[2023] 14 S.C.R. 230 : 2023 INSC 988

CASE DETAILS

STATE OF KARNATAKA

v.

T. NASEER @ NASIR @ THANDIANTAVIDA NASEER @ UMARHAZI @ HAZI & ORS.

(Criminal Appeal No. 3456 Of 2023)

NOVEMBER 06, 2023

[VIKRAM NATH AND RAJESH BINDAL, JJ.]

HEADNOTES

Issue for consideration: The High Court rejected the applications filed by the prosecution u/s. 311 of the Cr.P.C., seeking recall of PW-189 and to permit the prosecution to produce the report and the certificate u/s. 65B of the Evidence Act, 1872.

Code of Criminal Procedure, 1973 – s. 311 – Evidence Act, 1872 – s.65B – A serial bomb blasts took place – Certain electronic devices were seized – Trial Court held electronic devices inadmissible in evidence – Thereafter, an application was filed in the court to allow the prosecution to recall PW-189 and to produce the certificate u/s. 65B of the Act in evidence – Application rejected by the Trial Court holding same to be delayed – High Court upheld the order of the Trial Court – Propriety:

Held: The courts below had gone on a wrong premise to opine that there was delay of six years in producing the certificate whereas there was none – The matter was still pending when the application to resummon PW-189 and produce the certificate u/s. 65B of the Act was filed u/s. 311 of the Cr.P.C. – In fact, report received from CFSL on the basis of the contents of electronic devices dated 29.11.2010 was already placed before the Trial Court on 16.10.2012 – It was only vide order dated 07.04.2017 that the report prepared on the basis of electronic devices was refused to be taken on record by the Trial Court in absence of certificate issued u/s. 65B – It was during the examination in chief of PW-189 that the report of CFSL dated

29.11.2010 was sought to be exhibited – When the aforesaid witness was further examined in chief on 27.04.2017, the report u/s. 65B was produced to which objection was raised by the counsel of the defence and vide order dated 20.06.2017 the Trial Court declined to take the certificate, issued u/s. 65B of the Act, on record – It was thereafter that an application was filed u/s. 311 of the Cr.P.C. for recalling PW-189 and produce the certificate u/s. 65B of the Act on record – The same was rejected by the Trial Court – From the aforesaid facts, it cannot be inferred that there was delay of six years in producing the certificate – A certificate u/s. 65B of the Act, which is sought to be produced by the prosecution is not an evidence which has been created now – It is meeting the requirement of law to prove a report on record – By permitting the prosecution to produce the certificate u/s. 65B of the Act at this stage will not result in any irreversible prejudice to the accused – The accused will have full opportunity to rebut the evidence led by the prosecution. [Paras 12, 13, 14 and 15]

LIST OF CITATIONS AND OTHER REFERENCES

Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473: [2014] 11 SCR 399; *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal,* (2020) 7 SCC 1: [2020] 7 SCR 180; *State of Karnataka v. M.R. Hiremath,* 2019 (7) SCC 515: [2019] 8 SCR 713 – relied on.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.3456 of 2023.

From the Judgment and Order dated 27.01.2022 of the High Court of Karnataka at Bengaluru in CRLP No.2585 of 2019.

Appearances:

Aman Panwar, AAG, Shivam Singh Baghel, D. L. Chidananda, Advs. for the Appellant.

Balaji Srinivasan, Ms. Sukanya Joshi, Haris Beeran, Azhar Assees, Anand B. Menon, Radha Shyam Jena, Advs. for the Respondents.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

RAJESH BINDAL, J.

1. Leave granted.

2. *Vide* order[1] passed by the High Court[2] in Criminal Petition No. 2585 of 2019 filed by the appellant-State, an order dated 18.01.2018 passed by the Trial Court[3] was upheld. *Vide* the aforesaid order an applications[4] filed by the prosecution under Section 311 of the Cr.P.C.[5], seeking recall of M. Krishna (PW-189) and permit the prosecution to produce the report and the certificate under Section 65B of the Act[6] was rejected.

