

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.56898 of 2017

Arising Out of PS.Case No. -15 Year- 2016 Thana -MAHILA P.S. District- NALANDA
(BIHARSHARIFF)

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The State of Bihar through District Magistrate, Nalanda at Biharsharif, P.S.-Bihar,
District-Nalanda

.... Petitioner

Versus

1. Rajballav Pd. @ Rajballav Prasad Yadav, S/o Jehal Pd. R/o Pathra English,
P.S.-Mufassil, Nawada, District-Nawada.
2. Sulekha Devi, W/o Arun Kumar Mehta, R/o Garhapar, Professor Colony,
Udantpuri, P.S.-Bihar, District-Nalanda.
3. Radha Devi, W/o Surendra Singh, R/o Shivpuri, P.S.-Laheri, District-Nalanda.
4. Chhoti Kumari @ Amrita, W/o Sandeep Suman @ Pushpanjay, R/o Patel
Nagar, Ranchi Road, P.S.-Laheri, District-Nalanda.
5. Sandeep Suman @ Pushpanjay, son of Sanjay Kumar, R/o Patel Nagar, Ranchi
Road, P.S.-Laheri, District-Nalanda.
6. Tusi Devi, W/o Pramod Kumar, R/o Ranisarai, P.S.-Bakhtiyarpur, District-
Patna.

.... Opposite Parties

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Appearance :

For the Petitioner/s : Mr. Shyameshwar Dayal, , Advocate
For the O.P. No. 1 : Mr. Tanvir Ahmad Mir, Advocate
For the O. P. Nos. 2, 3, 4 and 6: Mr. Aruni Singh, Advocate
For the O. P. No. 5 : Mr. Anuj Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

CAV JUDGMENT

Date: 09 -03-2018

This application under Section 482 of the Code of
Criminal Procedure (for short 'Cr. P.C.') has been filed by the State



of Bihar against the order dated 29.08.2017 passed by the learned Additional District and Sessions Judge-I-cum-Special Judge, Biharsharif, Nalanda in Mahila P.S. (Nalanda) Case No.15 of 2016 by virtue of which the application filed by the State dated 20.06.2017 for summoning witness along with certified copies of Customer Acquisition Forms (for short 'CAFs') of mobile telephone applications and Call Detail Records (for short 'CDRs') and 65-B certificates of 10 mobile numbers filed under Section 311 of the Cr. P.C. came to be rejected.

2. It is submitted by Mr. Shyameshwar Dayal, learned advocate appearing for the State of Bihar that by mistake the prosecution did not summon the nodal officers of the four service providers of the ten mobile numbers to prove original CAFs and CDRs and, therefore, an application was filed by the prosecution on 20.06.2017, but the trial court erroneously rejected the prayer of the prosecution vide impugned order dated 29.08.2017. He submitted that the trial court failed to appreciate that the examination of nodal officers of the service providers of the ten mobile phones and the production of the original certificates of nodal officers of service providers is essential in view of the Section 65-B of the Indian Evidence Act. For arriving at just decision of the case, it is the duty of the court to get relevant records to do justice between the parties.



The court below wrongly interpreted that the petition filed under Section 311 of the Cr. P.C. is belated one. It failed to appreciate that the provision prescribed under section 311 of the Cr. P.C. can be invoked at any stage before judgment. The court below also failed to appreciate that the CDRs are already on record, but the same could not be proved in the manner in which they ought to have been proved and, thus, there was no question of filling of lacunae by the prosecution at a belated stage. He submitted that as per best evidence theory, the trial court ought to have summoned the four nodal officers of the respective service providers companies and the original CDRs and CAFs.

3. The opposite parties have contested the matter. The opposite party no.1 is being represented by Mr. Tanvir Ahmad Mir, learned advocate, opposite party nos. 2, 3, 4 and 6 are being represented by Mr. Aruni Singh, learned advocate, opposite party no.5 is being represented by Mr. Anuj Kumar, learned advocate. They have filed their respective counter affidavits. The lead argument on behalf of opposite parties has been made by Mr. Tanvir Ahmad Mir, learned advocate for the opposite party no.1. His arguments have been adopted by the learned advocates appearing for the other opposite parties.

