



THE ACCUSED PERSON'S RIGHT TO RELY ON EXCULPATORY MATERIAL AT THE STAGE OF FRAMING OF CHARGES

By Nipun Kalra

From National Law University, Delhi

INTRODUCTION

The prosecutor has been appointed as the officer of the state under Section 25 of the *Code of Criminal Procedure, 1973* (hereinafter referred to as "**Procedure Code**").¹ The prosecutor should act as the representative of the state and not of the police. He/she is not part of the investigating agency, nor is vested with forwarding authority but is charged with a statutory duty. The Public Prosecutor is supposed to be a Minister of Justice whose critical role includes maintaining impartiality in the field of the criminal law justice.²

In a large number of cases, the Supreme Court has held that the court cannot look beyond the material presented by the prosecution.³ Ultimately, this leads to prosecution solely choosing the evidence which is incriminatory in nature. However, in the recent judgment of *Nitya Dharmananda v. Gopal Sheelum Reddy*, the Supreme Court has again raised a question regarding the scope of the right of the accused to rely on material other than the police report, in order to make a case for discharge. The Court, in

this regard, stated that if the evidence is of a *sterling quality* then the same can be relied upon. However, the author believes that the use of this term has not clearly given the law in place.

Therefore, through this article, the author explores the scope of the accused person's right to rely upon the material other than the police report. Firstly, the role of prosecutor has been traced. Thereafter, the statutory provisions and case laws are listed relating to the above law. By use of Relevancy and Admissibility as concepts, it is then demonstrated that how not relying upon accused person's evidence can further lead to failure of justice.

A ROLE OF THE PUBLIC PROSECUTOR

It is settled law that fair and just investigation is a hallmark of any investigation.⁴ In the case of *Ashutosh Verma v. CBI*, it was held that prosecution cannot pick and choose evidence, and accused must be supplied with those materials which support the accused's case and are ignored by the prosecution.⁵ The duties of a public prosecutor extend to ensuring that there is fairness involved in the proceedings.⁶ It should be ensured that for the just determination of truth, if the magistrate feels appropriate, the accused must be supplied with those materials which are in prosecution's possession.⁷

Additionally, in common law jurisdictions,⁸ the role of the prosecutor is not restricted to

¹ Code of Criminal Procedure (1973), §25 (hereinafter "**Procedure Code**").

² *Jitendra Kumar@ Ajju v. State (NCT of Delhi)* ILR (2000) 1 Del 193.

³ *Gujarat v. Ashok Kumar Lavjiram Joshi*, R/Sp. Crim. App. No. 2349 (2018) ¶11.

⁴ *Shakuntala v State of Delhi* ILR (2007) I Delhi 1005.

⁵ *Ashutosh Verma v CBI* 2014 SCC OnLine Del 6931 ¶28.

⁶ *Manu Sharma v State (NCT of Delhi)* (2010) 6 SCC 1 [hereinafter "**Manu"].**

⁷ *Dharambir v Central Bureau of Investigation* 148 (2008) DLT 289.

⁸ *Boucher v Queen* (1955) SCR 16; *William Stinchcombe v. Queen* (1991) 3 SCR 326 ¶338;



securing convictions but extends to bringing forward all material evidence even if it falls in favour of the accused.⁹ The impartiality of the prosecutor is as fundamental as the impartiality of the Court.¹⁰ And it shall be considered as violation of the due process if prosecution has suppressed evidence which is material to the case of the accused.¹¹

Moreover, as held by the Apex Court in *Nitya Dharmananda* that if the evidence is of sterling quality which has been withheld by the prosecution, then the court is not debarred from summoning or relying upon the same even if such document is not part of the charge-sheet.¹²

Further, in the advanced stage of trial, after the material has been supplied by the prosecution under §207 of the *Procedure Code*, accused can claim access to the documents in police's protection. But if the same cannot be provided, then its suppression can cause serious prejudice to the accused if it had crucial bearing on the case.¹³

B. STATUTORY SCHEME OF RELATED PROVISIONS

Under *Procedure Code*, the law relating to discharge has been given under Section 227 and Section 239. Depending on the nature of the offence, these provisions are applicable (Section 227 provides for discharge in Sessions cases while Section 239¹⁴ is applied in Magistrate cases) in respective cases. For convenience purposes, I will only refer to

Section 227 for explaining the law, which states:

*If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.*¹⁵

The above provision uses the expression "record of the case". This leads to the inference that the Court can only decide on the basis of the police report and other documents submitted alongside, as to whether the person can be discharged, on consideration of the grounds of conviction. Hence, in most cases, the police report would necessarily entail the material in favour of the prosecution. Therefore, it is important to know what all this police report contains. The relevant provision in this regard is Section 173(5), which refers to police report containing "all documents or relevant extracts thereof on which the prosecution proposes to rely". The above expression limits the scope of the report to the material posited by the prosecution. This provision is openly misused by the investigating agencies to selectively choose the evidence which serves their ends. They go on to heavily rely on incriminating evidence and avoid the exculpatory material

⁹ *Sheshrao v. State* (2001) Cri. L. J. 3805 ¶26; *Medichetty Ramakistiah v State of Andhra Pradesh* AIR 1959 A.P. 659 ¶10.