3. Genesis of the trial is that in a serial bomb blasts which took place in Bangalore on 25.07.2008, one woman lost her life whereas several persons were injured. Several FIRs were registered at Madivala[7], Koramangala[8], Byatarayanapura[9], Kengeri[10], Ashokanagar[11], Sampangirama[12] and Adugodi[13] Police Stations for the offence punishable under Sections 120B, 121, 121A, 123, 153A, 302, 307, 326, 337, 435, 506 & 201 of the IPC[14] and Sections 3 to 6 of the Explosive Substances Act, 1908, Sections 3 and 4 of the Prevention of Destruction and Loss of Property Act, 1981, Sections 3 and 4 of the Prevention of Damage to Public Property Act, 1984 and Sections 10 and 13 of the Unlawful Activities (Prevention) Act, 1967. During the

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1 Dated 27.01.2022.
2 High Court of Karnataka at Bengaluru.
3 XLVIII Additional City Civil and Sessions Judge (Special Court for Trial of CBI Cases) City Civil Court, Bangalore.
4 S.C. Nos. 1480/2010 & 1481/2010.
5 The Code of Criminal Procedure, 1973.
6 The Indian Evidence Act, 1872
7 Criminal Case No. 483/2008.
8 Criminal Case No. 297/2008.
9 Criminal Case No. 314/2008.
10 Criminal Case No. 117/2008.
11 Criminal Case No. 260/2008 and 261/2008.
12 Criminal Case No. 92/2008.
13 Criminal Case No. 217/2008.
14 The Indian Penal Code, 1860.

course of investigation certain electronic devices such as one Laptop, one external Hard Disc, 3 Pen Drives, 5 floppies, 13 CDs, 6 SIM cards, 3 mobile phones, one memory card and 2 digital cameras etc. were seized at the instance of accused no.3 i.e., Sarafaraz Nawaz@ Seju @Hakeem. The original electronic devices were submitted before the Trial Court along with the additional chargesheet dated 09.06.2010. The Trial Court vide order dated 07.04.2017 ordered that the CFSL Report dated 29.11.2010 with reference to the electronic devices was inadmissible in evidence in the absence of a certificate under Section 65-B of the Act. Though, according to the prosecution, the original devices being already on record (as a primary evidence), there was no requirement of a certificate under Section 65-B of the Act. Still, as a matter of abundant caution, a certificate under Section 65-B of the Act was obtained and when M. Krishna (PW-189) was further examined in chief on 27.04.2017, a certificate under Section 65-B of the Act was sought to be produced. Objection was raised by the counsel for the accused. *Vide* order dated 20.06.2017, the Trial Court opined that the certificate issued under Section 65-B of the Act produced on 27.04.2017 was not admissible in evidence. Thereafter an application was filed in the court to allow the prosecution to recall M. Krishna (PW-189) and to produce the certificate under Section 65-B of the Act in evidence. The application was rejected by the Trial Court holding the same to be delayed. The order of the Trial Court was upheld by the High Court. It is the aforesaid order which is under challenge before this Court.

4. Mr. Aman Panwar, Additional Advocate General, appearing for the appellant-State, in his brief argument submitted that in the case in hand, which shocked the whole country as such, serial bomb blasts in Bangalore were master minded by the accused. The courts below should have considered the application in that light. What was sought to be produced by the prosecution was not something, which was created later on. Rather it was merely a certificate under Section 65B of the Act. The primary evidence in the form of electronic devices was already on record along with the report from CFSL. It is only because the accused raised an objection to the production of that report and not to take any chances, the prosecution filed an application under Section 311 Cr.P.C. to resummon M. Krishna (PW-189) and produce the certificate under Section 65-B of the Act in evidence. There was no delay as immediately after the court rejected the

report dated 29.11.2010 of CFSL on 07.04.2017, an application was filed on 16.12.2017 seeking to produce the certificate under Section 65B of the Act dated 27.04.2017. The learned courts below should have appreciated the fact that by denying the prosecution opportunity to produce the certificate under Section 65-B of the Act, great injustice would be caused to the appellant. In support of the arguments that a certificate under Section 65-B of the Act can be furnished/produced at any stage of proceedings, reliance was placed on the judgments of this Court in **Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473** and **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal, (2020) 7 SCC 1.**

5. In response, Mr. Balaji Srinivasan, learned counsel appearing for the respondents, submitted that there was no error in the orders passed by the courts below. The prosecution cannot be allowed to fill up the lacuna in the evidence by filing an application under Section 311 of the Cr.P.C. The certificate was sought to be produced after a delay of six years. Hence, the same was rightly not permitted to be produced on record. Great prejudice shall be caused to the respondents now if the same is permitted. The respondents will be deprived of their right of fair trial. The appeal deserves to be dismissed.

