

Form No. HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Crl. Appeal No.68635/2024

Shabbir Hussain		Vs	The State and another
Sr. No.	Date of order	Order with signature of Judge, and that of parties or counsel, where necessary.	

01) 06.11.2024 Mian Muhammad Tayyib Wattoo, Advocate for the appellant. Mr. Haroon Rasheed, Deputy Prosecutor General for the State (on Court’s call).

Through instant criminal appeal, following prayer has been made:-

“In the light of above submissions, it is respectfully prayed that this appeal may graciously be accepted and the impugned order dated 20.09.2024 passed by learned Additional Sessions Judge/Judge Special Court CNSA Sialkot be set aside and the learned trial court be directed to call the CDR from the concerned companies of the PW.4 for the sake of justice and fair play.

It is further prayed that the proceedings of the learned trial court may kindly be suspended/stayed till the final disposal of the main criminal appeal to meet the ends of justice.

Any other relief which this Hon’ble Court deems fit and proper may also be awarded to the appellant.”

2. Brief however necessary facts for disposal of instant appeal are that Shabbir Hussain (appellant/accused in case arising out of F.I.R. No.775/2023 dated: 28.09.2023 registered under Section: 9 (1) 3(d), 9 (1) 5(d) of the Control of Narcotic Substances Act, 1997 at Police Station: City Pasrur, District: Sialkot) has filed an application under Section: 540 Cr.P.C. for production of mobile data of complainant Ghazanfar Ali-ASI/PW-4 which has been dismissed *vide* order dated: 20.09.2024 passed by learned Additional Sessions Judge, Pasrur, District Sialkot; relevant portion of said order is reproduced:-

“Learned counsel for the accused filed application u/s 540 Cr.PC for production of Mobile Data of complainant Ghazanfar Ali ASI whose statement was recorded as PW-4. As per record the prosecution evidence was completed on 18.05.2024 and then the statement of accused was recorded on 29.06.2024 and then the case remained fixed for final arguments. Instead of advancing final arguments the instant application for production of Mobile Data of PW-4 has been filed. After closure of prosecution evidence and the statement of accused u/s 342 Cr.P.C, the accused could not be permitted to create new evidence through the court by filing the instant application. So the application having no force in the eye of law is hereby dismissed.”

3. Learned counsel for the appellant submits that production of CDR of PW-4 is necessary; also adds that impugned order is against the law and facts of the case therefore same is liable to be set aside.

4. Learned Deputy Prosecutor General (on Court's call) has supported the impugned order.

5. **Heard and record appended with the appeal perused.**

6. The Call Data Record = Call Detail Record herein after being referred as **CDR** is the record generated by telecommunication companies for every call made or received on its network, it includes phone numbers involved, date, time and duration of the call as well as detail of telecommunication/cellular tower in whose territorial range, SIM (Subscriber Identity Module) received or made the call, needless to add that range of cellular tower comprises of sizeable area.

As far as production of **CDR** in the trial of criminal case for proving or disproving the presence of any witness at some place is concerned, it is relevant to mention here that if said witness is owner of the SIM i.e. same is registered in his name, it was operational/functional in his cell/mobile phone, he made or received phone call through said SIM and his forensically analysed voice record transcript/end to end audio or video recording is available, then availability of said SIM and its use at that particular time i.e. of making/receiving phone call in territorial range of cellular tower of said company can be assessed and ascertained, however, even then exact point/locale of availability of the SIM and person using the same in the territorial range of said cellular tower, which range usually comprises of considerable area, cannot be ascertained through **CDR**.

So, in absence of forensically analysed voice record transcript/end to end audio or video recording, mere production of CDR is of no avail/help to establish presence of any person even in territorial area/range of cellular tower; guidance in this regard has been sought from the case of **"AZEEM KHAN and another vs. MUJAHID KHAN and others"** (2016 SCMR 274), **"The STATE through P.G. Sindh and others vs. AHMED OMAR SHEIKH and others"** (2021 SCMR 873) and **"ISHTIAQ AHMED MIRZA and 2 others vs. FEDERATION OF PAKISTAN and others"** (PLD 2019 Supreme Court 675).

It is not uncommon/unusual in our system that some time witness makes concessional statement against the record as well as case of prosecution for extending undue benefit to the accused; in this regard case of **"MUHAMMAD SHARIF vs. MUHAMMAD JAVED alias JEDA TEDI AND 5 OTHERS"** (PLD 1976 SC 452) can be safely referred; so, mere concessional statement of any witness that he was having mobile phone

number with him at relevant time without proof that SIM was registered in his name and without forensically analysed voice record transcript of call made or received by said witness, is of no avail and same cannot be made basis for summoning the CDR as it would be of no help for just decision of the case; in this regard, full Bench decision of this Court in the case of **“Mst. SAIMA NOREEN vs. The STATE and another”** (PLD 2024 Lahore 522) can also be advantageously referred and relevant portions from the same are reproduced:-

7. CDR is abbreviation of “Call Data Record” of SIM which is abbreviation of “Subscriber Identity Module”. As per “Report” submitted on behalf of Pakistan Telecommunication Authority, PTA was established under Section: 3 of Pakistan Telecommunication (Reorganization) Act, 1996 and is mandated to regulate the establishment, maintenance and operation of the telecommunication system and provision of telecommunication services in Pakistan.”