¹⁰ *Mallard v Queen* (2005) 224 CLR 125 ¶81 [hereinafter "Mallard"]; *Hksar v Lee Ming Tee* (2003) 6 HKCFA 336 ¶139.

¹¹ R. V. Kelkar, CRIMINAL PROCEDURE (6th edition) 27.

¹² *Brady v State of Maryland* 373 US 83 (1963).

¹³ *Nitya Dharmananda v Gopal Sheelum Reddy* (2018) 2 SCC 93 ¶8.

¹⁴ *V.K. Sasikala v State* (2012) 7 SCC 771 ¶20; *Rukmini Narvekar v Vijaya Satardekar*, (2008) 14 SCC 1.

¹⁵ *Procedure Code*, §239.

¹⁶ *Ibid* §227.



in order to maximize the chances of conviction. In such a situation, either the court or the accused must have a right to summon such material, which has exculpatory tendencies. Section 91(1) of the *Procedure Code* states:

“Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, 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.”¹⁶ (emphasis supplied)

The above provision is wide enough to be used at the stage of discharge by the court. However, this has still been not used due to the effect created by Section 227 and Section 239 (provisions relating to discharge), which limit the scope to police report, in the first place. Hence, the tussle between the above provisions has resulted in the court choosing only those materials which are filtered down by the investigating agencies.

The amalgamation of above provisions was first taken up in the case of *State of Orissa v. Debendra Nath Padhi*. The 3-judge bench of the SC in this case ruled that:

“...it is clear that all that the court has to do at the time of framing a charge is to consider the question of sufficiency of ground for proceeding against the accused on a general

consideration of the materials placed before it by the investigating agency. There is no requirement in law that the court at that stage should either give an opportunity to the accused to produce evidence in defence or consider such evidence the defence may produce at that stage.”¹⁷ (emphasis supplied)

Hence, it was ruled that the accused could not avail of the right to file material in his/her favour at the stage of discharge. This would practically mean that the said right could only be used at the stage of trial. In effect, this would lead to prejudice against the accused, when s/he would not have any remedy against the blatantly wrong conduct of investigating functionaries, at the stage of discharge. The above position was repeatedly used by the Court to exclude the accused person's say from the stage of discharge.

C. LATEST POSITION: LAW OF THE LAND

The Supreme Court in the case of *Nitya Dharmananda v. Gopal Sheelum Reddy*, in this regard, ruled that:

“...it is clear that while ordinarily the Court has to proceed on the basis of material produced with the charge sheet for dealing with the issue of charge but if the court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not a part of the charge sheet.”¹⁸ (emphasis supplied)

¹⁶ Procedure Code, §91(1).

¹⁷ *State of Orissa v. Debendra Nath Padhi* 2003 2 SCC 711 ¶11.

¹⁸ *Nitya Dharmananda v Gopal Sheelum Reddy* (2018) 2 SCC 93 ¶9.



The dictionary meaning of the term “sterling” (Collin’s dictionary) is, something which is very good in quality. This expression when used in reference to the evidence which has been withheld by the prosecution, does not provide a clear meaning to include within it the evidence, which might be in favour of the accused person. The use of this term does not do justice to the purpose that has to be achieved because the same is open to different interpretations and subjectivity, when applied by the judges. Something might be of sterling quality to one judge, might not be of the same to another judge. Hence, this brings in the unguided discretionary power to the judges and makes the law judge-centric in nature. Thus, in order to give meaning to the term “sterling quality”, it is necessary to recognize the implications that are there in deciding the permissibility of any evidence in the Court of Law.

D. RELEVANCY ADMISSIBILITY

AND

It is the duty of the prosecution to bring all prima-facie evidence before the court.¹⁹ Although discretion has been accorded to the prosecution, it is required that the prosecution relies on all the relevant evidence. In this regard, a bare reading of the Section 5 of the *Indian Evidence Act, 1872* is important. The said section reads as:

“...Evidence may be given in any suit or proceedings of the existence or non-existence of every fact in issue and of such other facts

as are hereinafter declared to be relevant, and of no others.”²⁰ (emphasis supplied)

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.²¹ High probative value of a evidence is considered when an examination of its source indicates that it would have been given considerable weight by the judge.²² That the prosecutor honestly doubted the admissibility or reliability of the undisclosed information does not preclude reversal,²³ because the attention of the court is focused solely on the probable accuracy of the judgment and not on the competency or intent of either counsel.²⁴ The text messages had a high probative value and would have been deemed weighty by the judge, had they been allowed to be introduced.