4. Mr. Tanvir Ahmad Mir, learned advocate



submitted that there is no illegality in the order dated 29.08.2017 passed by the trial court by which prayer made under Section 311 of the Cr. P.C. for calling of witnesses and for calling of documents has been rejected. He submitted that the prosecution concluded its argument during trial on 26.05.2017 whereafter the defence began its final arguments. The defence pressed its submissions into service on 13th, 14th and 15th June, 2017 on the aspect of electronic evidence before the trial court and argued that CDRs and CAFs sought to be proved by the prosecution were not admissible in evidence, because they were proved by PW-14 Alok Kumar. The prosecution neither along with charge-sheet nor at the stage of Section 207 nor at the stage of prosecution evidence nor at the stage of 313 made any effort to call the four nodal officers by filing and pressing any application under Section 311 of the Cr. P.C. Even, when the application under Section 311 of the Cr. P.C. was filed, no substantive application was filed by the prosecution to place any additional documents on record whereafter the procedure of proving such documents through appropriate witnesses could be sought for and pressed into service. According to him, the power under Section 311 of the Cr. P.C. is limited to summoning of witnesses only and does not entail any power for placing any documentary evidence on record for which the law entails that a separate substantive application has to be filed and



pressed into service. He submitted that once the prosecution closed its case and advanced its final arguments and the defence began its submission and arguments were pressed into service on different dates during which elaborate arguments were made as to how and under what circumstances the prosecution case was miserably failing and deserved to be rejected as far as electronic evidence in the form of CDRs and CAFs were concerned and the defence elaborately submitted before the trial court that no authenticated copy of CDRs and CAFs or Section 65-B certificate had ever been seized during course of investigation and the nodal officers of the service providers were neither examined during course of investigation nor they were cited as prosecution witnesses along with charge-sheet, the prosecution filed the application under Section 311 of the Cr. P.C. just in order to fill up the lacunae in its case and the trial court committed no error in dismissing and rejecting the petition. He submitted that the application, as filed by the prosecution, was an utter abuse of the process of law and, if allowed, the same would cause grave prejudice to the accused as it was an illegal attempt to cure lacunae in the prosecution evidence.

5. In reply, learned counsel appearing for the petitioner submitted that the scope and object of Section 311 of the Cr. P.C. is to enable the court to determine the truth and to render a



just decision after discovery of relevant facts and obtaining proper proof of such facts to arrive at a just decision of the case. The trial court has ample power to summon any person as a witness or recall or re-examine any such evidence even if the evidence of both the sides is closed and arguments have been advanced if evidence was not adduced properly or a relevant material was not brought on record due to any inadvertence as function of the criminal court is administration of criminal justice. He submitted that an inadvertence or an oversight in conducting the trial by the prosecutor cannot be treated as irreparable lacunae and taking into consideration the provisions prescribed under Section 65-B of the Indian Evidence Act, the court below ought to have allowed the application filed on behalf of the prosecution.

6. I have heard learned advocates appearing for the parties and perused the record.

7. Before I proceed further, it would be pertinent to take note of the admitted factual aspects of the case.

8. The Mahila P.S. (Nalanda) Case No.15 of 2016 was instituted on the basis of written report of the victim prosecutrix against one Sulekha Devi, a man, aged about 40-50 years and other 4-5 persons. On 09.02.2016, at 10:30 a.m., the victim 'P' submitted a written information to the Station House Officer (for short 'SHO')



Mahila Police Station in which, she stated that on 06.02.2016 at 4:00 p.m., one Sulekha Devi, her neighbour came to her house and asked her to attend a birthday party at Bharao Chowk. She obtained permission from her elder sister and, as such, she left her house with Sulekha Devi and her daughter Chhoti. Firstly, they went to Ramchandrapur bus stand and there they caught a bus for Bakhtiarpur. When she enquired that where are they going then, Sulekha Devi disclosed that she will be picking her mother from Bakhtiarpur and then, they will attend birthday party. When all of them reached Bakhtiarpur, one Bolero car was stationed there and, after a short while, all of them including mother of Sulekha Devi boarded the vehicle. At 11.30 p.m., they reached at village-Giriyak. It was too dark. Then, she was taken to a four storied building at Giriyak and was asked to wait till a teacher would come and will ask some questions to her and, on query, Sulekha Devi asked the informant to act as per advice, after sometime, one man, aged about 40-50 years entered into the house. Sulekha Devi and that person started consuming alcohol. The informant was also offered alcohol, but she refused. After taking alcohol, Sulekha Devi disrobed the victim and forcibly inserted a piece of cloth into her mouth and Sulekha Devi caught her hand. She was then ravished by the person, who had consumed alcohol there. On the following day, at about 10



