



Meena/Jose

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO.968 OF 2024 (FILING)

Bharat alias Bhomaram Choudhary,
Age 43 years, Indian national,
Flat No.F-2, Jackson Apartments,
Borda, Fatorda, Salcete Goa
(Presently in Judicial Custody).

...Petitioner

Versus.

1. State,
The Police Inspector, Fatorda Police
Station, Fatorda, Goa.
2. The Public Prosecutor,
The High Court of Bombay at Goa,
Porvorim, Goa.

... Respondents.

Mr. Rohan Pandurang Desai, Advocate with Ms Arya S. P. Parrikar, Advocate for the Petitioner.

Mr. Shailendra G. Bhohe, Public Prosecutor for Respondents No.1 and 2.

CORAM: VALMIKI MENEZES, J.

DATED: 20th December 2024.

JUDGMENT:

1. Registry to waive objections and register the matter.

2. Heard learned Counsel for the parties.
3. Rule. Rule returnable forthwith. Learned Public Prosecutor waives service on behalf of the Respondents/State. By consent of the learned Counsel for the parties, petition is disposed of finally.
4. This petition invokes this Court's inherent powers under Section 482 Cr.P.C. and its supervisory jurisdiction under Article 227 of the Constitution of India, to impugn order dated 23.08.2024 passed by the Principal District and Sessions Court, South Goa in Sessions Case No. SCORS/20/2023; by the impugned order, the Sessions Court allowed an application at Exhibit-25, permitting the Investigating Officer to rely on documents and to produce such documents, listed in the application in evidence. In order to decide the controversy before this Court, certain background facts are required to be referred to.
5. The Sessions Case came to be registered on the filing of a final report/charge sheet on 05.06.2023, against the present Petitioner who is the sole accused and who is in judicial custody. Charge was framed by the Sessions Court against the Petitioner under Section 307 IPC on 15.12.2023. After charge was framed, the Public Prosecutor filed a trial program on 12.02.2024 stating therein the witnesses to be examined. The first witness, Pw1-Narsiram, who is

the Complainant was examined on 04.10.2024, followed by Pw2-Madaram, who has deposed that he had received a phone call from the Accused immediately after the alleged incident. The Prosecution then examined Pw3-Ranaram, who reached the scene of the offence immediately after its commission, and took the victim to the hospital; thereafter one Nilton (Pw4) was examined, being a computer technician who has attached the DVR containing the CCTV footage alleged to be of the crime/assault on the victim. The fifth witness examined as Pw5 on 06.12.2024 was one Raju Shirodkar who claimed that he had let out the premises where the incident took place to the victim, Lalit alias Dungaram Choudhary, who is the eyewitness to the incident, and who is yet to be examined.

6. An application dated 19.04.2024 purporting to be under Section 91 r/w. Section 231 CrPC, under signature of the Public Prosecutor came to be filed before the Sessions Court claiming that the victim had material evidence which was not produced before the Court at the time of filing the charge sheet, and that the victim had handed the said evidence to be produced in Court. The application sought to produce, through the Public Prosecutor three documents namely:

- (i) 12 Photographs of the victim after the incident of assault showing the injuries sustained by him
- (ii) Copy of a CD containing CCTV footage, photographs and a video showing the condition of the victim soon after the incident.
- (iii) A certificate under Section 65B of the Evidence Act.

By this application the Public Prosecutor requested the Sessions Court to take these documents on record, to allow the same to be exhibited in evidence and to examine the author of the certificate under Section 65B one Sameer Pavithran as a witness.

7. The above application was opposed by the accused, *inter alia*, on the ground that the application was not maintainable under Section 231 Cr.P.C., and that, by this application, the Prosecution was taking the role of an Investigating Officer, which is impermissible at law. This application is still pending disposal before the Sessions Court.

8. While the application under Section 231 Cr.P.C. was pending decision before the Sessions Court, a second application dated 22.07.2024 came to be filed by the Investigating Officer, P.I., Fatorda Police Station, which simply submits that the

aforementioned three documents/pieces of evidence along with the letter dated 05.07.2024 of the victim Dungaram were required to be produced by the I.O. before the Court. This application came to be registered as Exhibit-25 on the file of the Sessions Court and was accompanied with the aforementioned letter of the victim which stated that the victim was submitting the three documents to the I.O., to submit the same to the Court under relevant provisions of law. The application was also opposed on grounds that the same was not maintainable and filed at a belated stage.

9. The Sessions Court allowed the application at Exhibit-25 holding that the provisions of Section 231 of the Code empowers the concerned Judge to take all evidence as may be produced in support of the prosecution, which provision, according to the Trial Court does not restrict the production of evidence apart from the documentary evidence produced with the charge-sheet. Reliance was placed by the Sessions Court on the judgment of the Supreme Court in *Central Bureau of Investigation v/s. R.S. Pai*; (2002) 5 SCC 82, to arrive at this conclusion and to permit the Investigating Officer to rely on the said documents and produce the same in the trial. As a consequence, a fresh witness, Sameer Pavithran, the author of the Certificate under Section 65B of the Evidence Act was also allowed to be relied upon.

