

(2018) 01 GUJ CK 0005
In the Gujarat High Court
Case No : 356 of 2016

JOY KIRITBHAI PARMAR

APPELLANT

Vs

SNEHIKA @ SNEHA NAGINDAS KHANDERKAR & ANR

RESPONDENT

Date of Decision : 17-01-2018

Acts Referred:

Citation : (2018) 01 GUJ CK 0005

Hon'ble Judges : S.G. Shah

Bench : Single Bench

Advocate : SR YADAV, MAKBUL I MANSURI, MANAN MEHTA

Judgement

1. Heard learned advocate Mr.S.R.Yadav for the applicant, learned advocate Mr.M.I.Mansuri for respondent no.1. whereas learned APP

Mr.Manan Mehta for the respondent State. Perused the record.

2. Petitioner herein is facing charges under The Domestic Violence Act at the hands of respondent no.1 - his wife. During the evidence before the

Trial Court, the petitioner has produced certain CD with audio recording to prove that respondents no.1 - his wife is having illicit relations with

some other man. The petitioner has categorically stated in his pleadings about such evidence and when he has filed his affidavit as examination-in-

Chief being Exh.25 sworn on 21.02.2015, he has categorically stated on oath in paragraph no.7 of such affidavit that he is producing evidence

regarding relationship of his wife including audio recording of CD with list of documents. Such list of documentary evidence is referred in

examination-in-Chief, copy of which is produced at Annexure E, which confirms that petitioner has produced call details of the respondents, her

facebook profile so also audio-clip and video-clip on CD and DVD respectively.

Therefore, after cross examination of the petitioner, when respondent wife could not rebut such evidence on oath referred and produced by the petitioner and on the contrary, during her cross examination when respondent - wife has admitted that voice record on audio CD is of her relatives, petitioner has requested the Trial Court being Chief Metropolitan Magistrate, Ahmedabad to exhibit such CD. Thereby, though there is admission of the respondent - wife that voice of audio CD is of one Fulkeriyaben who is maternal aunt of respondent wife (masi i.e. sister of the mother of the wife), the Trial Court has refused to admit such audio CD in evidence on record and by order dated 12.08.2015 rejected the application of the petitioner at Exh.42. While doing so, the Trial Court has simply observed and held that since it is not confirmed that whether CD is primary or secondary and since certificate of registration of the institution is not produced to confirm its genuineness, it could not be admitted in evidence. Therefore, petitioner has no option but to challenge the order dated 12.08.2015 below Exh.42 in Criminal Misc. Application No.276 of 2012 so also judgment and order dated 26.04.2016 in Criminal Appeal No.490 of 2015 by the Sessions Court, when Sessions Court has also confirmed the order of the Trial Court and rejected the revision application and thereby, refused to accept the CD as evidence on record. While doing so, the Sessions Court has gone one step further by stating that witness was not asked to identify the voice.

3. Unfortunately, both the Courts below have failed to realize that once respondent no.1 has admitted that voice in the audio CD is of her relatives and one of the voice is of sister of her mother (masi - maternal aunt), practically, burden of proof gets shifted from the petitioner to respondent to explain that voice in CD is not of her relatives or that it is not a genuine document but when respondent wife has failed to rebut the evidence adduced by the petitioner, the Court cannot refuse to admit it as an evidence. It is also clear that admission of evidence does not mean that every time it is to consider that it proves the certain fact in manner in which person who has adduced evidence wants to prove it. In simple words, admission of evidence is not sufficient for determination of the case since it would depend upon interpretation of such evidence with reference to the allegation and other evidence proved on record.

4. Otherwise also, so far as evidence of CD is concerned, law is now well settled by following citations:

1. In the case of *Bipin Shantilal Panchal v. State of Gujarat and Another*, reported in AIR 2001 SC 1158 (1), whenever an objection is raised

during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial Court can make a note of such objection

and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections

to be decided at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the Judge or

Magistrate can keep such evidence excluded from consideration. There is no illegality in adopting such a course. The Court however made it clear

that if the objection relates to deficiency of stamp duty of a document the Court has to decide the objection before proceeding further. For all other

objections the procedure suggested above can be followed.