O' clock in the morning, she was dropped to her house by said Sulekha Devi. It is mentioned in the written report that when she was in the captivity, she heard conversation of money transaction between Sulekha Devi and the person, who had ravished her. After her return, she disclosed the entire facts of the occurrence to her sister in the evening, who gave information of the occurrence to her father. On receiving information, her father came and carried the victim 'P' to Mahila Police Station where she submitted her written report.

9. On the basis of the aforesaid written report, a criminal case was initially registered under Sections 376 and 420 read with 34 of the Indian Penal Code. However, in course of investigation, Sections 212 and 120-B of the Indian Penal Code, Sections 4, 6 and 8 of the Protection of Children from Sexual Offences Act, 2012 and Sections 4, 5 and 6 of the Immoral Traffic Act were also added in the first information report.

10. After completion of investigation, a police report in the nature of a charge-sheet under Section 173(2) of the Cr. P.C. was filed before the trial court, which took cognizance of the offences and after complying with the mandatory requirements of Section 207 of the Cr. P.C. framed charges against the accused persons on 06.09.2016.

11. Pursuant to the framing of charges, the trial



commenced. The prosecution adduced the testimony of 19 of its witnesses from amongst the list of witnesses mentioned in the charge-sheet. It also filed an application on 02.03.2017 seeking permission of the trial court to drop 13 witnesses as mentioned in the charge-sheet, which was allowed on the same day. Thereafter, the prosecution closed its evidence on 08.03.2017 and statements of accused persons were recorded under Section 313 of the Cr. P.C. The recording of statement of the accused persons under Section 313 of the Cr. P.C. finally concluded on 18.03.2017. Thereafter, the defence led its evidence. As many as 15 defence witnesses were examined before the trial court.

12. After examination of the defence witnesses, the trial was posted for the next stage and the prosecution started its arguments and concluded the same on 26.05.2017.

13. After 26.05.2017, the defence began its final arguments and it was at this stage that the prosecution filed an application on 20.06.2017 for calling four nodal officers of different service providers as witnesses and for proving original CAFs and CDRs of ten mobile phones seized from the accused and related persons under Section 311 of the Cr. P.C., which was rejected by the trial court vide impugned order dated 29.08.2012.

14. It would be relevant to note that prior to 2000,



electronically stored information was dealt with as document and secondary evidence of electronic records were adduced as documents in accordance with Section 63 of the Indian Evidence Act. In the year 2000, Parliament enacted the Information Technology Act, 2000 (for short 'IT Act') to allow for the admissibility of digital evidence. By virtue of Section 92 of the IT Act, the Indian Evidence Act has been amended.

15. The most important amendment to the Indian Evidence Act is the introduction of Sections 65A and 65-B under the 2nd schedule of the IT Act, which provides for a special procedure for adducing evidence in relation to electronic records. Sections 65-A and 65-B, which would be relevant for consideration in the present case read as under:-

“65-A. Special provisions as to evidence relating to electronic record.-The contents of electronic records may be proved in accordance with the provisions of section 65-B.”

“65-B. Admissibility of electronic records.—

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if



the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents;



and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is



to say,—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,—

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to



its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.—For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.”

16. Section 65 of the Indian Evidence Act provides for cases in which secondary evidence relating to documents may be given whereas Section 65-A provides that the contents of electronic records may be proved in accordance with the provisions of Section 65-B of the Indian Evidence Act. Section 65-B provides that notwithstanding anything contained in the Indian Evidence Act any information contained in any electronic record, i.e., the contents of a document or communication printed on paper that has been stored, recorded or copied in optical or magnetic media produced by a



computer output is deemed to be a document and is admissible in evidence without proving of the originals production, provided that the conditions set out in Section 65-B (2) for the admissibility of evidence are satisfied, which are as under:-

(i) At the time of creation of electronic record, the computer output containing the information was produced from a computer that was used regularly to store or process information for the purpose of any activities regularly carried on over that period by the person having lawful control over the use of computer.

