretion of the Prosecutor to the accused whether the prosecution relies or not upon such documents, however C in other cases the obligation to disclose would be more certain. As already noticed the provisions of Section 207 have a material bearing on this subject and make an interesting reading. This provision not only require or mandate that the court without delay and free of cost should furnish to the accused copies of the police report, D first information report, statements, confessional statements of the persons recorded under Section 161 whom the prosecution wishes to examine as witnesses, of course, excluding any part of a statement or document as contemplated under Section 173(6) of the Code, any E other document or relevant extract thereof which has been submitted to the Magistrate by the police under sub-section (5) of Section 173. In contradistinction to the provisions of Section 173, where the legislature has used the expression "documents on which the prosecution relies" F are not used under Section 207 of the Code. Therefore, the provisions of Section 207 of the Code will have to be given liberal and relevant meaning so as to achieve its object. Not only this, the documents submitted to the Magistrate along with the report under Section 173(5) G would deem to include the documents which have to be sent to the Magistrate during the course of investigation as per the requirement of Section 170(2) of the Code.

220. *The right of the accused with regard to disclosure* H *of documents is a limited right but is codified and is the*

very foundation of a fair investigation and trial. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report under Section 173(2) as per orders of the court. *But certain rights of the accused flow both from the codified law as well as from equitable concepts of the constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial.* To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the court under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely.

221. It will be difficult for the Court to say that the accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. *A document which has been obtained bona fide and has bearing on the case of the prosecution and in the opinion of the Public Prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused.* Then that document should be disclosed to the accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would affect administration of criminal justice and the defence of the accused prejudicially."

(emphasis supplied)

(*Sidhartha Vashisht v. State (NCT of Delhi)*, (2010) 6 SCC 1)

16. The declaration of the law in Sidhartha Vashisht (supra) may have touched upon the outer fringe of the issues arising in the present case. However, the positive advancement that has been achieved cannot, in our view, be allowed to take a roundabout turn and the march has only to be carried forward. If the claim of the appellant is viewed in context and perspective outlined above, according to us, a perception of possible prejudice, if the documents or at least an inspection thereof is denied, looms large. The absence of any claim on the part of the accused to the said documents at any earlier point of time cannot have the effect of foreclosing such a right of the accused. Absence of such a claim, till the time when raised, can be understood and explained in several reasonable and acceptable ways. Suffice it would be to say that individual notion of prejudice, difficulty or handicap in putting forward a defence would vary from person to person and there can be no uniform yardstick to measure such perceptions. If the present appellant has perceived certain difficulties in answering or explaining some part of the evidence brought by the prosecution on the basis of specific documents and seeks to ascertain if the allegedly incriminating documents can be better explained by reference to some other documents which are in the court's custody, an opportunity must be given to the accused to satisfy herself in this regard. It is not for the prosecution or for the Court to comprehend the prejudice that is likely to be caused to the accused. The perception of prejudice is for the accused to develop and if the same is founded on a reasonable basis it is the duty of the Court as well as the prosecution to ensure that the accused should not be made to labour under any such perception and the same must be put to rest at the earliest. Such a view, according to us, is an inalienable attribute of the process of a fair trial that Article 21 guarantees to every accused.

17. The issue that has emerged before us is, therefore, somewhat larger than what has been projected by the State and what has been dealt with by the High Court. The question

arising would no longer be one of compliance or non-compliance with the provisions of Section 207 Cr.P.C. and would travel beyond the confines of the strict language of the provisions of the Cr.P.C. and touch upon the larger doctrine of a free and fair trial that has been painstakingly built up by the courts on a purposive interpretation of Article 21 of the Constitution. It is not the stage of making of the request; the efflux of time that has occurred or the prior conduct of the accused that is material. What is of significance is if in a given situation the accused comes to the court contending that some papers forwarded to the Court by the investigating agency have not been exhibited by the prosecution as the same favours the accused the court must concede a right to in the accused to have an access to the said documents, if so claimed. This, according to us, is the core issue in the case which must be answered affirmatively. In this regard, we would like to be specific in saying that we find it difficult to agree with the view taken by the High Court that the accused must be made to await the conclusion of the trial to test the plea of prejudice that he may have raised. Such a plea must be answered at the earliest and certainly before the conclusion of the trial, even though it may be raised by the accused belately. This is how the scales of justice in our Criminal Jurisprudence have to be balanced.

