



**NAFR**

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**CRMP No. 1970 of 2022**

- Kamaljit Singh Chhabra S/o Late Nanak Singh Chhabra Aged About 57 Years R/o Mig/c/house No. 127 Vaishali Nagar, Bhilai Police Station Vaishali Nagar, Bhilai Tehsil And District Durg, District Dhamtari (C.G.)

---- **Petitioner**

**Versus**

1. State of Chhattisgarh Through Police Station Vaishali Nagar Bhilai Durg C.G., District Durg, Chhattisgarh.
2. Abc D/o Def Aged About 16 Years R/o GHI.
3. Xyz D/o Tuv Aged About 13 Years R/o MNO.

---- **Respondents**

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For Petitioner : Mr. Prasoan Agrawal, Advocate.  
For State/ Respondent No. 1 : Mr. Himanshu Sharma, P.L.  
For Respondent No. 2 and 3 : None.

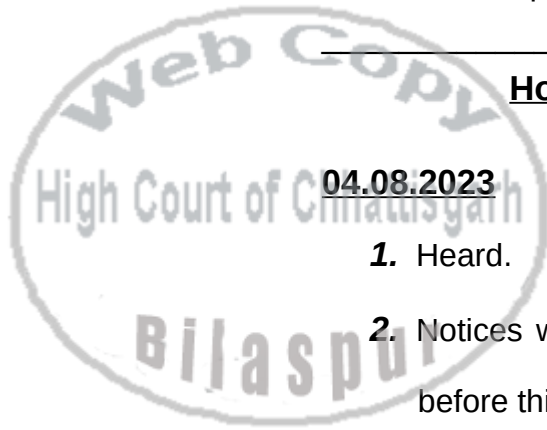
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**Hon'ble Shri Justice Rakesh Mohan Pandey**

**Order On Board**

**04.08.2023**

1. Heard.
2. Notices were issued to the victims pursuant to which they appeared before this Court and raised their serious objections.
3. The petitioner has challenged the order passed by the Additional Sessions Judge, 4<sup>th</sup> FTSC POCSO Durg, District – Durg (C.G.) in Criminal Case No. SCC POCSO/46/2022 dated 14.09.2022, whereby an application moved by the petitioner/accused under Section 91 of Code of Criminal Procedure, 1973 has been rejected.
4. The facts of the present case are that the petitioner is being prosecuted for the offence punishable under Sections 354(A)(i) and 342 of the Indian Penal Code, 1860 and Sections 9(f), 10 of the POCSO Act, 2012. The report was lodged by the victim herself on 14.02.2022 making an allegation that when she went to tuition class, the present petitioner tried to outrage her modesty. On this basis, the police registered an offence against the present petitioner. After the

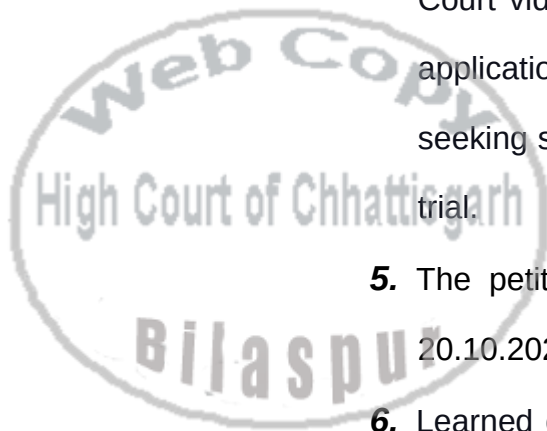




completion of the investigation, a charge sheet has been filed on 12.04.2022. During the course of the investigation, the mobile phone of the petitioner was seized. All prosecution witnesses have already been examined. After examination of the victim, the petitioner moved an application under Section 91 of the Cr.P.C. on 16.08.2022 which was rejected by the learned trial Court vide order dated 14.09.2022. Again, an application was moved under Section 91 of the Cr.P.C. on 12.10.2022, with a prayer to direct the Network Service Provider of the concerned Network Operator to produce the Whatsapp messages from 08.02.2022 to 14.02.2022. The application was replied to by the prosecution thereafter the application was rejected by the learned trial Court vide order dated 16.08.2022 on the ground that earlier similar application was rejected vide order dated 14.09.2022 and again seeking similar relief another application has been moved to delay the trial.