10. The primary contention of learned Shri Rohan Desai for the Petitioner, to assail the impugned order are;

- (a) The trial having commenced on the charge being framed on 15.12.2023, there was a bar in terms of Section 173 Cr.P.C., to produce any further evidence or rely upon such evidence; it was submitted, that it was more so because 5 witnesses, including at least three material witnesses had been examined and cross-examined, the defence of the Accused had been disclosed and serious prejudice will result if the course adopted by the learned Sessions Judge was accepted.
- (b) Placing reliance on the judgments of the Supreme Court in *Vinubhai Haribai Malaviya v/s. State of Gujarat*; [(2019) 17 SCC 1] and on *Bhagyashee Prashant Wasankar v/s. State of Maharashtra* [2001 SCC OnLine Bom 1064] of this Court, it was contended that production of documents which were not part of the charge sheet filed before the Court should neither be produced by the prosecution witness directly nor could further investigation be directed into the material sought to be produced, after trial has commenced; it was further

contended that the Public Prosecutor could not act contrary to the interest of the Accused or in the manner done before the trial Court, by filing the application dated 19/04/2024, as the procedure followed literally amounted to the Public Prosecutor taking the role of the Investigating Officer under sub-Section 8 of Section 173 of the Code.

11. Shri S.G. Bhole, learned Public Prosecutor has very fairly conceded that, in terms of the law laid down by the Supreme Court in *Vinubhai* (supra), followed by this Court in *Bhagyashree Wasankar* (supra), the impugned order ought to be set aside and the application at Exhibit-25 be dismissed. The learned Public Prosecutor further submits that the Supreme Court in *CBI v/s. R.S. Pai* (supra) has held that production of additional documents which were part of investigation but missed to be produced, could be produced, provided trial had not commenced. He submits that the Sessions Court appears to have relied upon *CBI v/s. R.S. Pai* (supra), in a manner quite contrary to what has been laid down in the judgment. The learned Public Prosecutor has further relied upon several passages in the judgment of *Vinubhai Malaviya* (supra) and in *Bhagyashree Wasankar* (supra) to contend that a Public Prosecutor, during the course of a trial assumes the role of an independent Officer to assist the Sessions Court during the

course of a trial, and to ascertain the truth of the allegations and charges against the Accused, in a fair manner; the Public Prosecutor cannot assume a partisan role in a matter and produce documents after the charge is framed, or even request investigation, as this would be the role of the Investigating Officer. The learned Public Prosecutor further submits that since charge has been framed in the present matter, trial has commenced and in terms of the ratio laid down in the aforementioned two judgments, prejudice that would result to the accused is to be assumed. The learned Public Prosecutor also relies on four other judgments of this Court on similar lines to what is held in *Vinubhai Malaviya* (supra), *Nayna Rajan Guhagarkar V/s. State of Maharashtra* (2002) 1 BCR (Cri) 105], *Sandeep Sunil Kumar Lohariya V/s. State of Maharashtra* [Criminal Revision Application No. 140 of 2021, High Court of Bombay Criminal Appellate Jurisdiction], *Haroon Ebrahim v/s. State of Goa* [2024 SCC OnLine Bom 2196], *Wazid Ansari v/s. Police Inspector Mapusa* [2024 SCC OnLine Bom 3293]. He also places reliance upon a judgment of the Supreme Court in *K.Vadivel v/s. K. Shanthi* [2024 SCC OnLine SC 2643] to submit that, in the facts of the present case there would no scope for the Court to order a further investigation into the documents sought to be produced.

12. Based upon the above submissions and the facts stated above, the following two questions arise for determination:

- a. Whether the impugned order dated 23.08.2024 is sustainable in terms of the provisions of the Code of Criminal Procedure, 1973?
- b. Whether, the application dated 19.04.2024 filed by the Public Prosecutor in SCORS No.20/2024 before the Sessions Court, Margao, seeking to exhibit the documents listed at para 6 thereof is maintainable?

13. Before proceeding to deal with the controversy raised in the present matter, it would be apposite to make reference to certain provisions in, and the scheme of the Code of Criminal Procedure, 1973 (the Code), which would apply to the pending trial in this case. In terms of the savings clause under Section 531 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), the provisions of the Code would govern the procedure to be followed at the trial.

