

Ashok Kumar Tomar vs State Of U.P. And Another on 28 February, 2025

Author: Rajeev Misra

Bench: Rajeev Misra

HIGH COURT OF JUDICATURE AT ALLAHABAD

?Neutral Citation No. - 2025:AHC:36700

Court No. - 71

Case :- APPLICATION U/S 482 No. - 33118 of 2024

Applicant :- Ashok Kumar Tomar

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Ramesh Chandra Tiwari, Sr. Advocate

Counsel for Opposite Party :- Ajay Kumar Kashyap, G.A., Niharika Dubey, Vishakha Dubey

Hon'ble Rajeev Misra, J.

1. Heard Mr. Anoop Trivedi, the learned Senior counsel assisted by Mr. R.C. Tiwari, the learned counsel for applicant, Mr. A.K. Sand, the learned Government Advocate assisted by Mr. Pankaj Srivastava, the learned A.G.A. for State-opposite party-1 and Mr. P.C. Srivastava, the learned counsel representing first informant-opposite party-2.

2. Perused the record.

3. Applicant-Ashok Kumar Tomar, who is a named and charge sheeted accused and also facing trial before Court below, has approached this Court by means of present application under Section 482

Cr.P.C. with the following prayer:-

"It is, therefore, most respectfully prayed that the Hon'ble Court may graciously be pleased to;-

(i) Set aside the impugned order dated 26.07.2024 passed by learned Sessions Judge, Agra in S.T. No. 1817/2022 (State Vs. Ashok Tomar), U/s 302/506 IPC, PS-Jagdishpura, District-Agra, vide Annexure No. 22 to the affidavit and allow the application 44-B of the applicant.

(ii). Stay the further proceedings of S.T. No. 1817/2022 (State Vs. Ashok Tomar), U/s 302/506 IPC, PS-Jagdishpura, District-Agra pending before learned Sessions Judge, Agra during the pendency of present application before this Hon'ble Court.

(iii) Pass such other or further order, which this Hon'ble Court may deem fit and proper under the circumstances of the case.

(iv). Award cost in favour of the applicant."

And/or pass such other and further order which this Hon'ble Court may deem fit and proper, under the facts and circumstances of the case."

4. Record shows that in respect of an incident, which is alleged to have occurred on 14.07.2022, a prompt FIR dated 14.07.2022 was lodged by first informant-opposite party-2-Sharad Kumar Gupta and was registered as Case Crime No. 0415 of 2022, under Sections 307, 506 IPC, Police Station-Jagdishpura, District-Agra. In the aforesaid FIR, two persons namely (1) Ashok Tomar (applicant herein), and (2) Sonu Tomar were nominated as named accused, whereas an unknown person was also arraigned as an accused.

5. After aforementioned FIR was lodged, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter-XII Cr.P.C. He examined the first informant and other witnesses under Section 161 Cr.P.C. He also visited the place of occurrence and recovered the CCTV footage from the DVR of cameras installed at the place of occurrence. The CCTV footage was recorded in a Pen Drive and taken into custody by the Investigating Officer on 19.07.2022. The said fact is clearly discernible from the document, which is part of case diary and is occurring at page 60 of the paper book.

6. Apart from above, Investigating Officer on the basis of above and other material collected by him, during course of investigation, came to the conclusion that complicity of Ashok Kumar Tomar is fully established in the crime in question up to that stage. Accordingly, he submitted the charge sheet/police report dated 09.10.2022 in terms of Section 173(2) Cr.P.C., whereby and whereunder, aforementioned accused was charge sheeted under Sections 302, 506 IPC. Subsequently, Investigating Officer submitted another charge sheet dated 14.01.2023, whereby another accused Bhanu Pratap Tomar @ Sonu Tomar was charge sheeted under Sections 302, 120-B and 506 IPC.

7. After submission of aforementioned charge sheet/police report, cognizance was taken upon same by the Jurisdictional Magistrate in exercise of jurisdiction under Section 190(1)(b) Cr.P.C. However, as offence complained of is triable exclusively by the Court of Sessions, therefore, the concerned Magistrate, accordingly, first complied with the mandate of Section 207 Cr.P.C. (supply of documents to accused) and thereafter, in line with Section 209 Cr.P.C., committed the case to the Court of Sessions. Resultantly, Sessions Trial No. 1817 of 2022 (State Vs. Ashok Tomar), under Sections 302, 506 IPC, Police Station-Jagdishpura, District-Agra came to be registered. On date, the same is said to be pending in the Court of District and Sessions Judge, Agra.