5. The petitioner has challenged those orders dated 14.09.2022 and 20.10.2022 in the present petition.

6. Learned counsel for the petitioner would submit that the PW-1/Victim stated in her statement that she had received certain Whatsapp messages sent by the petitioner however some parts of chat/messages have been deleted by her. He would submit that this fact was admitted by the victim in her deposition. He submits that the prosecutrix came to her house on the date of the incident to discuss certain family issues and this fact can be proved by the Whatsapp messages, which may still be in possession of the service provider. He has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Varsha Garg Vs the State of Madhya Pradesh and Ors.** Reported in **2022 SCC Online SC 986**, in the matters of **Mahaveer Chandrakar Vs. State of Chhattisgarh (CRR No. 710 of 2017 and CRR No. 704 of 2017)** and **Aakesh Kumar Sinha Vs.**



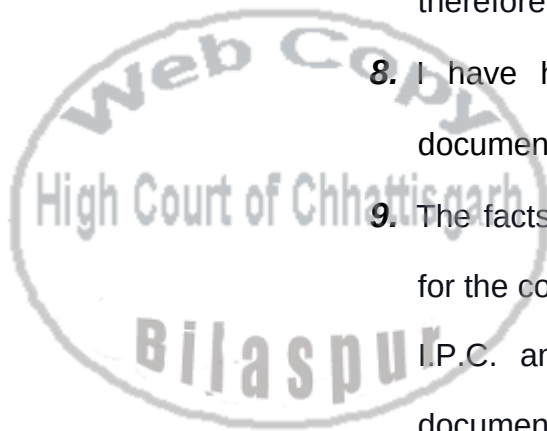


***State of Chhattisgarh (CRR No. 410 of 2017)*** passed by the coordinate bench of this Court and the judgment passed by the High Court of Madhya Pradesh in the matter of ***Special Police Establishment vs. Umesh Tiwari and another [(2022) SCC Online M.P. 100]***.

7. On the other hand, learned State counsel would oppose. He would submit that there is no nexus between the material sought to be supplied to the petitioner and the allegations made against him. He would further submit that earlier an application moved by the petitioner under Section 91 of CrPC was rejected which remained unchallenged and again an application under same provision has been moved therefore the petition is liable to be dismissed.

8. I have heard learned counsel for the parties and perused the documents annexed herewith carefully.

9. The facts of the present case reflect that the petitioner is being tried for the commission of an offence under Sections 354A(1)(i) and 342 of I.P.C. and Sections 9(f) and 10 of the POCSO Act. From the documents filed along with this petition, it appears that the prosecution witnesses have already been examined and the criminal case is at its fag end. After completion of the examination of the prosecution witnesses, the petitioner moved an application under Section 91 of the Cr.P.C. where he stated there was cordial relation between the petitioner and victims. They used to chat through Whatsapp messenger and on the date of the incident victim had sent certain messages to the petitioner to discuss family issues. It is also reflected in the charge-sheet that police have filed some part of chats/messages. The victim in her evidence has stated that there was a conversation through chats/messages between the petitioner and her.





**10.** Earlier, the application of the petitioner was rejected by the learned trial Court on 14.09.2022 but the petitioner kept mum for a considerable period. He moved another application under section 91 of the Cr.P.C. The petitioner could have challenged the earlier order when he was aware of the facts which he narrated in the repeat application filed under Section 91 of Cr.P.C. Further, the petitioner could not establish nexus between the information sought and the defence which he wants to take through Whatsapp Chats in the trial.

**11.** The Hon'ble Supreme Court in the matter of **Varsha Garg** (supra) in para No. 40 held as under:-

*"40. In the present case, the application of the prosecution for the production of the decoding registers is relatable to the provisions of Section 91 Cr.P.C. The decoding registers are sought to be produced through the representatives of the cellular companies in whose custody or possession they are found. The decoding registers are a relevant piece of evidence to establish the co-relationship between the location of the accused and the cell phone tower. The reasons which weighed with the High Court and the Trial Court in dismissing the application are extraneous to the power which is conferred under Section 91 on the one hand and Section 311 on the other. The summons to produce a document or other thing under Section 91 can be issued where the Court finds that the production of the document or thing "is necessary or desirable for the purpose of any investigation, trial or other proceeding" under the Cr.P.C. As already noted earlier, the power under Section 311 to summon a witness is conditioned by the requirement that the evidence of the person who is sought to be summoned appears to the Court to be essential to the just decision of the case."*

**12.** In this judgment, the Hon'ble Supreme Court has observed that the application filed under section 91 can be considered where the Court finds that the production of the documents or material sought is necessary or desirable for the purpose of any investigation, trial or other proceedings under the Cr. P.C. and order can be passed if the documents already placed appear to the Court to be essential for a just decision of the case.

**13.** In the matter of **Aakesh Kumar Sinha** (supra), this Court in Paragraphs 8,9 and 10 observed thus:-





"8. If the power is given to the prosecution agency to file documents to their choice to which they placed reliance, it would give an authority to the police or prosecution agency to mend the facts and law to their own wish by concealment. Then if such practice is encouraged in a given case, the prosecution may suppress important relevant documents and may not allow to surface the facts which support the accused. The investigating agency or the prosecution agency which are part and parcel of the State are not the decision maker and the accused is a person who is charged with the offence is held to be innocent till the guilt is proved which is to be adjudged by the Court. The State agencies are under bounden duty to place documents which are in their possession and submit the same in compliance of section 173 Cr.P.C., It is for the Court to adjudicate after taking into consideration the cases.