6. We have heard learned counsel for the parties and perused the relevant referred record.

7. The facts of the case have been briefly noticed in the preceding paragraphs. Serial bomb blasts took place in Bangalore on 25.07.2008 which shocked not only the Bangalore city or the State but the entire country, as in such terror attacks it is only the innocents who suffer. The investigation had to be scientific. At the instance of the accused no.3, electronic devices such as one Laptop, one external Hard Disc, 3 Pen Drives, 5 floppies, 13 CDs, 6 SIM cards, 3 mobile phones, one memory card and 2 digital cameras etc. were recovered and seized. These were sent for examination to the CFSL, Hyderabad. Report was received on 29.11.2010. The same was submitted before the Trial Court on 16.10.2012 and sought to be proved at the time of recording of statement, M. Krishna, Assistant Government Examiner, Computer Forensic Division, CFSL, appeared as PW-189. The accused vide application dated 06.03.2017 objected to taking the report dated 29.11.2010 in evidence in the absence of a certificate under Section 65-B of the Act.

Immediately, thereafter a certificate dated 27.04.2017 was got issued under Section 65-B of the Act and an application was filed under Section 311 of the Cr.P.C. seeking to recall M. Krishna (PW-189) and to produce the aforesaid certificate in evidence. The trial was still pending. Learned Trial Court without appreciating the legal position in this regard had dismissed the application. The order was upheld by the High Court. It was primarily for the reason of delay in producing the certificate under Section 65B of the Act.

8. This Court in ***Anwar's case (supra)*** has opined that a certificate under Section 65B of the Act is not required if electronic record is used as a primary evidence. Relevant paragraph thereof is quoted herein below:

> **"24.** The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65-B of the Evidence Act are not satisfied. **It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65-B of the Evidence Act."**
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> *(Emphasis added)*

9. The aforesaid issue was subsequently considered by this Court in ***Arjun Panditrao Khotkar's case (supra).*** It was opined that there is a difference between the original information contained in a computer itself and the copies made therefrom. The former is primary evidence and the latter is secondary one. The certificate under Section 65-B of the Act is

unnecessary when the original document (i.e., primary evidence) itself is produced. Relevant paragraph '33' thereof is extracted below:

> "**33.** The non obstante clause in sub-section (1) makes it clear that when it comes to information contained in an electronic record, admissibility and proof thereof must follow the drill of Section 65-B, which is a special provision in this behalf — Sections 62 to 65 being irrelevant for this purpose. **However, Section 65-B(1) clearly differentiates between the "original" document — which would be the original "electronic record" contained in the "computer" in which the original information is first stored — and the computer output containing such information, which then may be treated as evidence of the contents of the "original" document. All this necessarily shows that Section 65-B differentiates between the original information contained in the "computer" itself and copies made therefrom — the former being primary evidence, and the latter being secondary evidence."**
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> *(Emphasis added)*

10. In ***State of Karnataka v. M.R. Hiremath, 2019(7) SCC 515,*** this Court after referring to the earlier judgment in ***Anwar'a case (supra)*** held that the non-production of the Certificate under Section 65B of the Act is a curable defect. Relevant paragraph '16' thereof is extracted below:

> "*16.* The same view has been reiterated by a two-Judge Bench of this Court in *Union of India v. Ravindra V. Desai,* (2018) 16 SCC 273. **The Court emphasised that non-production of a certificate under Section 65-B on an earlier occasion is a curable defect.** The Court relied upon the earlier decision in *Sonu v. State of Haryana,* (2017) 8 SCC 570 in which it was held:
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> '*32.* … The crucial test, as affirmed by this Court, is *whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, 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.'*
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> *(Emphasis added)*

