



2024:DHC:5990



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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 08.08.2024

+ CRL.REV.P. 452/2024

MANOJ RANA @ TINKU

.....Petitioner

Through: Mr.Vikas Bhardwaj, Advocate

versus

THE STATE

.....Respondent

Through: Ms. Manjeet Arya, APP for State with
SI Desh Raj, P.S. BHD Nagar.
Mr. Shekhar Nanavati and Ms. Shikha
Gupta, Advocates with prosecutrix in
person.

CORAM:

HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA

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J U D G M E N T**ANOOP KUMAR MENDIRATTA, J (ORAL)****CRL.M.A. 23527/2024**

An application under Section 482 Cr.P.C. has been preferred on behalf of the petitioner for restoration of Revision Petition which was dismissed in default as well as for non-prosecution vide order dated 01.08.2024.

Issue notice. Learned APP for the State alongwith learned counsel for prosecutrix appear on advance notice and accept notice.

Considering the facts and circumstances, application is allowed. Revision Petition be restored to its original number.

Application is accordingly disposed of and Revision Petition is taken up for consideration.

CRL.REV.P. 452/2024**1. Criminal Revision Petition under Section 397 of the Code of Criminal**

CRL.REV.P. 452/2024

Page 1 of 7



2024:DHC:5990



Procedure, 1973 ('Cr.P.C.') has been preferred on behalf of the petitioner challenging order dated 23.02.2024 passed by learned ASJ (FTSC) (POCSO)-02, Dwarka Courts, Delhi whereby an application preferred on behalf of petitioner/accused in FIR No. 299/2013, under Sections 376/328/363/366/342/368/34 IPC and Sections 8/12 of POCSO Act, registered at P.S. Baba Haridas Nagar for sending mobile phone of accused for CFSL examination in order to ascertain the genuineness of the messages allegedly sent by the prosecutrix to the accused, was declined.

2. Learned counsel for the petitioner submits that certain messages were forwarded by victim to the petitioner / accused prior to registration of FIR, which are relevant to prove the innocence of the petitioner and reflect that accused has been falsely implicated. He further urges that FSL examination of the phone is necessary to ascertain that the aforesaid messages are genuine.

3. On the other hand, learned APP for the State alongwith learned counsel for prosecutrix vehemently oppose the petition and submit that mobile phone was not submitted by the petitioner during investigation at the relevant time and the application was belatedly moved on behalf of the petitioner to delay the proceedings after about eight months of closure of prosecution evidence as observed in the impugned order passed by learned Trial Court. It is also submitted that the petitioner accused did not confront the prosecutrix with the aforesaid messages during the course of prosecution evidence.

4. I have given considered thought to the contentions raised.

Considering the background facts of the case and nature of allegations, the petitioner / accused cannot be precluded from leading evidence in



defence with respect to messages exchanged between him and prosecutrix, which the accused considers would substantiate his defence and prove his innocence. Merely because the phone of accused was not seized during investigation or was not handed over by the petitioner to the IO would not foreclose his right to produce and lead the evidence in defence, if the same is relevant.

5. In the aforesaid context, it may be appropriate to notice the observations of the Hon'ble Apex Court in *Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal*, (2020) 7 SCC 1, in para 78 & 79 as under:

“78. Section 136 which confers a discretion upon the Judge to decide as to the admissibility of evidence reads as follows:

“136. Judge to decide as to admissibility of evidence.— When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first-mentioned, unless the party undertakes to give proof of such fact, and the court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.”

79. There are three parts to Section 136. The first part deals with the discretion of the Judge to admit the evidence, if he



thinks that the fact sought to be proved is relevant. The second part of Section 136 states that if the fact proposed to be proved is one, of which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned. But this rule is subject to a small concession, namely, that if the party undertakes to produce proof of the last mentioned fact later and the court is satisfied about such undertaking, the court may proceed to admit evidence of the first mentioned fact. The third part of Section 136 deals with the relevancy of one alleged fact, which depends upon another alleged fact being first proved. The third part of Section 136 has no relevance for our present purpose.”

6. However, instead of outrightly sending the phone for FSL examination, the matter needs to be seen in perspective if the petitioner / accused can lead evidence in defence with respect to the messages exchanged between the petitioner and prosecutrix, which constitutes a part of electronic record and is relevant.