14. Chapter XII deals with the reduction to writing by a police officer of every information relating to the commission of a cognizable offence (FIR) and the powers that police officers are invested with to investigate such a case. Under Section 170 of the Code, upon investigation, if it appears to the Officer that there is

sufficient evidence or grounds to take cognizance of the offence, the Officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence and to try the accused or commit him for trial to an appropriate Court. In terms of Section 173 of the Code, every investigation under Chapter XII, on completion shall be forwarded by the Police Officer concerned to a Magistrate empowered to take cognizance of the offence stated in the report; under Sub-Section 5 of Section 173, the report/charge sheet shall be accompanied by all documents on which the Prosecution proposes to rely along with the statements of witnesses recorded under Section 161 of the Code, which the Prosecution proposes to examine as witnesses. Sub-Section 8 of Section 173 permits investigation of an offence even after a report under Sub-Section 2 thereof has been forwarded to the Magistrate. On the Officer obtaining further evidence, whether oral or documentary, he shall forward a further report regarding such evidence collected by him to the Magistrate concerned.

15. In pursuance of the powers vested in an Officer to investigate a cognizable offence, in terms of Chapter VII of the Code, the Officer may, by a written order, direct any person in whose possession or power such document or thing is believed to be, to produce the same to aid the investigation into the offence. Under

Sub-Section 2 of Section 91, a person so directed by a Police Officer shall merely produce the document or thing directed to be produced in compliance with the summons.

16. Chapter XVIII of the Code lays down the procedure to be followed in conducting a trial before the Court of Sessions. Section 225 specifies that prosecution in every trial before a Court of Sessions shall be conducted by a Public Prosecutor who is appointed for that purpose in terms of Section 24 of the Code. The case of the Prosecution, in terms of Section 226 is opened by the Prosecutor by stating, **by what evidence he proposes to prove the guilt of the accused.** If upon consideration of the documents submitted with the Report, the Sessions Court considers there are sufficient grounds to presume the accused has committed an offence, the Court shall frame charge in terms of Section 228 record the plea of the accused and set a date in terms of Section 231 for recording the Prosecution's evidence in trial.

Thus, under the above scheme, the "evidence" referred to in Section 226 and the record of the case and its "documents" referred to in Sections 227 and 228 can only refer to the documents and material that are submitted along with the Charge Sheet/Final Report and none else.

17. Section 231 empowers the Sessions Judge to proceed to record all such evidence referred to in Sections 226 and 227, and which has been produced in support of the Prosecution. Clearly, the words “such evidence” found in Section 231 can only refer to the evidence in the form of documents submitted along with the charge sheet and could by no means have reference to any document that is sought to be produced or relied upon which does not form part of the Final Report.

The scheme of Chapter VIII thus, does not permit the production or taking into evidence any document other than those produced with the Final Report.

The only exception to this rule being further evidence, oral or documentary, which may be, upon further investigation of the Officer, be obtained by him, and is filed in the form of a supplementary charge sheet/supplementary report in terms of Sub-Section 8 of Section 173.

18. The question that then arises is whether further evidence in the form of documents or oral statements in terms of Sub-Section 8 of Section 173 could be used against the accused at any stage of the proceedings.

The Supreme Court considers this position in *CBI vs. R.S. Pai* (supra), which was a case where additional documents were produced after gathering the same during investigation and after having submitted the charge sheet; however, in that case the charge was not yet framed. On considering the scheme of Section 173, in the light of the aforementioned facts, where the charge had not been framed and trial had not begun, the Supreme Court has held as under:

“7. From the aforesaid sub-sections, it is apparent that normally, the investigating Officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or charge-sheet, it is always open to the Investigating Officer to produce the same with the permission of the Court. In our view, considering the preliminary stage of prosecution and the context in which Police Officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which prosecution proposes to rely, the word 'shall used in Sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during the investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Analogous provision under Section 173(4) of

the Code of Criminal Procedure, 1898 was considered by this Court in Narayan Rao v. The State of Andhra Pradesh MANU/SC/0042/1957 : 1957 CriLJ 1320 and it was held that the word 'shall' occurring in Sub-section 4 of Section 173 and Sub-section 3 of Section 207A is not mandatory but only directory. Further, the scheme of Sub-section (8) of Section 173 also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to investigation. In such cases, there can not be any prejudice to the accused. Hence, the impugned order passed by the Special Court cannot be sustained”.

What has been thus held is that considering the preliminary stage of the prosecution, in terms of Sub-Section 8 of Section 173, prior to a charge being framed, and considering the mistake of the Investigating Officer who missed producing some of the relevant documents collected during investigation with the Final Report, the application to produce the same could be allowed. *CBI vs. R.S. Pai* (supra) nowhere holds that documents, other than the ones produced along with the Final Report or during the course of further investigation, can be produced or relied upon at all or at any stage of the trial. To that extent, reliance placed upon a truncated version of what has been held in para 7 in *CBI vs R.S. Pai* (supra),

by the Sessions Court is misplaced, as the facts in that case were totally different from the facts of the present case.