8. During pendency of aforementioned Sessions Trial, accused-applicant filed an application dated 15.06.2023 (Paper No. 15-B) with the prayer that during course of investigation, Investigating Officer had recovered the CCTV footage of the cameras installed at the place of occurrence from the DVR. The said material was transferred in a Pen Drive and made part of the case diary. Since the aforesaid material shall fall in the category of a document but the same was not supplied by the prosecution to the accused. Accordingly, it was prayed by accused-applicant that a direction be issued to the prosecution to supply the said document to accused-applicant. The said application is on record as Annexure-5 to the affidavit filed in support of present application.

9. Aforementioned application filed by accused-applicant was opposed by the prosecution. It, accordingly, filed an objection dated 19.07.2023 (Paper No. 16-B) disputing the aforementioned application.

10. However, Court below upon appraisal and appreciation of material on record, came to the conclusion that accused-applicant is clearly entitled to the copy of Pen Drive prepared by the Investigating Officer and relied upon by the prosecution. Accordingly, vide order dated 19.07.2023, Court below allowed the aforementioned application dated 15.06.2023 (Paper No. 15-B) filed by accused-applicant. Since the order dated 19.07.2023 passed by Court below has much relevance with regard to the issues involved in present application, accordingly, the same is extracted herein under:-

"19.07.2023 Put up today. Accused Ashok Tomar has been produced under custody from jail. Today another learned private counsel for the complainant side has appeared, filed Vakalamama and objection 16-B against the application 15-B. Learned counsel for the accused persons and L.d. D.G.C. (Cri) for prosecution are also present.

Heard the learned counsels on application 15-B which has been moved on behalf of the accused, briefly stated, on the grounds that the I.O. of the maner has also submitted a pen-drive containing CCTV footage of certain cameras from the crime scene, such pen-drive also comes into the category of document, but no copy thereof has been provided the accused persons. Such CCTV footage has been relied on by the prosecution witness Sharad Kumar Gupta, PW-1 and hence he has got to be cross-examined in that respect also. On such grounds it has been prayed to provide a copy of the pen-drive containing the aforementioned CCTV footage and to further get

it played during the cross-examination of the aforementioned witness.

The learned private counsel for the prosecution has filed objection 16-B to the intent that the application has been moved with the object of delaying the trial. The copies of entire prosecution papers were provided to the accused persons on 28.10.2022. But no application was earlier moved by the accused persons regarding the supply of such pen-drive.

A perusal of the record of concerned Magistrate Court reveals that in the committal order dated 28.10.2022, it has been mentioned that the entire copies have been provided to the accused. But there is nothing on record to show that amidst such copies of documents, copy of the pen-drive has also been provided to the accused. The learned private counsels for the complainant could also not point out any such instance from the original record.

On the other hand, the learned counsel for the accused persons has drawn my attention to the provision contained in Section 65(B)(1) of Evidence Act wherein the legislature has provided that such electronic evidence shall be deemed to be also document. Moreover, it has also been pointed out that prosecution witness Sharad Kumar Gupta in his evidence as P.W.-1 has also relied on such CCTV footage and made averments in that regard.

Amidst the entirety of the aforementioned discussion application 15-B deserves to be allowed.

ORDER Application 15-B is hereby allowed. The concerned I.O. is directed to get prepared two more copies of the pen-drive (one each for the Ld. D.G.C. (Cri.) and the learned defence counsel from that source only from which the pen-drive, that has been annexed to this record, has been prepared and to further produce a certificate to that regard while producing the aforementioned copies in this Court.

Let a copy of this order be provided free of cost to the Ld. D.G.C. (Cri) for getting the necessary compliance from the agency of concerned police station/I.O. Since the evidence of PW-1. Sharad Kumar Gupta is already in the process, no further time shall be granted to the prosecution for getting the needful one.

Put up on 02.08.2023 for further orders."

