

**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT  
JODHPUR**

S.B. Criminal Misc(Pet.) No. 8014/2022

Sanjay Singh Kachhwaha S/o Jitendra Singh Kachhwaha, Aged  
About 23 Years, R/o B-30 Hari Dasji-Ki-Magri, Malla Talali,  
Udaipur.

-----Petitioner

Versus

State Of Rajasthan, Through P.P.

-----Respondent

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For Petitioner : Mr. Nishant Bora

For Respondent : Mr. Abhisehk Purohit, Additional G.A.

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**HON'BLE DR. JUSTICE PUSHPENDRA SINGH BHATI**

**Judgment**

**Reportable**

**12/12/2022**

1. This Criminal Misc. Petition under Section 482 Cr.P.C. has  
been preferred claiming the following prayer:-

*"It is, therefore most respectfully prayed that the  
application filed by the petitioner u/s 482 Cr.P.C. may be  
allowed and:*

*(i) The order dated 30.09.2022 passed by the learned  
Special Judge, SC/ST Act Cases, Udaipur may kindly be  
quashed and set aside and the application filed by the accused  
petitioner for taking the CC TV footage on record as secondary  
evidence may kindly be allowed*

*(ii) defence may be allowed to exhibit mark and play the  
CD containing the CC TV footage and confront the eye-  
witnesses in cross examination;*

*(iii) proceedings pending before Special Judge, SC/ST  
(Prevention of Atrocities Cases) Udaipur (sic.) in Criminal  
Misc. Case No. 168/2018 may kindly be quashed and set  
aside.*

*(iv) Any other appropriate order or direction which may  
be deemed just and proper in the facts and circumstances of  
the case may kindly be passed in favour of the petitioner."*

2. Brief facts of the case, as the pleaded facts and a perusal of the record would reveal, are that complainant-Mahendra Chhaparwal, his brother-Gajendra Chhaparwal, his uncle-Murli Chhaparwal and Rahul Tamboli were travelling on a motorcycle and a scooty, from Kanhaiya Petrol Pump towards their home, when three of the accused persons, namely, Sunil Lot @ Bunty, Deepak Chandel @ Guddu and Ramesh Chandel opened fire on the complainant party. That as a result of the same, Gajendra Chaparwal was declared dead upon being taken to a hospital, while Rahul Tamboli sustained injuries.

3. In the aforesaid factual backdrop, on 22.07.2018, an F.I.R. bearing No. 0299/2018, was lodged at Police Station Ambamata, Udaipur against the aforementioned three accused persons for the offences under Sections 147, 148, 149, 323, 302, 120-B IPC and under Sections 3/25 Arms Act, 1959. Upon investigation, a charge-sheet came to be filed on 14.10.2018, whereby four more persons were also arrayed, and charges for the offences under Sections 5/25 Arms Act, 1959 and under Sections 3(2) and 5(1) of the SC/ST (Prevention of Atrocities) Act, 1989 (as amended in 2015) were also levelled against all the accused persons, in addition to the charges mentioned in the aforesaid F.I.R.

4. The genesis of the present controversy is the CCTV footage, which was obtained by the concerned police authorities during the course of investigation, of Eklingnath Garden, on the basis of which the charge-sheet was filed against the accused. A copy of the same was also supplied to the accused persons, along with the charge-sheet. The copy of the said CCTV footage was supplied by way of a Compact Disc i.e. C.D. to the Court and the accused

persons, however, the C.D. submitted to the Court broke, and hence the same could not be seen. Thereafter, the defence sought a direction to bring on record the call details, location and *Rojnamcha* report, for the period from 21.07.2018 to 15.08.2018, pertaining to the concerned witness(es), by way of an application under Section 91 Cr.P.C. before the learned Court below; which also came to be dismissed vide the impugned order. Subsequently, an application under Sections 65 and 65B of the Indian Evidence Act, 1872 was filed **seeking to treat the copy of the C.D. of the incident in question, which was given to the accused by the concerned police authorities, along with the charge-sheet, to be admissible, as a secondary evidence.** However, the same came to be dismissed by the learned Court vide the impugned order dated 30.09.2022.

5. Learned counsel for the petitioner assails the impugned order on the ground that the same is not in consonance with the law laid down by the Hon'ble Apex Court in the judgment rendered in the case of ***Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and Ors. (2020) 7 SCC 1***, and therefore the impugned order ought to be quashed and set aside.

