

(2020) 01 BOM CK 0114

In the Bombay High Court

Case No : Criminal Writ Petition No. 1579 Of 2019, Criminal Application No. 3214 Of 2019

Dhanshree Pramod Sawji

APPELLANT

Vs

State Of Maharashtra And Anr

RESPONDENT

Date of Decision : 13-01-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 482
Indian Penal Code, 1860 — Section 34, 354, 504, 506
Evidence Act, 1872 — Section 3, 59, 64, 65A, 65B, 65(b)(4), 65B(1)
Information Technology Act, 2000 — Section 2(t)
Constitution Of India, 1950 — Article 226, 227

Citation : (2020) 01 BOM CK 0114

Hon'ble Judges : Vibha Kankanwadi, J

Bench : Single Bench

Advocate : AA Fulfagar, PR Katneshwarkar, BV Virdhe, SS Jaiswal

Final Decision : Disposed Of

Judgement

- 1) Rule. Rule made returnable forthwith by consent of parties.
- 2) Original Informant is required to invoke the constitutional powers of this Court under Articles 226 and 227 of Constitution of India as well as inherent powers of this Court, under Section 482 of Code of Criminal Procedure to challenge the order passed on 04-06-2019 and 26-08-2019 by learned Judicial Magistrate First Class, Jalna; thereby allowing the respondent No.2/ original accused to put questions in respect of electronic evidence.
- 3) The factual matrix leading to the petition are that, respondent No.2 with one child-in-conflict with law, stood prosecuted for the offence punishable under Section 354, 504, 506 r/w. 34 of Indian Penal Code. The incident is stated to have occurred when the informant had gone to a shop for purchasing cake. After presentation of the charge-sheet against present respondent No.2, charge has been framed against him. The trial proceeded after he has pleaded not guilty.

Examination-in-chief of the informant was recorded. Her cross-examination was completed on 14-12-2016. Thereafter it appears that as the matter was still pending, an application at Ex.37 came to be filed on behalf of the accused on 16-05-2018 for re-calling of PW 1, i.e. Present petitioner/informant and allowing the defence to cross-examine her. It was contended in the said application that accused has obtained a copy of the recording of CCTV camera in the form of CD with great efforts. It was specifically stated in the application that the shop owner had left the place, at the time of alleged incident, and therefore, the accused could not secure the said piece of evidence at the time when cross-examination of the informant was conducted on his behalf earlier. He could secure the CCTV footage after her cross. She has not disputed that there were CCTV cameras in the shop. The investigating officer had not collected the said footage. It was further contended that he was using another mobile during 2011-2012 and that mobile had got damaged. He has restored the password from his Facebook account. He could not collect the conversation data with informant, before the cross-examination of the informant earlier conducted. Now, he wants to produce both the pieces of evidence and wants to cross-examine the informant. He is not filling up the lacuna but it is necessary under these circumstances. Hence, he prayed that she be re-called for the cross-examination.

4) The application was objected by the learned APP on behalf of Prosecution. It has been stated that, at any earlier point of time, the accused had not called for any such evidence. The informant had claimed ignorance about existence of the CCTV cameras in her cross. It is not necessary to re-call the informant.

5) After hearing both sides, the learned Magistrate has allowed the application Ex.37 on 04-06-2019. Accordingly summons was issued to the informant and her further cross has been completed on 26-08-2019. The CCTV footage was shown to the informant in cross and her answers were recorded. Thereafter the advocate, who was representing the informant sought time to challenge the order below Ex.37 and on that count, the matter was adjourned.

6) Interestingly, the application Ex.38 was filed with application Ex.37 on the same day i.e. 16-05-2018. Application Ex.38 was for the production of document i.e. CCTV footage. No reason was given in the application as to why the application is filed at that stage. It was only contended that accused wanted to produce the CCTV footage and permission be granted.

7) Learned APP had given say to the application Ex.38 on the same day, on which he had filed say to application Ex.37 i.e. 01-08-2018. It was contended that the accused wanted to produce the recording of CCTV footage by recording it on CD and the conversation on Facebook in the form of text. However, this evidence can not be accepted under the provisions of Indian Evidence Act. Unless those documents are produced along with necessary certificate, they can not be allowed to be produced.