19. *Vinubhai Haribai Malaviya* (supra) has considered in detail the position of law on Sub-Section 8 of Section 173, and whether documents other than those relied upon and produced with the charge sheet could be used in evidence, and the stages at which such documents, which do not form part of the Final Report could be produced. *Vinubhai* (supra) was a case where, investigation was completed and a charge sheet was filed before the Magistrate. After summons was issued to the accused, an application was filed by the Accused No.1 for further investigation under Section 173(8) of the Code and simultaneously an application for discharge of the very same accused was also filed. The application for further investigation was dismissed by the Magistrate stating that the facts sought to be placed by that accused in the nature of evidence of the defence, would be taken at the stage of trial. The question of law which arose before the Supreme Court as framed in para 10 of that judgment was, whether, after charge sheet is filed by the Police, the Magistrate has the power to order further investigation, and if so, at what stage of the criminal proceedings. At para 20 of the judgment, the Supreme Court considers the effect of the introduction of Sub-Section 8 of Section 173 of the Code, and

observes that this power of further investigation continues until the trial can be said to have commenced in a criminal case. It further observed that the vexed question to be answered is as to whether the Magistrate can order further investigation in terms of Section 173 after the trial has commenced. After considering the scheme of the Code, and making reference to the judgment of the Supreme Court in *Hardeep Singh vs. State of Punjab*; (2014) 3 SCC 92, wherein it was held that the “trial” commences only on the charge being framed, it was held thus:

“42. To say that powers under Section 319 CrPC can be exercised only during trial would be reducing the impact of the word "inquiry" by the court. It is a settled principle of law that an interpretation which leads to the conclusion that a word used by the legislature is redundant, should be avoided as the presumption is that the legislature has deliberately and consciously used the words for carrying out the purpose of the Act. The legal maxim a verbis legis non est recedendum which means, "from the words of law, there must be no departure" has to be kept in mind.”

20. The law as laid down in *Vinubhai Malaviya* (supra) could be thus summarized; the Magistrate or Court is within its powers to order further investigation in terms of Section 173(8) of the Code until a charge is framed i.e. during pre-trial proceedings, but is precluded from doing so after trial begins.

21. *Bhagyashree Wasankar* (supra) was a judgment rendered by this Court where the very question which arises before me has been dealt with. The question that arose in *Bhagyashree Wasankar* (supra) is quoted below:

“2. The question that arises for consideration in this Writ Petition is, as to whether a witness appearing for the prosecution in a sessions trial can produce documents which were not part of the charge-sheet filed before the Court and whether such procedure for production of documents directly by the prosecution witness is contemplated under the provisions of the Code of Criminal Procedure, 1973 (Cr.P.C.).”

Whilst answering the aforementioned question, this Court, after making reference to *Vinubhai Malaviya* (supra), and *CBI vs. R.S. Pai* (supra), has held, that the provisions of the Code do not allow for a witness to directly seek production of additional documents during the course of the trial or at the time of recording his evidence.

22. *Bhagyashree Wasankar* (supra) was a case where after trial had commenced, a witness moved an application to produce additional documents on the claim that he had misplaced the original documents at an earlier stage and had now found them. The application was allowed by the Sessions Court citing the

provisions of Section 242 and Section 294 of the Code. The very maintainability of the application filed on behalf of a witness was questioned before the High Court, laying reliance upon the observations of the Supreme Court in *CBI vs. R.S. Pai* (supra) to contend that even the Public Prosecutor could not file such an application, as this would amount to taking the role of an investigating agency. The contention raised in that case was that there is no provision in the Code to permit even the Investigating Officer in terms of Section 173 of the Code to investigate into and forward such documents by a supplementary charge sheet, as evidence before a Court, after trial has commenced. The paragraphs in *Bhagyashree Wasankar* (supra) relevant to the decision of our case are quoted below:

“12. A perusal of the material on record in the present case shows that the aforesaid application at Exh.1106 was filed on behalf of the said witness in order to produce additional/original documents in the form of receipts and vouchers in support of the statement of the witness about having invested amounts with the accused persons and having been defrauded in the process. There is no provision of law which the said application has been filed. It needs to be examined whether the Sessions Court could entertain such an application under the provisions of the Cr. P.C. pertaining to conduct of sessions trials.

13.

14. Upon the accused pleading not guilty under Section 230 of the Cr. P.C., a date is fixed for prosecution evidence and under Section 231 thereof, on the date so fixed, the Sessions Court proceeds to take all such evidence as may be produced in support of the prosecution. Such evidence includes the recording of evidence of the prosecution witnesses. As noted above, the documents upon which the prosecution seeks to rely are placed on record along with charge-sheet, copies of which are furnished to the accused:

15.

