

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 74 OF 2021

Yogesh Arun Wakure

.... Appellant

Versus

The State of Maharashtra & Anr.

.... Respondents

...

Shri. Sudarshan J. Salunke, Advocate for the appellant

Shri. S. D. Ghayal, APP for respondent No.1/State

Shri. S. S. Jadhavar, Advocate for respondent No. 2

....

WITH

CRIMINAL APPEAL NO. 105 OF 2021

Yogesh Arun Wakure

.... Appellant

Versus

The State of Maharashtra & Anr.

.... Respondents

...

Shri. Sudarshan J. Salunke, Advocate for the appellant

Shri. S. D. Ghayal, APP for respondent/State

Shri. S. S. Jadhavar, Advocate for respondent No. 2

....

**CORAM : RAVINDRA V. GHUGE
AND
B. U. DEBADWAR, JJ.**

DATE : 10th MARCH, 2021

PER COURT : -

1. On 04.03.2021, after briefly hearing the learned Advocates/prosecutor for the respective sides, we had passed the following order : -

“1. By Criminal Appeal No.105 of 2021 the appellant seeks to challenge the order dated 22-01- 2021 delivered by the learned Special Judge, Osmanabad, vide which, the report of the investigating agency under Section 169 of the CrPC, has been negated and the Investigating Officer has been directed to submit supplementary charge-sheet against the present appellant / accused - Yogesh.

2. Hearing of this appeal has commenced and as the learned Advocate for the appellant took us through the record available, we noticed that the CDR / SDR compilation at page nos. 194 to 196 set out in Criminal Appeal No.74 of 2021 (appeal paper book), does not reflect that the nodal officer of the cellular service provider has submitted those details.

3. The learned Prosecutor has drawn our attention to certain pages of the case diary pertaining to the case in hand indicating that the Investigating Officer (SDPO) has tendered a communication to the Superintendent of Police, Osmanabad praying for obtaining the CDR / SDR record from the service provider. The trial Court has disbelieved the said record. Ex facie, we find that the said record does not carry the letterhead of the service provider, inasmuch as, the nodal officer of the service provider is empowered to issue such CDR / SDR record print out only on a specific request as is prescribed in law.

4. Since we do not find that there is any authenticity lent to such record, we are directing the Superintendent of Police, Osmanabad to contact the service provider (we are informed that the appellant Yogesh was a subscriber with Jio Reliance) and obtain the CDR/ SDR record for his (appellant - Yogesh) Cell No.9975079298 for the 24 hours, beginning from 19-08-2020 (00.00 hours) ending on 19-08-2020 (23.59 hours). This record shall be urgently placed before

this Court, in view of the commencement of the hearing of this appeal, in a sealed envelope, on 10-03-2021.

5. Since the I.O. has already collected the CCTV footage from Hotel Saptarang, AUSA Road, Latur from 11:00 a.m. till 14:12 hrs, dated 19-08-2020, the transcription of the said footage shall be placed before us on 10-03-2021.

6. In the meanwhile, considering that appellant - Yogesh Wakure has been arrested on 25-08-2020, he is at liberty to seek default bail, from the Trial Court. In the event of Yogesh making an application for default bail, the trial Court shall decide the said application on its merits, within 3 days.

7. Stand over to 10-03-2021 in the urgent category. This matter is part-heard.”

2. Pursuant to our above order, the learned Counsel for the appellant - Yogesh submits, that his Criminal Appeal No. 74 of 2021 can be disposed off as being infructuous since he has been granted default bail by the trial Court on 06.03.2021. As such, Criminal Appeal No. 74 of 2021 is disposed off as being infructuous.

3. In the present Criminal Appeal No. 105 of 2021, the appellant is aggrieved by the direction of the trial Court, below Exh.1 in Special Case No. 99/2020, vide which, the trial Court has expressed an apprehension about the electronic evidence available as well as the production of the CDR / SDR record by a Cellular Service Provider. Further grievance of the appellant is, that the trial Court relied upon the

statement of an alleged eye-witness, on the basis of which, the presence of the accused at the crime spot is alleged in between 12:00 noon to 01:00 pm on 19.08.2020. Shri. Salunke strenuously contends, that when the I.O. himself has submitted his report u/s 169 of the Code of Criminal Procedure (in short 'Cr.P.C.'), concluding on the basis of the electronic evidence, that the present appellant was 60 kms away from the crime spot during the same time frame when the crime occurred, the trial Court cannot sit over the independent view expressed by the I.O. and disbelieve the said evidence by relying on the word of mouth of an alleged eye-witness.