The attention of this Court was drawn to the following paragraphs of the aforesaid judgment:-

*"50. We may hasten to add that Section 65B does not speak of the stage at which such certificate must be furnished to the Court. In Anvar P.V. (supra), this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. **However, in cases where either a defective certificate is given, or in cases***

**where such certificate has been demanded and is not given by the concerned person, the Judge conducting the trial must summon the person/persons referred to in Section 65B(4) of the Evidence Act, and require that such certificate be given by such person/persons.** This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. **When it comes to criminal trials, it is important to keep in mind the general principle that the Accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant Sections of the Code of Criminal Procedure.**

54. **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 of the Code of Criminal Procedure 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.**

72. The reference is thus answered by stating that:

(a) Anvar P.V. (supra), as clarified by us hereinabove, is the law declared by this Court on Section 65B of the Evidence Act. The judgment in Tomaso Bruno (supra), being per incuriam, does not lay down the law correctly. Also, the judgment in SLP (Crl.) No. 9431 of 2011 reported as Shafhi Mohammad (supra) and the



*judgment dated 03.04.2018 reported as MANU/SC/0331/2018 : (2018) 5 SCC 311, do not lay down the law correctly and are therefore overruled.*

***(b) The clarification referred to above is that the required certificate Under Section 65B(4) is unnecessary if the original document itself is produced. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate Under Section 65B(4). The last sentence in Anvar P.V. (supra) which reads as "...if an electronic record as such is used as primary evidence Under Section 62 of the Evidence Act..." is thus clarified; it is to be read without the words "Under Section 62 of the Evidence Act,..." With this clarification, the law stated in paragraph 24 of Anvar P.V. (supra) does not need to be revisited.***

*(c) The general directions issued in paragraph 62 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till Rules and directions Under Section 67C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers.*

*(d) Appropriate Rules and directions should be framed in exercise of the Information Technology Act, by exercising powers such as in Section 67C, and also framing suitable Rules for the retention of data involved in trial of offences, their segregation, Rules of chain of custody, stamping and record maintenance, for the entire duration of trials and appeals, and also in regard to preservation of the meta data to avoid corruption. Likewise, appropriate Rules for preservation, retrieval and production of electronic record, should be framed as indicated earlier, after*

*considering the report of the Committee constituted by the Chief Justice's Conference in April, 2016."*

6. Learned counsel for the petitioner submits that in the present case, the evidence in question is a relevant evidence, which was sought to be brought on the record, at the threshold itself (after examination-in-chief of the witnesses), and that the admissibility of the same may be decided at the time of final hearing.

6.1 Learned counsel further submits that the endeavor must be to bring all relevant evidences on the record, and in case of any defect(s), the same may be cured subsequently during the course of the trial, as held in the above cited case.

6.2 Learned counsel fortified such submissions by also placing reliance on the judgments rendered by the Hon'ble High Court of Allahabad, at the Lucknow Bench, in the cases of ***Shyam Sunder Prasad v. Central Bureau of Investigation, Lucknow (Criminal Revisional No. 588/2022)*** decided on 06.06.2022 and ***Rahul Verma v. State (Criminal Revision No. 1269/2019)*** decided on 23.09.2019.

7. Learned Public Prosecutor opposes but is unable to refute the submissions made on behalf of the petitioner.

8. Heard learned counsel for both parties and perused the record of the case along with the judgments cited at the Bar.

9. This Court finds that the issue in question though does not require any adjudication, in view of the judgments; rendered by a Division Bench of this Hon'ble Court in ***Raj Kaur v. Gurjeet Singh & Ors. (D.B. Criminal Appeal No. 151/2019)*** decided on 26.07.2021, rendered by a Coordinate Bench of this Hon'ble

Court in ***Durga Kanwar Rathore v. State of Rajasthan & Ors. (S.B. Criminal Misc(Pet.) 6516/2022)*** decided on 11.10.2022, rendered by this Court in ***Sidhanth Singh Charan Vs. State of Rajasthan & Anr. (S.B. Criminal Misc. Petition No. 7206/2022)*** decided on 06.12.2022.

Relevant portions of the aforequoted judgments are reproduced hereinunder:-

In ***Raj Kaur (supra)***:-

*"The information allegedly supplied by the accused persons to the IO (PW-34) Laxman Singh did not result into recovery of any incriminating material fact. Thus, the only semblance of evidence which remains on record so as to connect the accused with the crime would be in form of the call details records. Suffice it to say that on a perusal of the evidence of Devendra Kumar Bishnoi (PW31) the Additional S.P., who collected the call detail records, it is clear that he did not analyse the calls exchanged between the accused and the deceased. The trial court analysed the call detail records and found that the last call which was made by Buta Singh was of 16.06.2013 i.e. about 10-12 days before the incident. The presentation of the certificate issued by the service provider under Section 65B of the Evidence Act is mandatory to prove electronic record i.e. call details. However, the witness Shri Devendra Singh Bishnoi, admitted in his cross-examination that the certificate which he procured (Ex.P/45) only pertained to the call details of the mobile phone allegedly in the use of the deceased. No witness from the service providers concerned was examined to prove the call details. Thus, the call detail records are also of no avail of the prosecution and cannot be relied upon. Law in this regard is well settled by the Supreme Court Judgment in the case of **Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal** reported in **AIR 2020 SC 4908.**"*

***Durga Kanwar Rathore (supra)***:-

*"4. In the considered opinion of this Court, the prayer as made by the petitioner for dispensing with the certificate*

under Section 65B of the Act of 1872 can be granted only by the trial Court, obviously, in pursuance of an application filed by the concerned party that too after assuring that despite all efforts being made by the Investigating Officer or the person producing the document, certificate under Section 65B of the Act of 1872 could not be produced or made available.