(ii) During the said period, the kind of information contained in the electronic record was regularly fed into the computer in the ordinary course of the said activities.

(iii) Throughout the material part of the period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation for same period, but it was not such as to affect the electronic record or the accuracy of contents.

(iv) The electronic record bears the information, that is, a re-production of the original electronic record.

17. The certificate must identify the original electronic record, describe the manner of its creation, the particulars of the device that created it and certify compliance with the



conditions of sub-section (2) of Section 65-B of the Indian Evidence Act.

18. At this stage, this Court may take note of the fact that despite the mandatory nature of the aforesaid conditions prescribed under Section 65-B of the Indian Evidence Act, the law has not been applied invariably.

19. In **State (NCT of Delhi) vs. Navjot Sandhu [(2005) 11 SCC 600]**, a two judges Bench of the Hon'ble Supreme Court held: *"that courts could admit electronic records such as, printouts and compact discs (C.Ds.) as prima facie evidence without authentication"*. In the said case also, the issue raised before the Supreme Court was with proof and admissibility of records of mobile telephone calls. The accused made a submission that no relevance could be placed on the mobile telephone records because the prosecution has failed to produce the relevant certificates under Section 65-B (4) of the Indian Evidence Act and the procedure set out in Section 65-B of the Indian Evidence Act was not followed. However, the Hon'ble Supreme Court concluded that the cross-examination of the competent witness acquainted with the functioning of the computer during the relevant time and the manner in which the print-out of the call records was taken was sufficient to prove the call records.



20. The aforestated decision of the Hon'ble Supreme Court was followed across the country till the Constitution Bench of the Supreme Court in **Anvar P.V. vs. P.K. Basheer and others [(2014) 10 SCC 473]** overruled it.

21. In **Anvar P.V's. case**, the Hon'ble Supreme Court conclusively decided that documentary evidence in the form of an electronic record can be proved only in accordance with the procedure set out under Section 65-B of the Indian Evidence Act. The Constitution Bench specifically observed that the judgment of **Navjot Sandhu (supra)**, to the extent, the statement of law on admissibility of electronic evidence pertaining to electronic record of this Court does not lay down correct position. The Constitution Bench held as follows: *"that for any electronic evidence to be admissible in its secondary form, it is necessary to meet the mandatory requirements of Section 65-B, which includes giving a certificate as per terms of Section 65-B (4) at the time of proving the record and not any time later, failing which the electronic record will be considered inadmissible"*.

22. Thus, strict compliance with Section 65-B is now mandatory for proving any electronic evidence including CDRs and CAFs to be admissible in its secondary form.

23. Having noticed the facts of the case and the ambit



and scope of Sections 65-A and 65-B of the Indian Evidence Act, at this stage, it would be apt to examine the ambit and scope of Section 311 of the Cr. P.C., which reads as under:-

“Section 311. Any Court may, at any stage on any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall or re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case”.

24. It would be manifest from reading of Section 311 of the Cr. P.C. that it is in two parts. The first part gives discretionary authority to the criminal court and confers upon it at any stage of inquiry, trial or other proceeding to summon any person as a witness or to examine any person in attendance, though not summoned as witness or to recall and re-examine any person already examined whereas the second part mandates the court to summon and examine or to recall or re-examine any such person if his evidence appears to be essential to the just decision of the case.

25. In this regard, it would also be apt to make a reference to certain decisions rendered by the Supreme Court on the interpretation of Section 311 of the Cr. P.C.



26. In **Jamatraj Kewalji Govani vs. State of Maharashtra [AIR 1968 SC 178]**, the Supreme Court held in paragraph 14 as follows:-

“14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witnesses already examined, and makes this the duty and obligation of the court provided the just decision of the case demands it. In order words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court’s action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction.”

27. In **Raj Deo Sharma (II) vs. State of Bihar [(1999) 7 SCC 604]**, the Supreme Court observed as follows:-

“We may observe that the power of the court as envisaged in Section 311 of the Cr. P.C. has not been curtailed by the Supreme Court. Neither in the decision of the five judge Bench in A.R.



Antulay case nor in Kartar Singh case such power has been restricted for achieving speedy trial. In order words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 CrPC. We make it clear that if evidence of any witness appears to the court to be essential to the decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person.”