7. Observations in 81 to 84 and para 73.1 to 73.3 in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal** (supra) for purpose of proving the electronic evidence are further pertinent to be noticed and may be beneficially reproduced :

“81. What is laid down in Section 65-B as a precondition for the admission of an electronic record, resembles what is provided in the second part of Section 136. For example, if a fact is sought to be proved through the contents of an electronic record (or information contained in an electronic record), the Judge is first required to see if it is relevant, if the first part of Section 136 is taken to be applicable.

82. But Section 65-B makes the admissibility of the information contained in the electronic record subject to certain conditions, including certification. The certification is for the purpose of proving that the information which constitutes the computer



output was produced by a computer which was used regularly to store or process information and that the information so derived was regularly fed into the computer in the ordinary course of the said activities.

83. In other words, if we go by the requirements of Section 136, the computer output becomes admissible if the fact sought to be proved is relevant. But such a fact is admissible only upon proof of some other fact, namely, that it was extracted from a computer used regularly, etc. In simple terms, what is contained in the computer output can be equated to the first mentioned fact and the requirement of a certification can be equated to the last mentioned fact, referred to in the second part of Section 136 read with Illustration (b) thereunder.

84. But Section 65-B(1) starts with a non obstante clause excluding the application of the other provisions and it makes the certification, a precondition for admissibility. While doing so, it does not talk about relevancy. In a way, Sections 65-A and 65-B, if read together, mix up both proof and admissibility, but not talk about relevancy. Section 65-A refers to the procedure prescribed in Section 65-B, for the purpose of proving the contents of electronic records, but Section 65-B speaks entirely about the preconditions for admissibility. As a result, Section 65-B places admissibility as the first or the outermost checkpoint, capable of turning away even at the border, any electronic evidence, without any enquiry, if the conditions stipulated therein are not fulfilled.”

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*“73.1. Anvar P.V. [Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108], as clarified by us hereinabove, is the law declared by this Court on Section 65-B of the Evidence Act. The judgment in **Tomaso Bruno [Tomaso Bruno v. State of U.P., (2015) 7 SCC 178 : (2015) 3 SCC (Cri) 54]**, being per incuriam, does not lay down the law correctly. Also, the judgment in **Shafhi Mohammad [Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801 : (2018) 2 SCC 807 : (2018) 2 SCC***



(Civ) 346 : (2018) 2 SCC (Civ) 351 : (2018) 1 SCC (Cri) 860 : (2018) 1 SCC (Cri) 865] and the judgment dated 3-4-2018 reported as **Shafhi Mohd. v. State of H.P.** [**Shafhi Mohd. v. State of H.P.**, (2018) 5 SCC 311 : (2018) 2 SCC (Cri) 704], do not lay down the law correctly and are therefore overruled.

73.2. The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him. In cases where the “computer” happens to be a part of a “computer system” or “computer network” and it becomes impossible to physically bring such system or network to the court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4). The last sentence in para 24 in **Anvar P.V.** [**Anvar P.V. v. P.K. Basheer**, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] which reads as “... if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act ...” is thus clarified; it is to be read without the words “under Section 62 of the Evidence Act, ...”. With this clarification, the law stated in para 24 of **Anvar P.V.** [**Anvar P.V. v. P.K. Basheer**, (2014) 10 SCC 473 : (2015) 1 SCC (Civ) 27 : (2015) 1 SCC (Cri) 24 : (2015) 1 SCC (L&S) 108] does not need to be revisited.

73.3. The general directions issued in para 64 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67-C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers.”



2024:DHC:5990



8. In view of aforesaid legal position, the appropriate course for the learned Trial Court is to permit the petitioner / accused to lead evidence in defence, if the petitioner / accused so desires. The same rules out the forwarding of the phone for FSL examination as sought by the accused and would prevent shutting down of relevant evidence being considered by the learned Trial Court. The course adopted by the learned Trial Court of simply dismissing the aforesaid application is erroneous.

Petition is accordingly disposed of leaving it open to the petitioner to lead evidence in defence in accordance with law. An opportunity in this regard, shall be granted to petitioner by learned Trial Court, if he desires to lead defence evidence. Pending applications, if any, also stand disposed of.

A copy of this order be forwarded to learned trial court for information and compliance.

ANOOP KUMAR MENDIRATTA, J

AUGUST 8, 2024/v