“It is very much relevant to mention here that if question in a case is only regarding availability of any SIM in the territorial jurisdiction of any cellular tower at the time of receiving or making any particular phone call then perhaps CDR would provide some help but if the matter in issue is about presence of any human being either witness or accused on some particular place as a recipient or maker of the phone call as in this case is, then situation is quite different/otherwise.

10. Although any accused or witness can claim or admit possession and use of any SIM “Subscriber Identity Module” by him or anybody else at the time of occurrence or any other relevant time yet mere such claim or admission is not sufficient for relying on CDR “Call Data Record” of said SIM because CDR only shows use of SIM in territorial/geographical jurisdiction of “Cell Phone Tower” installed by telecom operator and does not disclose that who is actually/exactly carrying and using said SIM; however, “Voice Record Transcript” or “End to End Audio Recording” can reflect the detail/identification of the user. Therefore, without “Voice Recording Transcript”, mere “Call Data Record” (CDR) alone of the SIM is inconclusive piece of evidence regarding identity of its user/carrier; in this regard, guidance has been sought from the case of **“AZEEM KHAN and another versus MUJAHID KHAN and others”** (2016 SCMR 274); relevant portion from paragraph No.22 of said case law is hereby reproduced:-

“22. The cell phone call data collected is of no help to the prosecution for the reasons that numerous calls have been made indicating continuous interaction between the two cell phones, contrary to the evidence given by Muhammad Wali (PW-3), who has stated at the trial that the unknown caller made calls on his cell phone four times. No competent witness was produced at the trial, who provided the call data, Ex.P-1 to Ex.P-5. **No voice record transcript has been brought on record---**.”

(emphasis added).

Guidance on the subject has also been sought from the case of **“Mian KHALID PERVIZ versus THE STATE through Special Prosecutor ANF and another”** (2021 SCMR 522); relevant portion from paragraph No.7 of said case law reads as follows:-

“--- Mere production of CDR DATA without transcripts of the calls or end to end audio recording cannot be considered/used as evidence worth reliance. Besides the call transcripts, it should also be established on the record that callers on both the ends were the same persons whose calls data is being used in evidence. While considering such type of evidence extra care is required to be taken by the Courts as advancement of science and technology, on the other hand, has also made it very convenient and easy to edit and make changes of one’s choice as highlighted and discussed in the case of Ishtiaq Ahmad Mirza supra. We also can lay hand on the case of Azeem Khan v. Mujahid Khan (2016 SCMR 274) in this regard. So, the CDR

DATA produced by the said witnesses is of no help to the Appellant and cannot be termed as evidence worth reliance to shatter the direct evidence adduced by the prosecution.”

(emphasis added).

Even “Voice Record Transcript” or “End to End Audio/Video Recording” of the call cannot be relied upon without forensic report about its genuineness; in this regard case of “The STATE through P.G. Sindh and others versus AHMED OMAR SHEIKH and others” (2021 SCRM 873) can advantageously be referred; relevant portion from paragraph No.15 of said case law is hereby reproduced:-

“---In absence of any forensic report about the genuineness or otherwise of the said video clip, no reliance can be placed on such piece of evidence as held in the case of Asfandiyar and another v. Kamran and another (2016 SCMR 2084).”

(emphasis added)

Requirements insisted upon by the august Supreme Court of Pakistan for proving audio tape or video before a court of law have been elaborated in paragraph-11 of the case of “ISHTIAQ AHMED MIRZA and 2 others versus FEDERATION OF PAKISTAN and others” (PLD 2019 Supreme Court 675) and same are hereby reproduced:-

- * No audio tape or video can be relied upon by a court until the same is proved to be genuine and not tampered with or doctored.
- * A forensic report prepared by an analyst of the Punjab Forensic Science Agency in respect of an audio tape or video is per se admissible in evidence in view of the provisions of section 9(3) of the Punjab Forensic Science Agency Act, 2007.
- * Under Article 164 of the Qanun-e-Shahadat Order, 1984 it lies in the discretion of a court to allow any evidence becoming available through an audio tape or video to be produced.
- * Even where a court allows an audio tape or video to be produced in evidence such audio tape or video has to be proved in accordance with the law of evidence.
- * Accuracy of the recording must be proved and satisfactory evidence, direct or circumstantial, has to be produced so as to rule out any possibility of tampering with the record.
- * An audio tape or video sought to be produced in evidence must be the actual record of the conversation as and when it was made or of the event as and when it took place.
- * The person recording the conversation or event has to be produced.
- * The person recording the conversation or event must produce the audio tape or video himself.
- * The audio tape or video must be played in the court.
- * An audio tape or video produced before a court as evidence ought to be clearly audible or viewable.
- * The person recording the conversation or event must identify the voice of the person speaking or the person seen or the voice or person seen may be identified by any other person who recognizes such voice or person.
- * Any other person present at the time of making of the conversation or taking place of the event may also testify in support of the

conversation heard in the audio tape or the event shown in the video.

