

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

CRIMINAL WRIT PETITION NO. 38 OF 2022

Suresh alias Sandeep Karbhari Sanap

..PETITIONER

VERSUS

State of Maharashtra

..RESPONDENT

....

Mr. A.A. Yadkikar, Advocate for petitioner

Mr. S.P. Sonpawale, A.P.P. for respondent - State

....

CORAM : R.G. AVACHAT, J.

DATED : 21st FEBRUARY, 2022

PER COURT :

1. Issue notice to the respondent. Learned A.P.P. waives service of notice for the respondent – State.

2. Heard finally with the consent of learned counsel for the parties. The challenge in this petition is to an order dated 30th November, 2021 passed by learned Additional Sessions Judge, Sangamner rejecting application Exhibit 24 moved under Section 91 of the Code of Criminal Procedure ('Cr.P.C.'). The petitioner is one of the accused in Sessions Case No. 38 of 2016. He moved the said application (Exh.24) for issuance of summons to the railway authorities and the authorities of the concerned cellular network companies viz. Airtel, Idea and Vodafone for production of

C.C.T.V. footage and Call Data Record ('C.D.R.') respectively. The C.C.T.V. footage is asked for the period from 21.00 hours to 23.00 hours of 17th March, 2016 of platform no.1 of four local railway stations i.e. two of western railways and two of central railways, as specified in the application. The cell phone numbers and the persons to whom those belong have also been given in the application of which the C.D.R. for the period of 17th March, 2016 to 18th March, 2016 is asked for.

3. The application is silent to state why for such documents were sought to be produced. The learned Judge, in-charge of the sessions case, rejected the application with the following reasons -

“Heard submissions from both sides at length. The counsel for accused submitted that the investigating machinery purposefully dropped this important piece of evidence. It clearly indicates a bias investigating process against the accused. Therefore, there is no alternative with the accused to request to the court to bring this evidence on record. Admittedly, the investigating officer is empowered to make further investigation and bringing additional evidence on record even after filing of the charge sheet. However, the accused cannot asked for such investigation. If any such piece of evidence is important in support of his own defence, he can produce it at the specific stage after the prosecution evidence will over. Apart from it, the accused can bring the evidence through the cross examination of the prosecution witnesses. Any such procedural defect in collecting of appropriate evidence will definitely affect upon the prosecution case and the benefit would

get to accused. Therefore, before beginning of the trial it is not necessary to give such directions for collecting the evidence as per the demand of accused. Accused is at liberty to bringing any relevant piece of evidence in his defence at appropriate stage.”

4. Learned counsel for the petitioner would submit that the petitioner is one of the accused facing charge of having committed offence under Section 302 read with Section 34 of the Indian Penal Code ('I.P.C.'). The alleged offence took place way back on 18th March, 2016 by 01.00 a.m. at village Shedgaon, Tq. Sangamner, Dist. Ahmednagar. At the relevant time the petitioner herein was in Mumbai. Application (Exh.24) was moved on 04th September, 2017 itself. Same came to be rejected after three and half years thereafter. If the order impugned herein is sustained, the petitioner would be prejudiced in his defence. Learned counsel, therefore, urged for allowing the writ petition.

5. Learned A.P.P. would, on the other hand, submit that the petitioner cannot seek direction to investigating officer to make further investigation and collect particular kind of evidence. According to learned A.P.P., the petitioner may move such application when his turn to lead defence evidence would come. He, therefore, urged for dismissal of the petition.

6. The petitioner is one of the accused in sessions case. The charge has been framed against the petitioner and co-accused for the offence punishable under Section 302 read with Section 34 of the I.P.C. in the year 2017. It is informed that not a single witness has yet been examined in spite of framing of charge. The petitioner has come with defence of *alibi*. There can be no dispute over legal proposition that the accused has no right to produce any document at the stage of framing of charge. True, Section 91 of the Cr.P.C. suggests that the Court may, at any stage of investigation or inquiry or trial, issue a summons on the person, in whose possession or power for production of the document or other thing is believed to be.

7. A three Judges Bench of the Hon'ble Supreme Court in the case of ***State of Orissa Vs. Debendra Nath Padhi*** reported in ***(2005) 1 SCC 568*** has observed thus -

“In so far as Section 91 is concerned, it was rightly held that the width of the powers of that section was unlimited but there were inbuilt inherent limitations as to the stage or point of time of its exercise, commensurately with the nature of proceedings as also the compulsions of necessity and desirability, to fulfill the task or achieve the object. Before the trial court the stage was to find out whether there was sufficient ground for proceeding to the next stage against the accused. The application filed by the accused under Section 91 of the Code for summoning and production of document was dismissed and order was upheld by High Court and this Court. But observations were made in para 6 to the effect that

if the accused could produce any reliable material even at that stage which might totally affect even the very sustainability of the case, a refusal to look into the material so produced may result in injustice, apart from averting an exercise in futility at the expense of valuable judicial/public time, these observations are clearly obiter dicta and in any case of no consequence in view of conclusion reached by us hereinbefore. Further, the observations cannot be understood to mean that the accused has a right to produce any document at stage of framing of charge having regard to the clear mandate of Sections 227 and 228 in Chapter 18 and Sections 239 and 240 in Chapter 19.”

8. The facts of the present case indicate that the charge has been framed in 2017 itself. It thus suggest that the trial has commenced, although no prosecution witness was examined by the time the order impugned herein was passed. The same indicates that the turn of the petitioner to lead evidence in his defence would come after long. There is every possibility of the C.C.T.V. footage not being preserved for so long. So far as regards prayer for summons to produce C.D.R. of certain cell phone numbers given in the applications is concerned, learned counsel for the petitioner came around to not press the said prayer.

9. Considering the legal position, a balance is required to be struck, so as to ensure the petitioner to have a fair opportunity to produce evidence in his defence. In view of this Court, the same can be done with the

directions to the trial Court to request the authorities concerned named in the application (Exh.24) from whom production of C.C.T.V. footage is solicited, to preserve the same, if the same is available.

10. Criminal writ petition is, therefore, disposed of in terms of following order :-

The trial Court, first ascertain from the authorities concerned as to whether such C.C.T.V. footage, as has been asked for vide application Exh. 24, is available with them, and if so, ask them to preserve the same so as to enable the petitioner/accused to seek its production at the relevant time when his turn for defence evidence would be there. Non availability of C.C.T.V. footage shall not be a reason to raise adverse inference against the prosecution.

(R.G. AVACHAT, J.)

SSD