8) Learned Magistrate has not passed any order on 04-06-2019 on application

Ex.38, but allowed the said application on 26-08-2019 i.e. on the day the informant's cross was conducted. The order passed by learned Magistrate on Ex.38 is reproduced here:

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Perused application and say filed. Heard both parties. Ld. APP objected application on ground that certificate u/s. 65-B of Evidence Act is not produced. Accused has right to defend. The CD may help him to defend himself. Want of certificate will be taken into consideration when document already tendered in evidence. Hence, production of CD is allowed.

Sd/-

26-8-19

JMFC"

. Both the orders below Ex.37 and 38 are challenged by the original informant in this petition.

9) Heard learned Advocate Shri. A.A. Fulfagar h/f Advocate Shri. P. R. Katneshwarkar for petitioner/ original informant; learned A.P.P. Shri. B.V. Virdhe for State/respondent No.1 and learned Advocate Shri. S. S. Jaiswal for respondent No.2/ original accused.

10) It has been submitted on behalf of the petitioner that the learned Magistrate has committed grave error in allowing the production of the CD. The point, that accused had not produced certificate under Section 65-B of Evidence Act, was not considered at all. Without giving any explanation by the accused, accused was allowed to produce the CD and it was even shown to the informant by recalling her.

11) Learned APP has supported the submissions made on behalf of petitioner. It was submitted that unless production would have been legally allowed, the informant ought not to have been re-called.

12) Per contra, the learned Advocate for respondent No.2 submitted that the accused has right to defend himself. Though there was facility of CCTV cameras in the shop, the investigating officer has not collected the same. Therefore, accused was required to obtain the same by using his sources. The CCTV footage was shown to the informant and she has admitted the situation. No error has been committed by the learned Magistrate. The point as regards certificate under Section 65-B of Evidence Act has been kept open, therefore, no prejudice is going to be caused to the prosecution or informant.

13) At the outset it is required to be observed that merely because an accused has right to defend that does not mean that a Judge should allow those questions also to be put to a witness which are not relevant and / or admissible. Learned Magistrate in this case has totally failed to consider that he was required

to decide application Ex.38 first, which was for allowing the accused to produce documents. Unless the production would have been allowed, there was no question of re-calling the witness. He has done exactly reverse thing. He had re-called the informant for cross-examination on those point by passing order on application Ex.37, in respect of those documents which were yet to be allowed to be produced on 26-08-2019. After the witness had arrived on that day, it appears that he has hurriedly decided the application Ex.38. Learned Magistrate had failed to consider that accused had not given any reason in application Ex.38 as to why he could not produce those documents or document on any earlier point of time. Perusal of application Ex.38 would show that it has been drafted in a very causal manner. Such application on the face of it, could not have been allowed. As aforesaid, since application Ex.37 for re-calling was already allowed by the learned Magistrate, it appears that the contents of that application were considered by him while allowing application Ex.38. Even the application Ex.37 is silent on the point as to from whom or from whose custody the CCTV footage has been collected by accused. It is not the case of the accused that he got it from the shop-keeper. If he was interested to bring the said piece of evidence on record then he could have called the shop-keeper for evidence along with CCTV footage. Shop-keeper could have been examined as his witness. Accused has not adopted the legal permissible mode. In application Ex.37 itself, it is stated that the said CCTV footage is 'obtained'. Further the learned Advocate for respondent No. 2 submits before this Court that accused has "used his sources" to collect the footage. Such piece of evidence can not be allowed to be produced unless legal mode is adopted. Learned Magistrate appears to have swayed away with the fact that accused wants to defend himself.

Learned Magistrate failed to consider that there are rights in favour of prosecution/ informant also.

14) The evidence which accused intends to produce is an electronic evidence. Section 3 of Indian Evidence Act defines word 'Evidence'.

"Evidence" means and includes-

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.

15) Indian Evidence Act also provides that the expression 'electronic records' shall have the meaning assigned to it in Information Technology Act, 2000. Section 2(t) of IT Act defines 'electronic record' as - "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;".

Therefore, accused wanted to produce 'electronic record' where the data was

recorded. Learned Magistrate ought to have considered as to whether he could have allowed the production of the said record simply under the guise that accused wanted to defend himself.