4. The learned Prosecutor for the State and the learned Advocate representing the original complainant, are in unison in contending that the report of the I.O. is not to be accepted by the trial Court, blindly and without scrutiny. Hence, the trial Court was within its jurisdiction in directing the I.O. to submit a supplementary charge-sheet against the appellant-accused Yogesh, in connection with Crime No. 220/2020.

5. We find, that Crime No. 220/2020 was registered in view of the murder of the only male child of the informant. She has two married

daughters. The deceased Suresh is said to have been killed after he had left the agricultural field around 12:00 noon. He had visited the said field along with his mother. The informant stayed back in the field. At around 2:30 pm, a relative of the informant namely Prayagbai had broken the news to the informant that her son has been killed and his body is hung to a tree. Based on the events that occurred, the informant lodged the FIR with the Police Station, Dhoki, Tq. & Dist. Osmanabad.

6. It is undisputed that, an officer of the rank of Sub-Divisional Police Officer was entrusted with the investigation. In all, 6 accused have been named in the FIR and the present appellant is accused no. 6. He was arrested pursuant to interrogation along with all other accused. Presently, accused nos. 1 to 5 are in magisterial custody. Accused no. 6 was also in magisterial custody having been arrested on 25.08.2020. All accused are facing the charge of murder punishable u/s 302, 201, 323, 143, 147, 149 r/w Section 135 of the IPC.

7. We find from the material before us, that the present appellant was found to be in Hotel Saptarang, Ausa road, Latur in between 11:15 am to 02:30 pm on 19.08.2020. The I.O., in the course of his investigation, noticed this aspect and had collected CCTV footage from

11:15 to 14:30 hrs and had produced the transcript, *albeit*, for the period 14:00 hrs till 14.15 hrs. Apprehension was voiced by the learned Prosecutor and the learned Advocate for the informant that if the crime has taken place in between 12:00 noon to 01:00 pm at the crime spot 60 kms away, it would be humanly possible for the appellant to kick start his motorcycle and reach Hotel Saptarang around 14:00 hrs. It is, in this backdrop, that we had called for the viewing and presentation of the transcript, by the I.O., for the entire period in between 11:15 hrs to 14:30 hrs.

8. In addition to the above, we had also ordered that the Nodal Officer of the Cellular Service Provider shall submit specific CDR / SDR details about the appellant based on his cell phone number recorded in our order. That record is also produced before us by the Additional Superintendent of Police, Osmanabad obtained through the Nodal Officer of Reliance Jio Infocomm Limited. The DVD pertaining to the footage is also before us.

9. The copy of the covering letter received by the learned Prosecutor from the I.O. (02 pages), the closed envelope containing CDR / SDR details from the Cellular Service Provider, the communication of the

I.O. to the Nodal Officer dated 05.03.2021, a sealed envelope received from Police Station, Dhoki with the DVD containing the CCTV footage and the two paged report dated 09.03.2021 from the I.O. expressing his views about the CCTV footage, has been placed before us.

10. *Prima facie*, we find from the report of the I.O. dated 09.03.2021, that the present appellant had reached Hotel Saptarang, as is seen in the footage, before 12:00 noon. He came out of the hotel on three occasions to visit the washroom, approximately at 12:42, 13:21 and finally while leaving the hotel around 14:00 hrs. His presence inside the hotel is, therefore, *prima-facie* established on the basis of the said footage.

11. The learned Prosecutor contends that the said footage should not be accepted at its face value. The trial Court could give a second look to the footage. The learned Advocate for the informant supports the contentions of the Prosecutor. The learned Counsel for the appellant opposes the same on the ground that the report of the I.O. and the CCTV footage cannot be disbelieved.

12. It is often said that “humans may lie, but documents would not lie” or “documents would speak louder than words”. An eye-witness claims to have seen the present appellant at the crime spot in between

12:00 to 13:00 hrs. Such is his oral statement. A human cannot be at two places at the same time. The CCTV footage is now accepted to be a piece of electronic evidence and as such, need not be disbelieved, save and except, when there is material before the Court or the I.O. to draw an impression that the electronic evidence has been tampered with or is a manufactured piece of evidence.