16. In the context of the specific contentions raised on behalf of the petitioner, it is necessary to refer to the manner in which sessions trials are conducted under the Cr. P.C. and the role of the Public Prosecutor while conducting such a trial. Public Prosecutors are appointed under Section 24 of the Cr. P.C. and Section 225 of Cr. P.C. specifically provides that in every trial before the Court of Sessions the prosecution be conducted by the Public Prosecutor. Section 226 of Cr. P.C. provides that the Prosecutor shall open his case by describing charge against the accused and stating that he proposes to prove the guilt of the accused. The role of the Public Prosecutor in the scheme of the Cr. P.C. is that of an Independent office which assists the Sessions Court during the course of the trial to ascertain the truth of the allegations and charges levelled against the accused, in a fair manner. This is precisely the reason why the counsel for the complainant or victim is permitted to only assist the Prosecutor and not to lead the charge during the course of a sessions trial. There is every possibility of a sessions trial degenerating into a vindictive battle between the complainant/victim on the one hand and the accused on the other. It is the Prosecutor's office

that leads the charge for the reason that it is the State which prosecutes the accused to prove the charge beyond reasonable doubt and the State acts on behalf of the society at large, because the offences alleged against the accused in sessions trial, by their very nature are offences against the State/society.

17. The Hon'ble Supreme Court has laid down in the cases of Shiv Kumar v. Hukam Chand (1999) 7 SCC 467, J.K. International v. State (2001) 3 SCC 462, Sundeep Kumar Bafna v. State (2014) 16 SCC 623 and Dhariwal Industries Ltd. v. Kishore Wadhvani ((2016) 10 SCC 378, that in a Sessions Trial the public prosecutor leads the charge and that the trial is conducted by the public prosecutor. Even the counsel engaged by the informant, victim or aggrieved person has to act under the directions of the public prosecutor, who represents the State in a Sessions trial, thereby showing the paramount role of the public prosecutor in Sessions trials under chapter XVIII of the Cr. P.C. consisting of sections 225 to 237.

18. It is the Public Prosecutor, who makes the strategic call as to which of the witnesses are to be examined and which of them are to be dropped. It is for the Public Prosecutor to take a call as to the documents on which reliance is to be placed during the course of the trial and it is for this reason that all such documents are placed on record along with the charge-sheet, with copies thereof being furnished to the accused persons. This is to afford the accused persons a fair opportunity to prepare their defence. In these circumstances, it becomes clear that the Cr. P.C. does not contemplate any procedure for a witness to directly produce documents during the course of trial. The procedure known to law whereby additional documents can be produced on record and then relied upon in a sessions trial is through the channel of further

investigation contemplated under Section 173(8) of Cr. P.C., as held by the Hon'ble Supreme Court in the case of Central Bureau of Investigation v. R.S. Pai (supra).

19. Recourse to Section 294 of the Cr. P.C. can also not be taken for a witness to claim that he could directly produce additional documents during the course of trial or during the course of recording of his evidence. Section 294 of the Cr. P.C. pertains to no formal proof of certain documents and it opens with the words "Where any document is filed before any Court by the prosecution or the accused", thereby demonstrating that the said provision is applicable only when a document is sought to be produced either by the prosecution or the accused and not any third party like a witness. In fact, in the judgment in the case of Shamsheer Singh Verma v. State of Haryana (2016) 15 SCC 485, the Hon'ble Supreme Court has referred to the object of Section 294 of Cr. P.C. and it has been held that same is for accelerating the pace of trial, by avoiding waste of time in recording unnecessary evidence. The judgment of this Court in the case of Niwas Keshav Raut v. The State of Maharashtra (supra) lays down that Section 294 of Cr. P.C. does not place any embargo upon the prosecution or the accused to file a document at a stage subsequent to filing of the charge-sheet. There can be no quarrel with the said proposition. Yet, it cannot come to the aid of the witness in the present case, who has sought permission of the Sessions Court to directly produce documents during the course of trial and at the time of recording his evidence.

20. A perusal of the impugned order shows that there is a reference made to Section 242 of the Cr. P.C. A perusal of the said provision would show that it pertains to the power of the Magistrate to issue summons to any witness on the

application of the prosecution, directing such witness to produce any documents or thing. In this provision also, the words "on the application of the prosecution", have been used. Even otherwise, Section 242 of the Cr. P.C. is found in Chapter XIX pertaining to trial of warrant cases by the Magistrate. But, in the present case, the Court below is concerned with a sessions trial under Chapter XVIII of the Cr. P.C. Therefore, reference to Section 242 of the Cr. P.C. by the Court below is also misplaced.

21. A perusal of the provisions of the Cr. P.C. and the entire scheme contemplated therein demonstrates that there is no provision available for a witness to directly seek production of additional documents during the course of sessions trial and at the time of recording of his/her evidence. The Sessions Court in the present case failed to appreciate this aspect of the matter. While passing the impugned' order, the Sessions Court also failed to appreciate that permitting such production of additional documents by the witnesses directly would prejudice the accused persons by depriving them of a fair opportunity to prepare their defence. The whole purpose of filing of charge-sheet, upon completion of investigation along with documents upon which the prosecution desires to place reliance, would be defeated if witnesses are permitted to directly produce additional documents in such a manner."