28. In **U.T. of Dadra Nagar Haveli and Anr. vs. Fatehsinh Mohansinh Chauhan [(2006) 7 SCC 529]**, the Supreme Court observed as follows:-

“A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such fact which lead to a just and correct decision of the case this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as “filling in a lacunae in the prosecution case” unless the facts and circumstances of the



case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice.”

29. In ***Natasha Singh vs. Central Bureau of Investigation (State) [(2013) 5 SCC 741]***, a three judge Bench of the Supreme Court took note of its earlier decisions rendered in respect of the scope of Section 311 of the Cr. P.C. and observed as follows:-

“15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr. P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a



witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 Cr. P.C. must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as “any Court”, “at any stage”, or “or any enquiry, trial or other proceedings”, “any person” and “any such person” clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person’s right to



fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. [Vide: , AIR 1958 SC 376; Zahira Habibulla H. Sheikh v. State of Gujarat, AIR 2004 SC 3114; Zahira Habibullah Sheikh (5) v. State of Gujarat, AIR 2006 SC 1367; Kalyani Baskar v. M.S. Sampooram, (2007) 2 SCC 258; Vijay Kumar v. State of U.P., (2011) 8 SCC 136; and Sudevanand v. State, (2012) 3 SCC 387)]”

30. In **Rajaram Prasad Yadav vs. State of Bihar & Anr. [(2013) 14 SCC 461]**, the Hon’ble Supreme Court while explaining the nature and scope of Section 311 Cr. P.C. reiterated that the power can be exercised at any stage as per the principles laid down thereunder and the paramount consideration should be for just decision of the case and observed as follows:-

“14. A conspicuous reading of Section 311 Cr. P.C. would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression “any” has



been used as a pre-fix to “court”, “inquiry”, “trial”, “other proceeding”, “person as a witness”, “person in attendance though not summoned as a witness”, and “person already examined”. By using the said expression “any” as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. ...”

31. It would be manifest from the above decisions of the Hon’ble Supreme Court that Section 311 Cr. P.C. empowers the Court at any stage of the inquiry, trial or other proceeding, to summon any person as a witness or examine any person in attendance, though not summoned as a witness or to recall and re-examine any person already examined as witness. However, summoning and examining or recalling or re-examining any such person should be made only if his evidence appears to be essential to the just decision of the case. It should not cause prejudice to the accused and it should not permit to the prosecution to fill up lacunae. Whether summoning of a witness is for filling up of a lacunae or it is for just decision of a case would depend on facts and circumstances of the case. Indisputably fair trial is the main objective and it is the duty of the Court to ensure such fairness. The width of power under



Section 311 Cr. P.C. is beyond any doubt.

32. At this stage, this Court would like to notice Section 91 of the Cr. P.C., which confers power upon a Court to summon document or other thing. It reads as follows:-

“91. Summons to produce document or other thing.

(1) 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.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed-

(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891) or



(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.”

33. Section 91 of the Cr. P.C. provides that 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 Cr. P.C. 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. When Section 91 of the Cr. P.C. talks of the documents being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the facts of each case. The width of the power of the court under Section 91 is unlimited.

34. Having considered the scope of the relevant provisions of the Indian Evidence Act and the Cr. P.C., when I look back to the facts of the present case, I find that there is no dispute to the fact that electronic evidences in their secondary form were led into evidence on behalf of the prosecution through P.W.14 Alok Kumar without any certificate in terms of Section 65-B (4) of the



Indian Evidence Act at the time of proving them.

35. In view of the decision of the Constitution Bench of the Hon'ble Supreme Court in **Anvar P.V. (supra)**, such electronic evidence will be considered inadmissible, as the same did not meet mandate of law provided under Section 65-B(4) of the Indian Evidence Act.

36. The prosecution neither examined the nodal officers of the four service providers of the mobile numbers to prove the original CAFs and CDRs nor any certificate in terms of Section 65-B was led into evidence pertaining to electronic records in their secondary form. It is true that the prosecution realized this aspect only when the defence took a plea that in absence of authenticated copies of CDRs and CAFs or certificate as provided under Section 65-B (4) of the Indian Evidence Act, the electronic evidence was inadmissible. However, the Court cannot shut its eyes from the fact that since the amendment made in the Indian Evidence Act in 2000 and Section 65-A and 65-B of the Indian Evidence Act was introduced, the judgment of the Hon'ble Supreme Court in **Navjot Sandhu (supra)** held the field till 04.08.2015 when it was overruled by the Constitution Bench in **Anvar P.V. (supra)**.