13. In our view, Section 45A of the Indian Evidence Act, 1872 would take care of such an eventuality and for the said purpose, the footage could be referred to for opinion of the Examiner of Electronic Evidence provided u/s 79A of the Information Technology Act, 2000. We have no hesitation in forming a view that a report by the I.O. u/s 169 of the Cr.P.C. concluding at the investigation stage that there is no material against a particular person, should not be blindly accepted. Nevertheless, such a report should also not be suspected merely on the ground of suspicion voiced by a litigant. The trial Court should not have discarded the report u/s 169 Cr.P.C. based on the CDR / SDR documents, considering the effect of Section 65B of the Indian Evidence Act. Section 65A of the Indian Evidence Act mandates that evidence relating to electronic record needs to be examined for its admissibility subject to the parameters of Section 65B of the Indian Evidence Act.

14. In **Prashant Bharti Vs. State (NCT of Delhi)**, (2013) 9 SCC 293, the Hon'ble Apex Court has held that the proof of facts based on mobile phone call details must be considered to be conclusive for all intents and purposes. Reliance was placed on an earlier judgment in **Gajraj Vs. State (NCT of Delhi)**, (2011) 10 SCC 675.

15. In **Anvar P.V. Vs. P.K.Basheer and others**, (2014) 10 SCC 473, it was held by the Hon'ble Apex Court that only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45A of the Evidence Act for seeking opinion of the examiner of electronic evidence.

16. In **Union of India Vs. Prakash P. Hinduja and others**, AIR 2003 SC 2612, it was held that the manner and method of investigation is to be left entirely to the Police Office. A Magistrate can not interfere u/s 190 of the Cr.P.C. Refusal by Magistrate to accept final report (closure report) does not mean interference with investigation. The Magistrate is no doubt not bound to accept a final report, commonly called as the closure report, submitted by the Police and if he feels that the evidence and material

collected during investigation justices prosecution of the accused, he may not accept the final report and take cognizance of the offence and summon the accused. But this does not mean that he would be interfering with the investigation, as such. He would be doing so in exercise of powers conferred by Section 190 of the Cr.P.C.

17. In **Satish Sharma and another Vs. State of Gujarath**, AIR 2003 SC 648, the accused were charged of serious offences. Anticipatory bail was refused on 2 occasions. The investigating Agency subsequently tendered/filed a report u/s 169 of the Cr.P.C. before the Court indicating it's intention that all the 3 accused be discharged. The High Court observed that the Officers have tried to interfere with the administration of justice amounting to a serious misconduct and that the State Government should initiate serious action including suspension of such Officers from service. The Hon'ble Apex Court concluded that such observations and directions by the High Court are unjustified. It is difficult to perceive that such a step would amount to interference with the administration of justice. It was thus held that a report u/s 169 of the Cr.P.C. does not amount to interfering with the administration of justice.

18. In view of the above, we do not find that the trial Court has considered the report u/s 169 Cr.P.C. along with the electronic evidence in

the form of a CCTV footage and CDR / SDR record, within the parameters of Section 45A and Section 65B of the Indian Evidence Act. As such, the impugned order dated 22.01.2021 stands quashed and set aside. This appeal is partly allowed with the following directions : -

- A. The appellant, though released on default bail, shall abide by the bail conditions.
- B. The report of the I.O. u/s 169 Cr.P.C. stands restored to the file of Special Case No. 99 of 2020.
- C. The report tendered by the I.O. u/s 169 Cr.P.C. shall be revisited by the trial Court subject to the compliance of Section 45A of the Indian Evidence Act r/w Section 79A of the Information Technology Act, 2000.
- D. After a report is received by the trial Court from the Expert Examiner u/s 45A r/w Section 79A, the trial Court would then decide the fate of the report filed by the I.O. u/s 169.

19. We direct the learned Registrar (Judicial) of this Court to place the documents, inclusive of the closed envelope containing the

CDR / SDR record and the sealed envelope containing the DVD, in an envelope, seal the envelope and transmit it to the learned Special Judge, Osmanabad in Special Case No. 99 of 2020 for compliance of our above directions, through a special messenger, expeditiously. The contents of this envelope which would be opened by the trial Court upon receipt and shall be a part and parcel of the original record in Special Case No. 99 of 2020.

[B. U. DEBADWAR]
JUDGE

[RAVINDRA V. GHUGE]
JUDGE