11. Subsequent to the above order dated 19.07.2023, Investigating Officer submitted the report dated 29.09.2023 to the effect that the order dated 19.07.2023 passed by Court below and referred to above, has been complied with. Since one of the grievance raised by the learned Senior counsel for applicant at the time of arguments of present application was to the effect that the order dated 19.07.2023 passed by Court below has not been complied with in letter and spirit, therefore, for ready reference, the report dated 29.09.2023, which is on record at page 113 of the paper book, is

17. Perusal of the order dated 08.08.2024 passed by Court below will go to show that application dated 14.03.2024 (Paper No. 44-B) filed by applicant was rejected by Court below on the following findings:-

- (i). An application (Paper No. 15-B) was filed on behalf of accused-applicant on 15.06.2023 with the prayer that the copy of CCTV footage of camera no. 16, 6 and 9 be supplied.
- (ii). The aforesaid application was allowed and it was directed that the requisite CCTV footage be supplied to accused-applicant.
- (iii). The Pen Drive containing the requisite CCTV footage was supplied to the defence counsel on 30.09.2023, vide order dated 30.09.2023.
- (iv). Subsequent to above, the evidence of PW-1 was recorded, which continued further from 11.10.2023 to 25.10.2023, 15.12.2023, 01.01.2024, 12.01.2024, 06.02.2024 and was ultimately closed on 29.02.2024.
- (v). The cross examination of PW-1 on behalf of accused-applicant runs into 40 pages.
- (vi). The issue that there are 24 cameras installed at the place of occurrence was raised only on 14.03.2024 by way of an application (Paper No. 44-B).
- (vii). No explanation has come forward in aforementioned application as to why the prayer for demand of copy of DVR was not raised initially vide application (Paper No. 15-B) and after expiry of a period of 9 months up to 14.03.2024.
- (viii). In view of above, Court below concluded that the application (Paper No. 44-B) falls in the category of roving enquiry and therefore, the same is not liable to be entertained.

18. Thus feeling aggrieved by the above order dated 26.07.2024 passed by the District and Sessions Judge, Agra, accused-applicant has now approached this Court by means of present application under Section 482 Cr.P.C.

19. Mr. Anoop Trivedi, the learned Senior counsel for applicant contends that order impugned in present application is manifestly illegal and without jurisdiction. As such, the same is liable to be quashed by this Court. According to the learned Senior Counsel the copy of the pen-drive prepared by Investigating Officer during course of investigation regarding CCTV footage of the place of occurrence was directed to be supplied to the applicant by Court below, vide order dated 19.7.2023. However, the Court specifically observed in the order dated 19.07.2023 that copies of the material contained in pen drive shall be prepared from the original. However, in derogation of aforesaid specific direction given by Court below, the copies of pen drive were prepared from the pen drive

previously prepared, which is contrary to the direction contained in the order dated 19.07.2023. The said fact is clearly explicit from the report dated 29.9.2023, copy of which is on record at page 113 of the paper book, . However, irrespective of above, Court below on an erroneous assumption came to the conclusion that the order dated 19.07.2023 stands complied with.

20. It is then contended by the learned Senior Counsel that the issue as to whether an accused is entitled to a document, which is not relied upon by the prosecution but in the possession of the prosecution is no longer res-integra. The Apex Court in *Suo Moto Writ (Crl) no. (s) 1 of 2017 (In Re: to issue certain guidelines regarding inadequacies and deficiencies in criminal trial Vs. The State of Andhra Pradesh and ors.)* itself realized the difficulty faced by accused during course of trial. Accordingly, Court issued the following directions in paragraph 19 of the said report. Accordingly, paragraph 19 of the aforesaid report is reproduced herein under:-

"19. The court is of the opinion that the Draft Rules of Criminal Practice, 2021, (which are annexed to the present order, and shall be read as part of it) should be hereby finalized in terms of the above discussion. The following directions are hereby issued:

(a) All High Courts shall take expeditious steps to incorporate the said Draft Rules, 2021 as part of the rules governing criminal trials, and ensure that the existing rules, notifications, orders and practice directions are suitably modified, and promulgated (wherever necessary through the Official Gazette) within 6 months from today. If the state government's co-operation is necessary in this regard, the approval of the concerned department or departments, and the formal notification of the said Draft Rules, shall be made within the said period of six months.