23. The conclusions thus arrived at in ***Bhagyashree Wasankar*** (supra) by this Court are the following:

- a. After the charge is framed and trial has commenced, serious prejudice would be caused to the accused if documents are allowed to be produced on further

investigation being conducted in terms of Sub-Section 8 of Section 173 of the Code.

- b. The Public Prosecutor is appointed under Section 24 of the Code to assist the Sessions Court during the course of the trial and to ascertain the truth of the allegations and charges levelled against the accused, in a fair manner; the role of the Public Prosecutor is to conduct the case for the Prosecution on behalf of the State, and he acts on behalf of society at large and cannot take a partisan role against the accused or for any witness or the complainant.
- c. It is the Public Prosecutor who takes a strategic call on which witnesses to examine and which documents to rely upon during the trial and under the scheme of the Code, neither a witness nor even an Investigating Officer can directly produce documents during the course of the trial.
- d. Additional documents collected during the course of further investigation in terms of Sub-Section 8 of Section 173 can be relied upon by production of a supplementary charge sheet only if the trial has not commenced and after considering the prejudice that would be caused to the

defence of the accused, at the stage at which they are sought to be relied upon.

24. In *Naina Guhagarkar vs. State of Maharashtra* (supra), the complainant was sought to be recalled to produce a memory card seized during investigation after the Prosecution had closed its evidence, the Statement of the Accused under Section 313 Cr.P.C. had been recorded and final arguments were to be recorded. Considering the trial had practically concluded, this Court held that the Trial Court could not take recourse to the provision of Section 311 of the Code and recall a witness to examine him and produce a piece of evidence, more so in the light of the grave prejudice that would be caused to the accused, who had fully opened up his defence during the trial.

25. In *Sandeep Loharia vs. State of Maharashtra* (supra), this Court considered whether the provisions of Sub-Section 8 of Section 173 could be relied upon to produce documents in the course of the trial, which were allegedly handed over by the complainant to the Investigating Officer but not produced along with the charge sheet.

26. Relying upon the observations in *CBI vs R.S. Pai* (supra), this Court has held that documents sought to be produced, other

than the ones relied upon whilst filing the Final Report, could not be construed as “further evidence” collected or discovered in the course of “further investigation”. The relevant portions of the judgment are quoted below:

“18. A perusal of the averments in the application as well as the contents of the complaint dated 22.11.2019 reveal that the documents at serial nos. (ii) to (xii) which are sought to be produced under Section 173(8) of the Cr.P.C. were not collected or discovered in the course of further investigation after filing of the report. These documents were allegedly handed over to the Investigating Officer in the year 2013 at the time of recording the statement of the applicant under Section 161 of Cr.P.C. In such circumstances, the documents sought to be produced cannot be construed as 'further evidence collected or discovered in the course of further investigation'. Nevertheless, there is no embargo to produce such documents at a later stage.

19.

20.

21.

22. In the instant case, the application does not confirm the statement of the applicant that the additional evidence which is sought to be produced under Section 173(8) Cr.P.C. was handed over to the Investigating Officer in the year 2013. The application does not disclose any reasons for non production of these documents/evidence along with the chargesheet, but merely states that though the chargesheet has been filed

before the Court, some evidence was available in the office of the deceased Sunil Kumar Lohariya. The Investigating Officer has also not offered any explanation in this regard despite opportunity given. It is not the case of the investigating agency/prosecution that the said evidence was not submitted along with the chargesheet due to inadvertance or some mistake. Hence no case is made out to deviate from the general procedure of producing all the evidence along with the chargesheet or for non compliance of Section 207 of Cr.P.C.

23. It is also pertinent to note that the audio and video CDs which were allegedly handed over to the Investigating Officer in the year 2013, were not seized under panchanama and were not forwarded to FSL to ascertain its authenticity. Hence even otherwise no fruitful purpose will be served by allowing mere production of the said evidence.”

27. Again, in *Wazid Ansari vs. P.I., Mapusa Police Station* (supra), referring to the role of the Public Prosecutor which finds reference in *Bhagyashree Wasankar* (supra), this Court has held thus:

“18. It is necessary to look into the specific role of the Prosecutor as provided under the Code which says that Prosecutor has to conduct the trial before the Court on the basis of the chargesheet filed by the Investigating Agency. If the Prosecutor is allowed to conduct the investigation, which is the job of the Investigating Agency/police, it will be seriously prejudicing the accused person.

19. Section 173 of the Code clearly makes a provision and that too only for Investigating Agency to file supplementary or additional chargesheet in case agency comes to the knowledge of additional evidence which is available and requires for the purpose of just decision of the matter. Proper procedure is only to be followed by the Investigating Agency by carrying out further investigation in the matter and if required to file additional or supplementary chargesheet. Only then the Prosecutor conducting the matter is entitled to support such a plea.