2. In the case of *Ghanshyambhai Madhavlal Patel v. State of Gujarat and Another*, in Special Criminal Application No.5012 of 2014,

Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it

is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be

zealous in ensuring that there is no breach of the same. From the above decision it is apparent that the CD itself is primary and direct

evidence admissible as to what has been said and picked up by the recorder. The decision of the High Court of Judiciary in *Hopes*"

Case, (1960) Scots Law Times 264 and held that according to the said decision the tape recorded conversation was admissible as

direct evidence.

In *Yusuffalli's* case, (1967) 3 SCR 720 = (AIR 1968 SC 147) the question was whether a conversation between the complainant

and a person, who later figured as an accused on a charge of offering bribe, and recorded on tape was admissible in evidence. It is

seen from the decision of this Court that the tape recorder was played in Court at the trial of the accused. This Court held that the

evidence of the complainant was sufficiently corroborated by the taperecorder

and observed at p. 723:

The contemporaneous dialogue between them formed part of the resgestae and is relevant and admissible under Section 8 of the

Indian Evidence Act. The dialogue is proved by Shaikh. The tape record of the dialogue corroborates his testimony. The process of

tape recording offers an accurate method of storing and later reproducing sounds. The imprint on the magnetic tape is the direct effect

of the relevant sounds. Like a photograph of a relevant incident, a contemporaneous tape record of a relevant conversation is a

relevant fact and is admissible under Section 7 of the Indian Evidence Act"".

Evidence based on conversations on telephone is admissible provided the identity of the person with whom the witness spoke or the

person whom he heard speak is satisfactorily established.

The tape, itself, is primary and direct evidence admissible as to what has been said and picked up by the recorder (N. Sri Rama

Reddy v. V. V. Giri, AIR 1972 SC 1162. It is a document as defined in Section 3 of the Evidence Act and stands on no different

footing than photograph (Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra, AIR 1975 SC 1788). However, such

evidence must be received with caution (Yusufalli Esmail Nagree v. State of Maharashtra, AIR 1968 SC 147. The conditions for

admissibility of a tape recorded statement are

(1) The voice of the speaker must be duly identified by the maker of the record or by other who recognise his voice. In other words,

it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the

speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the

voice of the speaker.

(2) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence direct or

circumstantial.

(3) Every possibility of tampering with or erasure of a part of tape recorded statement must be ruled out otherwise it may render the

said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of Evidence Act.

(5) The recorded cassette must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.

(Ram Singh v. Col. Ram Singh, AIR 1986 SC 3).

3. In the case of Sunil Panchal V. State of Rajasthan reported in 2016 CRI.L.J. 4238 the Court, while discussing admissibility of tape recorded

evidence in light of Sections 7,8 and 65 B held that tape recorded cassette is primary and direct evidence of what has been said and recorded.

Thus tape recorded conversation is relevant fact and admissible under Section 7 and Certificate under Section 65 B is not required.

5. Overall reading of above citations, makes it clear that in view of above settled legal position, the impugned order has resulted into irregularity

when there is prima facie evidence in favour of the petitioner, certain facts which are very much material between the parties and for deciding the

dispute between the parties, therefore, impugned order since needs to be interfered by quashing and setting aside the impugned order. Hence,

Criminal Revision Application is allowed whereby order dated 22.08.2016 passed by learned 6th Additional Sessions Judge, Bhavnagar in

Criminal Revision Application No.15 of 2016 and order dated 24.07.2015 passed by learned Chief Judicial Magistrate, Bhavnagar in Criminal

Case No.4250 of 2013 are hereby quashed and set aside which results into allowing application at Exh.42, thereby, admitting the CD as an

evidence. However, it is made clear that admission of CD as evidence does not confirm anything except existence of evidence in form of

conversation between the concerned persons in form of audio recording and therefore, it should be appreciated in accordance with law by the

Trial Court while deciding the main matter which can be done based upon evidence available on record.