9. More over, the investigating agency and the prosecution both are part and parcel of the State and the action of the State is legally required to be fair, just and reasonable. If the State withholds any material fact or evidence which accrues in favour the accused, such withholding cannot be fair and would be in violation of Article 14 of the Constitution. More so a procedure which permits the with-holding of evidence which is in favour of accused cannot be termed as fair and reasonable and such procedure would be in violation of Article 21 of the Constitution of India. Withholding any evidence without any justification would amount to shelving of facts away from the Court. The prosecution, therefore, is required to place the whole truth before the Court and it cannot be allowed to keep the things in dark before the Court. Above all, the Court is also duty bound to discover the truth of case. The courts are empowered to discover the truth. In case the court is of the opinion that the application u/s 91 of the Code is genuine and has not been moved with such motive, then the Court must exercise its jurisdiction and direct the production of document including the case diary. The Criminal Court should keep in mind that justice should not only be done, but must appear to be done.

10. The provisions of Section 173(5) contemplate and make it obligatory upon the investigating officer where the provisions of Section 170 apply to forward to the Magistrate along with his report, all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation. During the investigation the statement recorded u/s 161 of all the persons whom the prosecution proposes to examine as witnesses shall also be sent to the Magistrate. Some element of discretion is vested with the police officer under Section 173(6); where he is of the opinion that any such statement is not relevant to the subject matter of the proceedings or its disclosure to the accused is not essential in the interest of justice and is inexpedient in the public interest, he shall indicate that part of the statement requesting a Magistrate that part from the copies to exclude to grant to the accused and stating his reason for making such a request. Sub-section (7) of the same section is indicative of another discretion given to the police officer under law that where he finds it





*convenient, he may furnish the copy of documents referred to in sub-section (5) of the Section."*

14. The same analogy has been laid down in **Mahaveer Chandrakar** (supra) however in those cases the statements of some of the witnesses were recorded but those statements were not filed along with charge-sheet therefore, the application moved under Section 91 of Cr.P.C. was allowed by this Court.
15. In the matter of **Umesh Tiwari** (supra), the High Court of Madhya Pradesh in paragraphs No. 17, 18 and 19 held as under:-

*"17. True it is that the right to privacy of the victim may be breached but if the production of the said call details can assist the Court in discovering truth and rendering justice in the matter then the Court has to adopt the due process before invoking Section 91, by affording opportunity to the person whose right to privacy is likely to be breached. This shall not only take care of the apprehension expressed by the complainant about the alleged breach of privacy but shall also ensure furtherance of the investigation/inquiry/trial/other proceedings in a free and fair manner thereby rendering justice and avoiding failure of justice. Thus, in the considered opinion of this Court, the trial Court ought to have heard the victim/complainant before passing the impugned order.*

*18. As regards objection of the prosecution, this Court is of the firm view that except during the pendency of the process of investigation, the accused cannot be denied his right to invoke Section 91. Section 91 admittedly does not in express terms identifies the stakeholder in justice dispensation system who can invoke the said provision, but the content and context of Section 91 implies that the said provision can be invoked by the Court at any stage of investigation, inquiry, trial and other proceedings.*

*19. The Court can invoke Section 91 either suo moto or on behest of some stakeholder in the process of investigation, inquiry, trial or other proceedings. The cause for invoking Section 91 can arise from any source, be it victim, accused (except during pendency of investigation) and Police. Denying any of the stakeholder, the right to invoke Section 91 may defeat the ultimate object behind Section 91 which is to ensure discovery of truth, rendering of justice and preventing failure of justice. However, any such invocation by any stakeholder at any point of time would be subject to satisfaction of necessity and desirability of that document to the process of investigation, inquiry, trial or other proceedings."*

16. In the above-referred case, it is observed by the High Court of Madhya Pradesh in paragraph 17 that the privacy of the victim may be





breached but if the production of the said call details can assist the Court in discovering truth and rendering justice in the matter then the Court has to adopt the due process. In paragraph 19 it is held that the object of Section 91 of Cr.P.C. is to ensure the discovery of truth, rendering of justice and prevent failure of justice.

17. In the present case the petitioner failed to establish that how he is going to be prejudiced if the chats/messages are not supplied to him. In the matter of **Umesh Tiwari** (supra), where application moved under Section 91 of Cr.P.C. was allowed by the learned trial Court, the High Court set aside the order passed by the trial Court. Further taking into consideration the fact that earlier application moved by the petitioner under Section 91 of Cr.P.C. was rejected and same was not challenged and the petitioner failed to establish any correlation between the data sought to be produced by the service provider and allegations made against him therefore this Court is not inclined to interfere with the orders passed by the learned trial Court.

18. Consequently, this petition is dismissed.

**Sd/-**  
**(Rakesh Mohan Pandey)**  
**Judge**