11.Coming to the issue as to the stage of production of the certificate under Section 65-B of the Act is concerned, this Court in ***Arjun Panditrao Khotkar's case (supra)*** held that the certificate under 65-B of the Act can be produced at any stage if the trial is not over. Relevant paragraphs are extracted below:

> **"56.** Therefore, in terms of general procedure, the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before commencement of the trial. Thus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in respect of the rights of parties has to be carried out by the court, in examining any application by the prosecution under Sections 91 or 311 CrPC or Section 165 of the Evidence Act. **Depending on the facts of each case, and the court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, the court may in appropriate cases allow the prosecution to produce such certificate at a later point in time. If it is the accused who desires to produce the requisite certificate as part of his defence, this again will depend upon the justice of the case — discretion to be exercised by the court in accordance with law.**
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> **59.** Subject to the caveat laid down in paras 52 and 56 above, the law laid down by these two High Courts has our concurrence. **So long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the learned Judge at any stage, so that information contained in electronic record form can then be admitted and relied upon in evidence."**
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> *(Emphasis added)*

12. The courts below had gone on a wrong premise to opine that there was delay of six years in producing the certificate whereas there was none. The matter was still pending when the application to resummon M. Krishna (PW-189) and produce the certificate under Section 65-B of the Act was filed under Section 311 of the Cr.P.C.

13. It was only vide order dated 07.04.2017 that the report prepared on the basis of electronic devices was refused to be taken on record by the

Trial Court. The original electronic devices had already been produced in evidence and marked as MOs. It was during the examination in chief of M. Krishna (PW-189) that the report of CFSL dated 29.11.2010 was sought to be exhibited. However, the Trial Court *vide* order dated 07.04.2017 declined to take the same on record in the absence of a certificate under Section 65B of the Act. When the aforesaid witness was further examined in chief on 27.04.2017, the report under Section 65B was produced to which objection was raised by the counsel of the defence and *vide* order dated 20.06.2017 the Trial Court declined to take the certificate, issued under Section 65B of the Act, on record. It was thereafter that an application was filed under Section 311 of the Cr.P.C. for recalling M. Krishna (PW-189) and produce the certificate under Section 65-B of the Act on record. The same was rejected by the Trial Court *vide* order dated 18.01.2018.

14. From the aforesaid facts, it cannot be inferred that there was delay of six years in producing the certificate. In fact, report received from CFSL, Hyderabad on the basis of the contents of electronic devices dated 29.11.2010 was already placed before the Trial Court on 16.10.2012. In fact, the stand of the prosecution was that when the original electronic devices were already produced and marked MOs, there was no need to produce the certificate under Section 65-B of the Act. Still, as a matter of abundant caution, the same was produced that too immediately after objection was raised by the accused against the production of CFSL report prepared on the basis of the electronic devices seized.

15. Fair trial in a criminal case does not mean that it should be fair to one of the parties. Rather, the object is that no guilty should go scot-free and no innocent should be punished. A certificate under Section 65-B of the Act, which is sought to be produced by the prosecution is not an evidence which has been created now. It is meeting the requirement of law to prove a report on record. By permitting the prosecution to produce the certificate under Section 65B of the Act at this stage will not result in any irreversible prejudice to the accused. The accused will have full opportunity to rebut the evidence led by the prosecution. This is the purpose for which Section 311 of the Cr.P.C. is there. The object of the Code is to arrive at truth. However, the power under Section 311 of the Cr.P.C. can be exercised to subserve

the cause of justice and public interest. In the case in hand, this exercise of power is required to uphold the truth, as no prejudice as such is going to be caused to the accused.

16. For the aforesaid reasons, the appeal is allowed. The orders passed by the courts below are set aside. Resultantly, application filed by the prosecution under Section 311 of the Cr.P.C. is allowed. The Trial Court shall proceed with the matter further.

Headnotes prepared by:
Ankit Gyan

Appeal allowed.