5. In the instant case, the petitioner has not been able to establish that in spite of all efforts made, the State has not been able to procure the requisite certificate from the mobile company.

6. Be that as it may.

7. In case the petitioner moves an application for dispensing with the requirement of production of certificate under Section 65B of the Act of 1872, the trial Court shall decide the same in accordance with law while giving due regard to the judgment of Hon'ble the Supreme Court in the case of **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal & Ors. reported in (2020) 7 SCC 1."**

In **Sidhanth Singh Charan (supra)**:-

"10. This Court observes that the impugned dated 30.09.2022, rejecting the Certificate under Section 65B of the Act of 1872, states that the certificate did contain the necessary particulars, viz. Mobile phone number of the petitioner nor from which mobile phone number the messages in question were received, etc., as mandated by the provision of law contained in the aforesaid Section.

11. This Court further observes that the law with respect to submission of a Certificate under Section 65B of the Act of 1872 is settled by the Hon'ble Apex Court in the case of **Sonu @ Amar (supra)**, which was reiterated and further clarified, in the case of **Arjun Panditrao Khotkar (supra)**.

For the sake of brevity, the relevant portion of the said judgment is reproduced hereinunder:

"We may hasten to add that Section 65B does not speak of the stage at which such certificate must be furnished to the



Court. In *Anvar P.V. (supra)*, this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. **However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the concerned person, the Judge conducting the trial must summon the person/persons referred to in Section 65B(4) of the Evidence Act, and require that such certificate be given by such person/persons.** This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. **When it comes to criminal trials, it is important to keep in mind the general principle that the Accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant Sections of the Code of Criminal Procedure.**

...

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 of the Code of Criminal Procedure 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.**

12. This Court thus observes that the learned Court below, vide the impugned order, has rightly held that the certificate in question, as preferred by the petitioner, was not submitted in compliance with the law. However, in view of the judgments referred to hereinabove, such a defective certificate may be curable at the instance of the concerned Court, depending on the merits of the case.

13. Adverting to the facts and circumstances of the present case, this Court finds that the documents sought to be brought on the record by the petitioner would be crucial to his defence, and thus,

it would be in the interest of justice to grant the petitioner an opportunity to file the same, after making due compliance of the requirements as per Section 65B of the Act of 1872.

14. The present petition is therefore partly allowed; the impugned order dated 30.09.2022 passed by the learned Court below is quashed and set aside; the application, as preferred by the petitioner before the learned Court below, stands restored. The present limited interference is made, while giving liberty to the petitioner to file a certificate under Section 65B of the Act of 1872, while making due compliance of the provisions of law, as contained in the said Section, and the adequate opportunities shall be afforded to the petitioner to present his defence before the learned Court below; it is also directed that the learned Court below shall consider the same afresh, strictly in accordance with law. All pending applications also stand disposed of."

10. However, this Court deems it apposite to make the following observations;

10.1 This Court observes that the basic tenets of criminal jurisprudence require that an accused must be given full opportunity to present her/his/their defence, strictly in accordance with the law. The endeavor must be to take on record all relevant evidences on the record, and the threshold is higher when an

accused in a criminal trial seeks to bring evidence in his/her/their defence, whether electronic or otherwise, on the record.

10.2 The legal position as clarified in the case of **Arjun Panditrao Khotkar (supra)**, requires that any electronic evidence sought to be brought on record, if secondary evidence, ought to be accompanied by a Certificate in accordance with Section 65B(4) of the Indian Evidence Act, 1872. And in case of any defect(s) with the same, it may be curable at a subsequent stage by the concerned party, after affording requisite opportunity to the concerned party for the same. The concerned Court ought to issue summons to such person(s) to fulfil such purpose. Subsequently, the same may be duly admitted onto the record by the concerned Court, in accordance with law.

10.3 However, in case of the original being produced in the competent Court, by way of bringing the electronic device itself on which the original information is first stored, or by way of the owner of such device by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him, such evidence becomes primary evidence, and the requirement of the Certificate under Section 65B(4) is accordingly dispensed and done away with.

11. In the present case, the evidence in question pertains to the CCTV footage of the incident in question, which is undeniably a relevant evidence.

12. As an upshot of the above discussion, and looking in the given factual matrix as well as the aforequoted judgments, the present petition is **partly allowed**. The impugned order dated

30.09.2022, passed by the learned Court below is interfered with, only to the extent that the learned Court below shall permit the petitioner to bring on record the copy C.D. of the incident in question, as supplied to him, along with the charge-sheet by the concerned police authorities; such consideration shall be made by the learned Court below, strictly in accordance with law, and while keeping in mind the judgment rendered by the Hon'ble Apex Court in the case of **Arjun Panditrao Khotkar (supra)**. All pending applications stand disposed of.

**(DR.PUSHPENDRA SINGH BHATI), J.**

35-SKant/-

