

\$~27

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Judgment delivered on: 08.08.2019

+ CRL.REV.P. 732/2017

CHATRAPAL SINGH LODHA & ORS Petitioners

versus

STATE OF NCT

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Garvesh Kabra with Mr. Prakhar Srivastava and
Ms. Pooja Kabra, Advocates.

For the Respondent : Mr. Hirein Sharma, APP for the State.
ACP Anil Dureja, PS Crime Branch.

CORAM:

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

CRL.REV.P. 732/2017 & Crl.M.A.16099/2017 (stay)

1. Status report is filed. Same is taken on record.
2. Petitioners impugn order on charge dated 10.08.2017, whereby, charges have been framed against the petitioners under Section 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 read with Section 120B Indian Penal Code.
3. The only challenge raised by learned counsel for the petitioners is that petitioners are liable to be discharged as the audio-video CDs

relied upon by the prosecution, being copies of the electronic evidence, were not admissible in evidence without a certificate under Section 65B of the Evidence Act and thus the Trial Court erred in relying upon them even for the purposes of framing of charges. Reliance is placed on the judgment of the Supreme Court in *Anwar P.V. vs. P.K. Bashir & Ors.*: (2014) 10 SCC 473.

4. Learned Additional Public Prosecutor for the State submits that the requirement of a certificate under Section 65B would arise only if secondary evidence is sought to be produced and further that it is only at the stage of trial that the court is called upon to consider as to whether the requirements of Section 65B of the Evidence Act, if applicable, are satisfied or not.

5. Learned APP for the State submits that where original device and the original media, on which the recordings have been made, is tendered in evidence, there is no requirement of furnishing a certificate under Section 65B of the Evidence Act.

6. He further under instructions from the Investigating Officer submits that the original devices and original media on which the recording was made have been produced by the prosecution and in case secondary evidence of electronic record is produced, appropriate certificate would be produced at the relevant stage.

7. The Supreme Court of India in *Anwar P.V. vs. P.K. Bashir & Ors (supra)* has held as under:-

14. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence 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 shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document i.e. electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65-B(2). Following are the specified conditions under Section 65-B(2) of the Evidence Act:

- (i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;*
- (ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;*

- (iii) *During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and*
- (iv) *The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.*

16. *It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.*

17. *Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45-A—opinion of Examiner of Electronic Evidence.*

22. *The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case [State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600 : 2005 SCC (Cri) 1715] , does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.*

(underlining supplied)

8. The Supreme Court in *Anwar P.V. (supra)* held that any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in

accordance with the procedure prescribed under Section 65-B. The purpose of this provision is to sanctify secondary evidence in electronic form, generated by a computer. Such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. Further that electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. In the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

9. Requirement of a certificate under section 65B of the Evidence Act arises only if secondary evidence is sought to be produced in place of original evidence. In case the original device and the original media on which the recording is made is produced, there is no requirement of a certificate under Section 65B of the Evidence Act. It is only where the secondary evidence is sought to be tendered in evidence that a certificate under Section 65B of the Evidence Act is required.

10. The Supreme Court of India in *Vikram Singh v. State of Punjab*, (2017) 8 SCC 518 referring to *Anvar P.V. versus P.K. Basheer* (*supra*) held that if an electronic record is used as primary evidence the same

is admissible in evidence, without compliance with the conditions in Section 65-B.

11. The Supreme Court of India in *State By Karnataka Lokayukta Police Station, Bengaluru Versus M.R. Hiremath Criminal Appeal No. 819 of 2019 decided on May 1, 2019: 2019 SCC OnLine SC 734* held that *Section 65B(4) is attracted in any proceedings “where it is desired to give a statement in evidence by virtue of this section”*. *Emphasising this facet of sub-section (4) the decision in Anvar holds that the requirement of producing a certificate arises when the electronic record is sought to be used as evidence.*

12. The Supreme Court in *State by Karnataka Lokayukta Police Station, Bengaluru Versus M.R. Hiremath Criminal (supra)* applied the principle laid down in the earlier decision in *Union of India v. CDR Ravindra V Desai 2018 (16) SCC 273* wherein the Supreme Court had emphasised that non-production of a certificate under Section 65B on an earlier occasion is a curable defect. Reliance was also placed on the judgment of the Supreme Court in *Sonu alias Amar v. State of Haryana 2017 (8) SCC 570*, wherein it was held that the crucial test was whether the defect could have been cured at the stage of marking the document. Applying the said test it held that if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency.

13. Having regard to the said principle of law, the Supreme Court in *State by Karnataka Lokayukta Police Station, Bengaluru Versus M.R. Hiremath Criminal (supra)* held that *the High Court erred in coming to the conclusion that the failure to produce a certificate under Section 65B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise.*

14. The sole contention of Learned Counsel for the petitioner is that since the electronic record produced along with the charge sheet was not accompanied with a certificate under Section 65B of the Evidence Act, same could not have been considered for the purposes of framing of charges.

15. Clearly, in view of the legal position as noticed hereinabove, such an argument is not tenable in law.

16. Further, in the present case the contention of learned APP for the State is that the original device and media have been produced before the court and in case any secondary evidence of the electronic record is sought to be tendered in evidence, an appropriate certificate under Section 65B of the Evidence Act shall be produced.

17. The prosecution has not merely relied on secondary evidence

but is seeking to produce primary evidence i.e. the original device and the media on which the CCTV footage was originally recorded. When the original device and media are produced, as noticed above, there is no requirement of a certificate under Section 65B of the Evidence Act.

18. In view of the above, I find no merit in the petition. Petition is, accordingly, dismissed.

19. It is, however, clarified that this court has neither considered nor opined upon the admissibility or otherwise of the electronic evidence. It would be open to the Trial Court to examine the evidence and to ascertain as to whether the original is being produced or not. If secondary evidence of electronic record is produced, to ascertain as to whether a certificate, as required under Section 65B of the Evidence Act has been filed or not.

20. Order *Dasti* under signatures of the Court Master.

AUGUST 08, 2019
st

SANJEEV SACHDEVA, J