(b) The state governments, as well as the Union of India (in relation to investigating agencies in its control) shall carry out consequential amendments to their police and other manuals, within six months from today. This direction applies, specifically in respect of Draft Rules 1-3. The appropriate forms and guidelines shall be brought into force, and all agencies instructed accordingly, within six months from today."

21. Subsequent to aforesaid order, the matter with regard to demand and supply of document to an accused, even if not relied upon by the prosecution but in possession of prosecution came up for adjudication in *P. Punnusamy Vs. State of Tamil Nadu*, 2022 SCC Online SC 1543. The Court after noticing the earlier order referred to above, ultimately issued the following directions as are contained in paragraphs 14, 16 and 17 of the report. Resultantly, the same are extracted herein below:-

"14. The framework that emerges (by reading Sections 173, 207, 208 and Draft Rule 4) is that based on the list of statements, documents, etc. received at the commencement of the trial, the accused can seek appropriate orders under Section 91CrPC, wherein the Magistrate on application of judicial mind, may decide on whether it ought to be called for. Additionally, by virtue of Section 391 of the Cr.P.C.

the appellate court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the appellate court is a High Court, by a Court of Session or a Magistrate.(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the appellate court, and such Court shall thereupon proceed to dispose of the appeal.(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.?] CrPC, the appellate court, if it deems necessary, may take further evidence (or direct it be taken by a Magistrate or Court of Session) upon recording reasoning. This safeguards the right of the accused in a situation where concern has been raised regarding evidence or material in possession of the prosecution, that had not been furnished, but was material to the trial and disposal of the case.

16. That some High Courts or Governments of the States/Union Territories have failed to comply with this Court's order and are delayed in adopting the Draft Rules or amending the police/practice manuals concerned, cannot prejudice the right of an accused (to receive this list of the statements, documents, material, etc. in the possession of the prosecution), which has unequivocally been recognised by this Court in its final order [Inadequacies & Deficiencies in Criminal Trials, In re, (2021) 10 SCC 598 : (2022) 1 SCC (Cri) 100] of the suo motu proceedings (Para 11, extracted above), itself. Further, to say that the judgment in Manoj [Manoj v. State of M.P., (2023) 2 SCC 353 : (2023) 2 SCC (Cri) 1] in relation to this, and the right of the accused to receive the said list of documents, material, etc. would only apply after the Draft Rules are adopted ? would lead to an anomalous situation where the right of the accused in one State, prejudicially differs from that afforded to an accused, in another.

17. As stated earlier, the requirement of disclosure elaborated on in Manoj [Manoj v. State of M.P., (2023) 2 SCC 353 : (2023) 2 SCC (Cri) 1] , not only was premised on the formulation of the Draft Rules, but normatively premised on the ratio of the three-Judge Bench decision in Manu Sharma [Manu Sharma v. State (NCT of Delhi), (2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385] . In these circumstances, the proper and suitable interpretation of the disclosure requirement in Manoj [Manoj v. State of M.P., (2023) 2 SCC 353 : (2023) 2 SCC (Cri) 1] would be that:"

17.1. It applies at the trial stage, after the charges are framed 17.2. The court is required to give one opportunity of disclosure, and the accused may choose to avail of the facility at that stage.

17.3. In case documents are sought, the trial court should exercise its discretion, having regard to the rule of relevance in the context of the accused's right of defence. If the document or material is relevant and does not merely have remote bearing to the defence, its production may be directed. This opportunity cannot be sought repeatedly ? the trial court can decline to issue orders, if it feels that the attempt is to delay.

17.4. At the appellate stage, the rights of the accused are to be worked out within the parameters of Section 391CrPC.

22. On the above premise, the learned Senior Counsel submits that it is by now well settled that an accused is entitled to demand copies of such document, which is not relied upon by prosecution but is in possession of prosecution subject to the restrictions imposed by the Apex Court itself in the case of P. Punnusamy (Supra). Referring to the document occurring at page 112 of the paper book, which is the report dated 30.09.2023 submitted by the Investigating Officer to Court concerned, the learned Senior counsel contends that since the owner of the DVR was directed to produce the DVR on the demand of the Investigating Officer, therefore, the original DVR shall be deemed to be in constructive possession of the prosecution. Since the bedrock of the argument raised by the learned Senior counsel for applicant is based upon aforesaid document itself, therefore, for ready reference the same is also reproduced herein under:-

"?????"