20. ...

21. In the case of Bhagyashree Prashant Wasankar (supra) learned Single Judge of this Court while considering the scope of Section 173 of P.C. has celery observed that witnesses who stepped into the witness box cannot be allowed to produce additional evidence/documents at the time of trial by bypassing the procedure envisaged in the Code as found in Section 173 of Cr. P.C. Observations of the learned Single Judge in the case of Bhagyashree Prashant Wasankar (supra) are squarely applicable to the matter in hand.

22. Statement made in the application for production of documents is only by the Prosecutor. It is not known as to how the Prosecutor _came to know that such documents were procured by the victim/complainant and by what mode. Contents in paragraphs 3 and 4 of the application cannot be considered as personal knowledge of the Prosecutor. Such an aspect ought to have been disclosed to the Investigating Agency for the purpose of conducting further investigation and if the Investigating Agency comes to the finding that such evidence is material, only then permitting it to produce by

way of supplementary chargesheet, could have been considered.

23. Role of the Prosecutor would start only on receipt of additional evidence by way of a supplementary chargesheet under Section 173(8) but not prior to it.”

28. *Wazid Ansari* (supra) was further referred to in another judgment of this Court in *Haroon Ebrahim vs. State of Goa* (supra), where documents were sought to be produced after trial had commenced and two witnesses had been examined. In that case too, the Public Prosecutor sought to produce documents in the form of a video clip along with an application under Section 65B of the Evidence Act, just as was done in the present case, by application dated 19.04.2024.

29. In *Haroon Ebrahim* (supra), the concerned Magistrate allowed the application, which order was ultimately set aside after holding thus:

“10. The impugned order passed in the present matter is therefore, clearly without jurisdiction. First of all the learned Prosecutor is not supposed to file such application for the purpose of additional documents or documents which is not relied upon in the charge-sheet. The duty of the prosecutor is conducting the trial on the basis of the charge-sheet and the supportive documents. The Prosecutor cannot step into the shoes of Investigator. Similarly, the learned Magistrate is duty bound to find out relevant provisions of

jurisdiction available with it. By allowing such application, and also observing that no prejudice is going to be caused to the accused, the learned Magistrate is virtually bringing the provisions of the Civil Procedure Code or of the Civil Law into Criminal jurisprudence. Thus, the question of allowing any witness to produce additional evidence and that too when he is in the witness box through the application filed by the Prosecutor needs to be curbed. The best recourse is to produce such evidence before the Investigating Agency and if the concerned authority is of the opinion that such additional evidence is necessary to prove the evidence, he is entitled to take recourse to Section 173(8) of Cr.P.C.”

30. The common thread that runs through all the above referred case laws is that the Public Prosecutor has a non-partisan role to play and can lead the Prosecution only on the basis of the documents produced along with the charge sheet and none else. The Public Prosecutor is not empowered to file applications to produce documents beyond those relied upon, and collected during the course of investigation, produced with the charge sheet. The Public Prosecutor in this case could not produce documents directly furnished by a witness or any third party after trial has commenced. Even before trial has commenced, in terms of Section 173(8) of the Code, the Public Prosecutor has no role to play in production of a document sought to be produced by a third party or witness, and such document is required to be investigated into by the

investigating Officer in exercise of powers under Sub-Section 8 of Section 173; this procedure could be followed only provided the trial had not commenced, and such documents gathered on further investigation, if produced, would not cause prejudice to the accused and his defence.

31. In the present case, the learned Sessions Court totally ignored the law as laid down in the above referred judgments. In the present case, the complainant has been examined (Pw1) as far back as 04.10.2024 after which four witnesses, Pw2 Madaram, Pw3 Ranaram, Pw4 Nilton Pereira and Pw5 Raju Shirodkar had been examined. Nilton Pereira (Pw4) is a computer technician who has examined the CCTV footage on the DVR, on which the entire incident has been recorded through a closed circuit camera. The entire defence of the accused in this case has opened up by the cross examination of the witnesses, with the victim, who was injured in the assault yet to be examined. The application at Exhibit-25 was filed by the Investigating Officer merely on the documents being handed over to him and without conducting any investigation into the same in exercise of powers vested in him under Sub-Section 8 of Section 173. The application was, therefore, filed totally *de hors* the jurisdiction vested in the Investigating Officer.

32. In any event, even assuming that the application was filed after further investigation was carried out, which is not the case, such an application, in terms of the law declared in *Bhagyashree Wasankar* (supra) was not maintainable, considering that the trial had commenced and the entire defence of the accused was disclosed. Clearly, in the facts of this case, grave prejudice would be caused to the accused if such documents were permitted by the Sessions Court to be produced as evidence. This would equally be the case if the documents were sought to be produced through a supplementary Report after exercising powers under Sub-Section 8 of Section 173. Whichever way one looks at this case, the application at Exhibit 25 was bound to be dismissed and is hereby dismissed. The impugned order dated 23.08.2024 is therefore quashed and set aside.