Relevancy Test

For relevancy of a fact, there need to be satisfaction of two types²⁵ of relevancies:

1. Logical relevancy- It means that the evidence must tend to prove or disprove a fact at issue. If a fact present has either cause or an effect over the final outcome, then it can be used. For example, in a case of theft, in order to prove mens rea, if the prosecution does not present an evidence, which has a tendency to negate the ‘bad intention’ factor, then the said evidence cannot be excluded. This is because of the logical relation between the facts and the

¹⁹ Procedure Code, §25.

²⁰ Indian Evidence Act (1872), §5.

²¹ Montana Code Annotated 2015, art IV.

²² *United States ex rel. Montgomery v. Ragen* 86 F. Supp. 382 (1949).

²³ *Mallard*, ¶83.

²⁴ *People v. Hoffner* 208 Misc. 117 (1952) 120.

²⁵ James Fitzjames Stephen, *A Digest of The Law Of Evidence*. (3rd edn, The Editor 1898).



issue at hand. This further means that not all logically connected facts are admissible in the Court of Law.

2. **Legal relevancy-** It means the evidence must be admissible and cannot be used to prove something that is inadmissible or not provable in the case. This simply indicates the evidence in question should be 'legal' in nature.

E. FAILURE OF JUSTICE CAUSED BY SUPPRESSION OF EVIDENCE

According to §465 of the *Procedure Code*, any finding, on appeal, of error, omission or irregularity in the course of trial proceedings shall not warrant a vitiation of the proceedings unless such error, omission or irregularity has resulted in a *failure of justice*.²⁶ To determine "*failure of justice*" the Court must examine whether the accused was given a full and fair chance to defend herself.²⁷ Non-reliance on important evidence must compulsorily necessitate vitiation of proceedings because a tailored or perfunctory case by the prosecutor leading to conviction is regarded as causing injustice to the accused.²⁸ Moreover, non-disclosure of copies of the relevant material to the accused will deprive him of a reasonable opportunity to defend himself.²⁹

Additionally, grave prejudice can be caused to the accused person if the exculpatory evidence is purposely kept out of the purview of the Court. Article 10 of the UDHR³⁰ and

Article 14 of the ICCPR³¹ have also stated that everyone is entitled to fair and public hearing, with equality by the impartial tribunal.

Furthermore, the basic presumption in the criminal administration system is innocence of the accused till charges are proved beyond reasonable doubt.³² Therefore, the substantive omission³³ to rely on accused person's evidence can cause an error of incurable nature,³⁴ thereby warranting a fresh trial.

F. CONCLUSION

The Supreme Court, in the case of *Nitya Dharmananda*, has taken a liberal move by ensuring that a fair trial is given to the accused through the application of Section 91. However, this move has to be challenged in terms of its compatibility with the earlier position in law, when the accused person had no right to bring up any evidence during the hearing for discharge. Even after this judgment, the accused person has to prove that the evidence s/he has brought before the Court is of *sterling quality*, the standard for which is not defined anywhere. This does not change the accused person's position to a larger extent.

Although the move to rely on accused person's evidence is welcomed with open arms, the objective reasons have to be taken into account. The move has rather shifted the burden on the accused to prove that the

²⁶ Procedure Code, §465; *Hanif Banomiyah v Maharashtra* (1981) Cri. L. J. 1622 ¶31.

²⁷ *Gurbachan Singh v Punjab* AIR 1957 SC 623 ¶7; *William Slaney v Madhya Pradesh* 1955 SCR (2)1140 ¶5.

²⁸ *Ashish Batham v Uttar Pradesh* (2002) 7 SCC 317 ¶9; *Zahira Habibulla Sheikh v State of Gujarat* (2004) 4 SCC 158 ¶63.

²⁹ *Jahid Shaikh v State of Gujarat* (2011) 7 SCC 762.

³⁰ Universal Declaration of Human Rights [UNGA Res 217 A(III)] Art. 10.

³¹ International Covenant on Civil and Political Rights [1999 UNTS 171 (ICCPR)] Art 14.

³² *Ashish Batham v Uttar Pradesh* (2002) 7 SCC 317 ¶8; *Haryana v Bhagirath*, (1999) 5 SCC 96 ¶8-11.

³³ *Santhosh De v Archana Guha* (1994) 2 SCC 40 ¶5.

³⁴ *Securities and Exchange Board of India v Gaurav Varshney* (2016) 14 SCC 430.



evidence s/he has brought is good in law. What has to be adjudged at this stage of criminal trial is the relevancy of the evidence. In this article, I have described relevancy as a touchstone of evidence and how it has to be applied whenever any evidence is brought before the Court. This article has also explored how non reliance upon accused person's evidence can lead to 'failure of justice'.