- * The voices recorded or the persons shown must be properly identified.*
- * The evidence sought to be produced through an audio tape or video has to be relevant to the controversy and otherwise admissible.*
- * Safe custody of the audio tape or video after its preparation till production before the court must be proved.*
- * The transcript of the audio tape or video must have been prepared under independent supervision and control.*
- * The person recording an audio tape or video may be a person whose part of routine duties is recording of an audio tape or video and he should not be a person who has recorded the audio tape or video for the purpose of laying a trap to procure evidence.*
- * The source of an audio tape or video becoming available has to be disclosed.*
- * The date of acquiring the audio tape or video by the person producing it before the court ought to be disclosed by such person.*
- * An audio tape or video produced at a late stage of a judicial proceeding may be looked at with suspicion.*
- * A formal application has to be filed before the court by the person desiring an audio tape or video to be brought on the record of the case as evidence. ”*

Of course, accused can take any plea and he has to simply show possibility of its correctness but such possibility must be based on conclusive and reliable piece of evidence.

*We are also conscious of the fact that extending of undue and gratuitous/obliging concessions by witnesses during recording of their statements is not uncommon in our system and in this regard, case of **“Muhammad Sharif versus Muhammad Javed alias Jeda Tedi and five others”** (PLD 1976 SC 452) can be advantageously referred, hence mere admission of the witness regarding use of any SIM must be corroborated not only by its CDR but also by “end to end” audio recording of “voice call” confirmed by due forensic analysis. Furthermore, CDR and voice record transcript as well as its forensic analysis report must be proved in accordance with law for reliance.*

*So far as case of **“Muhammad Asif Ali Usama versus The State and two others”** (2022 PCr.LJ 59) is concerned, it has been observed by us that aforementioned case-laws i.e. (**AZEEM KHAN and another versus MUJAHID KHAN and others**) 2016 SCMR 274, (**Mian KHALID PERVIZ versus THE STATE through Special Prosecutor ANF and another**) 2021 SCMR 522 and (**The STATE through P.G. Sindh and others versus AHMED OMAR SHEIKH and others**) 2021 SCRM 873 have not been discussed in it and we respectfully did not agree with ratio of the same.*

11. In peculiar facts and circumstances of the case, at this appellate stage, “Call Data Record” (CDR) is not conclusive piece of evidence for the purpose of determining and establishing the identity and presence of any witness or person at some exact locale/position/place. Application filed by applicant for summoning representative of a telecom company (JAZZ) for verification of photocopy of CDRs was dismissed by the learned trial court and said order was not challenged and same attained finality. It is important to mention here that only said piece of evidence can be brought on record through additional evidence at appellate stage

*which has been considered as necessary for decision of the case and is having concrete evidentiary worth beyond shadow of doubt, however, in the instant appeal, aforementioned Call Data Record (CDR) does not fulfill said condition/criteria. In **Ishtiaq Ahmed Mirza's** case (mentioned supra), the august Supreme Court of Pakistan has held that necessity of taking additional evidence at the appellate stage must be felt by the appellate court itself and it does not depend upon what a party to the appeal thinks of such necessity; relevant portion from paragraph No.12 of said case law reads as follows:-*

“---The necessity of taking additional evidence at the appellate stage must be felt by the appellate court itself and the same is not to depend upon what a party to the appeal thinks of such necessity---.”

(emphasis added).”

*“12. For what has been discussed above, we are of the considered view that at this appellate stage, bringing of “Call Data Record” (CDR) through additional evidence on record of instant appeal is neither necessary for just decision of the case nor the same would serve any useful purpose for the applicant/appellant in any manner whatsoever. In such perspective, instant miscellaneous application is without merits and same is hereby **dismissed**.”*

7. Since in this case forensically analysed voice record transcript/end to end audio or video recording of the call made or received by the witness is not available therefore CDR is not the conclusive piece of evidence hence cannot be considered as necessary for just decision of the case thus this appeal is without merits and is hereby **dismissed** *in limine*.

(Muhammad Tariq Nadeem)
Judge

(Farooq Haider)
Judge

“Approved for reporting”

(Muhammad Tariq Nadeem)
Judge

(Farooq Haider)
Judge

This order has been dictated and pronounced on
06.11.2024 however after preparation signed on
11.11.2024.

Irfan