33. This brings me to the irregular role of the Public Prosecutor in the present case. The application dated 19.04.2024 filed by the Public Prosecutor states that the victim had handed over the documents to be produced in the Court as evidence. This statement itself points to the partisan role being played by a Public Prosecutor. As emphasized in the judgments referred to above, the Public Prosecutor acts beyond his role and appointment under Section 24 of the Code, if he attempts to produce documents or evidence on

behalf of a witness, and beyond the documents accompanying the charge sheet. He cannot take the role of an Investigator or even inquire into the evidentiary value of such documents and has to play a non-partisan role during the prosecution of a case. The role of the Public Prosecutor is to base the entire trial upon the documents relied upon in the Final Report and to assist the Criminal Court at arriving upon a decision based on this material and none else.

In the present case, the Public Prosecutor, by application dated 19.04.2024 records that the victim has handed over the documents and that the same are very material and necessary to meet the ends of justice. How the Prosecutor came to this conclusion, whether on his own investigation or otherwise, defies all logic. This can certainly not be the role of a Public Prosecutor as in the present case, by the very averments in the application, he has taken up a partisan role in favour of the witness/victim. The application is, therefore, clearly not maintainable and certainly not in terms of Section 91 or Section 231 of the Code. The application necessarily has to be held to be beyond the powers vested in a Public Prosecutor to move such an application, and is not maintainable. This course of action has been taken by me in exercise of the supervisory jurisdiction under Article 227 of the Constitution of

India vested in me, in addition to the inherent powers exercised under Section 482 of the Code, to correct a gross injustice which may be caused to the accused if such an application were allowed or even dealt with.

34. A growing trend has been noticed, involving in trials where the Prosecutors have, in a number of cases adopted the above referred procedure of directly seeking to produce before the Court, evidence not relied upon in the Charge sheet. Apart from this procedure being not prescribed in the Code or even in the BNSS, the same trend continues. In this view of the matter, it would be not out of place to observe that such a procedure would be obviated, if, as far as possible in all criminal cases, the Public Prosecutors, with the aid of the defence counsel and under supervision of the concerned Magistrate/Sessions Court, file a Trial Program specifying the list of witnesses to be examined by the Prosecution and the specific documents to be produced/proved by each of the witnesses, before trial commences and before charge is framed. Following such a procedure would also enable the Public Prosecutor to confirm whether all evidence sought to be relied upon in the Charge sheet is actually available. The Public Prosecutor may also confirm the availability of important witnesses before the case goes to trial, in the event of the Charge being framed.

35. Under the Trial programme, the Public Prosecutor should endeavour to examine all vulnerable witnesses (including the victim and eyewitnesses) before witnesses such as Panch witnesses, experts or Investigating Officers. This procedure would also ensure that in custody cases, the fundamental rights of the accused under Article 21 of the Constitution of India are given effect to; if no evidence is given against the accused by the main witnesses at the earlier stages of trial, the Court may resort to provisions of discharge or even granting bail pending recording evidence of the remaining witnesses.

36. The present judgment is rendered being fully mindful of the provisions of the Code and shall not apply in cases where the new Code i.e. the BNSS would be applicable. The Sessions and Trial Courts shall take note of the fact that under Sub-Section 9 of Section 193 of the BNSS, which is akin to Sub-Section 8 of Section 173 of the Code of Criminal Procedure, a proviso has been inserted specifically empowering further investigation to be conducted, with the permission of the Court trying the case, after trial has commenced; the proviso appears to have been inserted, being mindful of the case law referred to above. The present judgment would apply only in cases to which the old Code i.e. CrPC of 1973 applies. Here again, it would be advisable that the Public Prosecutor

confers with the I.O. whether any aspects of investigation were missed, when the I.O. may at this initial stage exercise the option of seeking permission of the Court in terms of the proviso to Sub-Section 9 of Section 193 of the BNSS.

37. Consequently, the impugned order dated 23.08.2024 of the Sessions Court in Sessions Case No. SCORS/20/2023 is quashed and set aside. Application at Exhibit-25 is dismissed. Needless to state, the application filed by the Public Prosecutor dated 19.04.2024 is held to be not maintainable.

38. Rule is made absolute in the above terms.

39. The Registrar (Administration) of this Court is requested to circulate this judgment to the Principal District and Sessions Judges of North and South Goa to be further circulated to all the Courts under their jurisdiction; the Registrar (Administration) of this Court is further requested to circulate this judgment to the office of the Director of Prosecution to enable the Prosecutors engaged by the Directorate to take all such corrective measures which are necessary and to ensure that the observations in this judgment are given full effect to.

VALMIKI MENEZES, J.