18. There is yet another possible dimension of the case. It is the specific contention of the accused in both the applications dated 29.3.2012 (for certified copies of the unmarked documents) and 18.4.2012 (for inspection) that it is in the course of the examination of the accused under Section 313 Cr.P.C. that a perception had developed that the accused may be giving incomplete/ incorrect answers in response to the questions put to her by the Court and that she needs copies of the documents or at least an opportunity of inspection of the same to enable her to provide effective answers and to appropriately prepare her defence.

19. Any debate or discussion with regard to the purport

A and object of the examination of an accused under Section 313 Cr.P.C. is wholly unnecessary as the law in this regard is fairly well settled by a long line of the decisions of this Court. The examination of an accused under Section 313 Cr.P.C. not only provides the accused an opportunity to explain the incriminating B circumstances appearing against him in the prosecution evidence but such examination also permits him to put forward his own version, if he so chooses, with regard to his involvement or otherwise in the crime alleged against him. Viewed from the latter point of view, the examination of an accused under C Section 313 Cr.P.C. does have a fair nexus with the defence that he may choose to bring, if the need arises. Any failure on the part of the accused to put forward his version of the case in his examination under Section 313 Cr.P.C. may have the effect of curtailing his rights in the event the accused chooses D to take up a specific defence and examine defence witnesses. Besides, the answers given by the accused in his examination, if incorrect or incomplete, may also jeopardise him as such incorrect or incomplete answers may have the effect of strengthening the prosecution case against the accused. In this connection it may be appropriate to refer to two paragraphs of E the judgment of this Court in *Manu Sao Vs. State of Bihar*[5] which are extracted below:-

> "13. As already noticed, the object of recording the statement of the accused under Section 313 of the Code F is to put all incriminating evidence against the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also to permit him to put forward his own version or reasons, if he G so chooses, in relation to his involvement or otherwise in the crime. The court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the court and besides ensuring the compliance therewith the court has

H 5. 2010 (12) SCC 3100.

to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simpliciter denial or in the alternative to explain his version and reasons for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the court and the accused and to put to the accused every important incriminating piece of evidence and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.

14. The statement of the accused can be used to test the veracity of the exculpatory nature of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313(4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence against the accused in any other enquiry or trial for any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this section should not be considered in isolation but in

A conjunction with evidence adduced by the prosecution."

20. If the above is the avowed purport and object of the examination of an accused under Section 313 Cr.P.C., we do not see as to how the appellant (second accused) can be denied an access to the documents in respect of which prayers have been made in the applications dated 29.3.2012 (for certified copies of the unmarked documents) and dated 18.4.2012 (for inspection) before the learned trial Court. While the anxiety to bring the trial to its earliest conclusion has to be shared it is fundamental that in the process none of the well entrenched principles of law that have been laboriously built by illuminating judicial precedents is sacrificed or compromised. In no circumstance, the cause of justice can be made to suffer, though, undoubtedly, it is highly desirable that the finality of any trial is achieved in the quickest possible time. In view of what has been stated above and to balance the need to bring the prosecution in the present case to its earliest conclusion and at the same time to protect and preserve the right of the accused to a fair trial we are of the view that the following directions would take care of the conflicting interests that have surfaced in the present case:-

(1) The accused No.2, i.e. the appellant herein, be allowed an inspection of the unmarked and unexhibited documents referred to by her in the application dated 29.3.2012, i.e., IA No. 711 of 2012 in CC No. 2008/2004 filed in the Court of XXXVI Additional City Civil & Sessions Judge, Bangalore;

(2) Such inspection will be completed within a period of 21 days from the date of receipt of this order by the learned trial court. The venue of such inspection and also the persons who will be permitted to be present at the time of inspection will be decided by the learned trial court.

(3) The right of inspection conferred by this order will not affect the validity of any part of the trial till date, including,

the examination of the accused No.1 under Section 313 Cr.P.C. which has since been completed or any part of such examination of the second accused that may have been completed in the meantime.

(4) In the event the third and the fourth accused also desire inspection of the unmarked and unexhibited documents such inspection will be allowed by the learned trial court. In such an event the process of inspection will also be simultaneously carried out and completed within the period of 21 days stipulated in the present order.

21. In the result, both the appeals shall stand disposed of in terms of the directions as above.

B.B.B. Appeals disposed of.