37. The mandatory nature of the conditions as prescribed under Section 65-B was not being applied for over a



decade in legal proceedings and the courts across the country used to admit electronic records, such as, printouts and compact discs as prima facie evidence without authentication. Even before the Supreme Court in case of **Ratan N. Tata vs. Union of India [(2014) 1 SCC 93]**, a C.D. containing intercepted telephone calls was introduced without following the procedure laid down under Section 65-B of the Indian Evidence Act.

38. Thus, considering the fact that there was a lot of confusion in legal proceedings across the country in respect of admissibility of electronic evidence and electronic records for a sufficiently long time, if the prosecution misunderstood the law and adduced the electronic evidences in a manner, which would make them inadmissible and during trial it realized its fault and filed an application before the trial court for summoning the nodal officers of the mobile numbers given in the petition along with CDRs and 65-B certificates and the certified copies of CAFs of the relevant mobile telephone applications, the trial court ought to have allowed the same instead of rejecting them as it is the duty of the Court to determine the truth and to render a just decision after discovering all relevant facts to arrive at a just decision of the case. Since the discretionary power under Sections 311 and 91 of the Cr. P.C. has been given in the widest possible terms, the advanced stage of the trial is



immaterial, if summoning of witness and documents is found essential for just decision of the case. The petition filed by the prosecution was not an attempt to fill up the lacunae rather the same was necessitated due to inadvertence in conducting the case by the prosecutor and misunderstanding arose in interpretation of Section 65-B of the Indian Evidence Act. The Supreme Court has consistently held that an oversight in management of prosecution cannot be treated as irreparable lacunae. In case, proper evidence is not adduced or a relevant material is not brought on record it is the duty of the court to permit such mistakes to be rectified in exercise of powers under Sections 311 and 91 of the Cr. P.C. in order to arrive at a just decision. The evidence sought to be led before the trial court is germane to the issue involved. Moreover, the defence would not suffer any prejudice, as it will have an opportunity to cross-examine the witnesses so summoned in respect of the genuineness, veracity and reliability of the evidence sought to be adduced.

39. The trial court while passing the impugned order erroneously held that once the electronic documents and materials collected by the Investigating Officer during investigation has been exhibited, which are certificate under Section 65-B of the Indian Evidence Act through P.W.14, Alok Kumar, Sub-Inspector of Police, there is no reason or justification to allow the prayer under Section



311 of the Cr. P.C. to summon the nodal officers of the service provider of the ten mobile SIMs or to obtain any certificate under Section 65-B of the Indian Evidence Act from them. It failed to realize that Section 65-A mandates special procedure for adducing evidence in relation to electronic records and documentary evidence in the form of an electronic records and they can be proved only in accordance with the procedure set out under Section 65-B of the Indian Evidence Act. It also failed to realize that it is necessary to have certificate as per terms of Section 65-B (4) of the Indian Evidence Act at the time of proving the electronic records in their secondary form. It failed to realize that the certificate issued by a police officer or the Investigating Officer of the case for proof of electronic record does not meet the requirement of law.

40. In view of the discussions made above, the impugned order dated 29.08.2017 passed by the learned Additional District and Sessions Judge-I-cum-Special Judge, Biharsharif, Nalanda in Mahila P.S. (Nalanda) Case No.15 of 2016 cannot be sustained. Accordingly, it is set aside. The application dated 20.06.2017 filed on behalf of the prosecution is allowed. The court below shall summon the nodal officers and allow the prosecution to prove the electronic evidences in their secondary form in the manner prescribed under Section 65-B of the Indian Evidence Act. It shall



also summon the original/duly certified copies of the relevant CAFs and allow the prosecution to prove them in accordance with law.

41. Before parting with the judgment, I must say that since the opposite party no.1 is in custody and the trial has reached to a crucial stage, the prosecution shall be required to examine witnesses and prove documents without any undue delay. Further, the trial court shall be required to give the defence an adequate opportunity to cross-examine the witnesses in respect of genuineness, veracity and reliability of the evidences (oral and documentary) to be led before the court.

(Ashwani Kumar Singh, J.)

Sanjeet/-

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