????? ???? ?????? ?? ?? ?????? 14.07.2022 ?? ???? ?????????? ?? ??????
 ??0?0??0-415/2022 ???? 302/506 ????? ???? ???? ???? ???? ???? ???? ????
 ????????? ?????? ?????????? ?? ???? ?????????? ?? ???? ?????? ?? ?????????? ?????? ?? ?
 ????????? ?????????? ?????? ?? ???? ???? ?????? / ?????? ?? ?????? ???? ?????? ?????? ??????
 ?? ?????? ??0-6, 9, 16 ?? ?? 16.00 ?? ?? 16.56 ?? ?? ?? CCTV ?????? ??????????
 14.07.2022 ?? ?? ???? ?????? ???? ?????????? ???? ?????????? ???? ???? ???? ???? ????
 ?????? ?????? ?? ?????????? ?? ???? ?????????? ???? / ?????? ?? ?????? ?????? ???? ??????
 ?????????? ?????? ?? ?????????? ???? ???? ???? ?????????? ???? ???? ???? ?

?????????? ?????????? ?? ???? ???? ?????????? ???? ???? ?????????? / ?????? ?????? ?? ?????? ??
 ???? ???? ???? ???? ???? ???? ???? ?????????????? ?????????? ?? ?????????? ?????? ?? ?? ?
 ?????? ???? ???? ???? ???? ???? ???? ?????????? ?? ???? ???? ?????????? ???? ???? ???? ?"

23. According to the learned Senior counsel Court below, in ignorance of aforesaid settled legal position, has denied the prayer made by applicant for supply of the digital copy of disputed DVR on the ground that the said demand has been made belatedly and after the cross examination of P.W.1 has taken place. He, therefore, submits that reasons assigned by Court below for negating the prayer made by accused-applicant is antagonistic to the directions issued by the Apex Court mentioned above. There does not appear to be co-relation in between the reasons recorded by Court below for rejecting the claim of accused-applicant and observations made by Apex Court referred to above. On the above premise, it is urged by the learned Senior Counsel that the order impugned passed by Court below is unsustainable in law and fact. As such, the present application is liable to be allowed.

24. Considering the seriousness of the matter, the learned Government Advocate, Mr. A.K. Sand was requested to address the Court. Certain affidavits were also filed by the learned Government Advocate in opposition to the present application, wherein it has been stated that copy of pen drive has already been supplied to the applicant. As such, prayer made by means of application dated 14.03.2024 (paper no. 44-B) is wholly misconceived. It is further submitted by the learned A.G.A.

that since the prosecution is not in possession of DVR and copy of contents of same is being demanded by accused, therefore, no direction can be issued to the prosecution to supply the same. He, therefore, submits that no interference is warranted by this Court in present application.

25. Mr. P.C. Srivastava, the learned counsel representing first informant/opposite party-2 on the other hand, submits that the trial is at an advance stage. As per the charge sheet, there are 27 prosecution witnesses nominated therein. Up to this stage, the depositions of three prosecution witnesses i.e. PW-1 Sharad Gupta, PW-2 Rishabh Gupta and PW-3 Ashok Kumar (Watchman) have been recorded. The statement of PW-4 is under progress. The application (paper no. 44-B) was thus engineered only to delay the progress of trial. However, he submits that he has no objection to supply the copy of the said DVR to the accused applicant.

26. In view of above, admission made by Mr. P.C. Srivastava, the learned counsel for opposite party-2 who is also in possession of Original DVR, from which the pen drive of the CCTV footage was prepared, this Court is now not required to consider the merits of the order dated 26.7.2024.

27. In view of above, the present application is allowed.

28. The order dated 26.7.2024 is, hereby, set aside. Accused applicant shall be entitled to the copy of the DVR in respect of the cameras installed at the place of occurrence, without any addition or subtraction. The said exercise shall be undertaken by prosecution including the first informant as early as possible. Court below shall thereafter pass an order recording therein that the document i.e. copy of DVR having been supplied to applicant shall fix the date for trial of the accused applicant.

29. In the facts and circumstances of the case, the cost is made easy.

Order Date :- 28.2.2025 Vinay