16) Section 64 of Indian Evidence Act prescribes that documents must be proved by primary evidence except in the cases mentioned in subsequent provisions. That means the Courts of Law must insist upon the production of primary evidence. Section 65-A of the Evidence Act provides that the contents of electronic records may be proved in accordance with the provisions of section 65-B of the Evidence Act. Section 65-B of the Evidence Act provides for the admissibility of electronic records. Taking into consideration the nature of the electronic record, a special provision has been made as the evidence of such nature would be generated by or through computer. The section provides that any information contained in electronic record shall be deemed to be a document also, if the conditions mentioned in the section are satisfied and shall be admissible in any proceeding, without further proof or production of the original, as the evidence of any contents of the original or of any facts stated therein of which direct evidence would be admissible. Thus, unless the conditions mentioned in the section are satisfied, the said record can not be held to be admissible. The conditions referred to in sub-section 1 of Section 65-B of the Evidence Act are enumerated in sub-section(2) as follows:

- (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.

Thus, when any electronic record is produced, the person producing it should at least show and state about these conditions. In *Anwar P. V. V/s. P. K. Bashir* [(2014) 10 SCC 473] held that, -"Any documentary evidence by way of an electronic record under the Evidence Act, in view of Section 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. However, in the case of 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, Hon'ble Supreme Court has held that Section 65-B (4) is attracted in any proceedings "where it is desired to give a statement in evidence by virtue of this section". Emphasizing 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. Reliance was placed on the earlier decision in Union of India v/s. CDR Ravindra V Desai [2018 (16) SCC 273] wherein it was emphasised that non-production of a certificate under Section 65-B of Evidence Act on an earlier occasion is a curable defect. Reliance was also placed on the judgment of the Supreme Court in Sonu @ Amar v/s. 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 was 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. Thus, though it may be considered that the production of certificate is a curable defect; yet, accused in present case should explain from whose custody he has procured the said CCTV Footage. Unless the basic authenticity of the said document/ electronic record is shown, it can not be even used in cross-examination.

17) At the cost of repetition, it will have to be observed that the learned Magistrate appears to have got swayed away with the rights of accused to defend himself. He had forgotten the right of the prosecution/informant also to have a fair trial based on admissible evidence. A Judge can not allow those questions to be put to a witness which are inadmissible in nature. No doubt, sometimes it may not be possible to decide the admissibility of a question or document when the evidence is being recorded. This Court today itself in Criminal Writ Petition No.1764 OF 2019 Sanjay s/o Shankar Bhalkar v/s. State has held that a Judge has to control the cross-examination of a witness and he has to protect the interest of the witness also.

18) The procedure adopted by learned Magistrate was wrong. When the accused had not explained any reason in his application Ex.38, which was for production of document; there was no question of allowing the informant to re-call for cross. Further the learned Magistrate has failed to see that he had not allowed the production of document first, but then went on to re-call the witness in advance. Neither in application Ex.38 nor in Ex.37, the accused has disclosed the source from where he has secured the CCTV footage. There was no attempt on his part

earlier to call the owner of the said shop, where the CCTV cameras are installed. He also says that he has downloaded the said footage on the CD and has produced it. That means the manner in which the copy of the original record was made has not been explained. It appears that the CD has been got produced without its transcription. When the authenticity of the document was raised, then at least certain prima facie compliance ought to have been got done, before recalling the witness by the learned Magistrate. When all these facts and circumstances were not observed by the learned Magistrate, though in normal course it ought not to have been observed, it will have to be observed that the impugned orders below Ex.37 and 38 are sheer example of non-application of mind and non-adherence of basic provisions of law. They are patently illegal, hence, deserve to be set aside by invoking the constitutional powers under Article 226 and 227 of Constitution of India and inherent powers of this Court under Section 482 of the Code of Criminal Procedure.

19) The order passed below Ex.37 on 04-06-2019 and Ex.38 on 26-08-2019 by learned Judicial Magistrate First Class, Jalna in RCC No.827 of 2015 are hereby set aside. Those applications stand rejected. Needless to say that the evidence of the informant recorded by the learned Magistrate on 26-08-2019 shall not be read in evidence, which was in pursuant to order passed on 04-06-2019, which now stood set aside. The writ petition stands allowed in aforesaid terms. In view of disposal of the writ petition, Criminal Application No.3214/2019 stands disposed of.