Shafhi Mohammad vs The State Of Himachal Pradesh on 30 January, 2018

Bench: Adarsh Kumar Goel, Uday Umesh Lalit

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CRL.) No.2302 of 2017

SHAFHI MOHAMMAD Pet

VERSUS

THE STATE OF HIMACHAL PRADESH Res

WITH

SLP(Crl) No. 9431/2011

AND

SLP(Crl) No(S). 9631-9634/2012

O R D E R

SLP(Crl.)No.2302 of 2017 :

(1) One of the questions which arose in the course of consideration of the matter was whether videography of the scene of crime or scene of recovery during investigation should be necessary to inspire confidence in the evidence collected.

(2) In Order dated 25th April, 2017 statement of Mr. A.N.S. Nadkarni, learned Additional Solicitor General is recorded to the effect that videography will help the investigation and was being successfully used in other countries.

to the perceived benefits of “Body-Worn Cameras” in the United States of America and the United Kingdom. Body-worn cameras act as deterrent against anti-social behaviour and is also a tool to collect the evidence. It was submitted that new technological device for collection of evidence are order of the day. He also referred to the Field Officers' Handbook by the Narcotics Control Bureau, Ministry of Home Affairs, Government of India. Reference was also made to Section 54-A of the Cr.P.C. providing for videography of the identification process and proviso to Section 164(1) Cr.P.C.

providing for audio video recording of confession or statement under the said provision.

(3) Thereafter, it was noted in the Order dated 12th October, 2017, that the matter was discussed by the Union Home Secretary with the Chief Secretaries of the States in which a decision was taken to constitute a Committee of Experts (COE) to facilitate and prepare a road-map for use of videography in the crime scene and to propose a Standard Operating Procedure (SOP). However, an apprehension was expressed about its implementation on account of scarcity of funds, issues of securing and storage of data and admissibility of evidence. We noted the suggestion that still-photography may be useful on account of higher resolution for forensic analysis. Digital cameras can be placed on a mount on a tripod which may enable rotation and tilting. Secured portals may be established by which the Investigation Officer can e-mail photograph(s) taken at the crime scene. Digital Images can be retained on State's server as permanent record. SLP(Crl.)NO.9431 of 2011:

> (1) Since identical question arose for consideration in this special leave petition as noted in Order dated 12th October, 2017, we have heard learned amicus, Mr. Jayant Bhushan, senior advocate, Ms. Meenakshi Arora, senior advocate, assisted by Ms. Ananya Ghosh, Advocate, on the question of admissibility of electronic record. We have also heard Mr. Yashank Adhyaru, learned senior counsel, and Ms. Shirin Khajuria, learned counsel, appearing for Union of India. (2) An apprehension was expressed on the question of applicability of conditions under Section 65B(4) of the Evidence Act to the effect that if a statement was given in evidence, a certificate was required in terms of the said provision from a person occupying a responsible position in relation to operation of the relevant device or the management of relevant activities. It was submitted that if the electronic evidence was relevant and produced by a person who was not in custody of the device from which the electronic document was generated, requirement of such certificate could not be mandatory. It was submitted that Section 65B of the Evidence Act was a procedural provision to prove relevant admissible evidence and was intended to supplement the law on the point by declaring that any information in an electronic record, covered by the said provision, was to be deemed to be a document and admissible in any proceedings without further proof of the original. This provision could not be read in derogation of the existing law on admissibility of electronic evidence.
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> (3) We have been taken through certain decisions which may be referred to. In Ram Singh and Others v. Col. Ram Singh, 1985 (Supp) SCC 611, a Three-Judge Bench considered the said issue.

English Judgments in R. v. Maqsud Ali, (1965) 2 All ER 464, and R. v. Robson, (1972) 2 ALL ER 699, and American Law as noted in American Jurisprudence 2d (Vol.29) page 494, were cited with approval to the effect that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards

adopted by the Court about the authenticity of the same. In the case of tape-recording it was observed that voice of the speaker must be duly identified, accuracy of the statement was required to be proved by the maker of the record, possibility of tampering was required to be ruled out. Reliability of the piece of evidence is certainly a matter to be determined in the facts and circumstances of a fact situation. However, threshold admissibility of an electronic evidence cannot be ruled out on any technicality if the same was relevant. (4) In Tukaram S. Dighole v. Manikrao Shivaji Kokate, (2010) 4 SCC 329, the same principle was reiterated. This Court observed that new techniques and devices are order of the day. Though such devices are susceptible to tampering, no exhaustive rule could be laid down by which the admission of such evidence may be judged. Standard of proof of its authenticity and accuracy has to be more stringent than other documentary evidence.

(5) In Tomaso Bruno and Anr. v. State of Uttar Pradesh, (2015) 7 SCC 178, a Three-Judge Bench observed that advancement of information technology and scientific temper must pervade the method of investigation. Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an investigating agency. Reference was made to the decisions of this Court in Mohd. Ajmal Amir Kasab v. State of Maharashtra, (2012) 9 SCC 1 and State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600. (6) We may, however, also refer to judgment of this Court in Anvar P.V. v. P.K. Basheer and Others, (2014) 10 SCC 473, delivered by a Three-Judge Bench. In the said judgment in para 24 it was observed that electronic evidence by way of primary evidence was covered by Section 62 of the Evidence Act to which procedure of Section 65B of the Evidence Act was not admissible. However, for the secondary evidence, procedure of Section 65B of the Evidence Act was required to be followed and a contrary view taken in Navjot Sandh (supra) that secondary evidence of electronic record could be covered under Sections 63 and 65 of the Evidence Act, was not correct. There are, however, observations in para 14 to the effect that electronic record can be proved only as per Section 65B of the Evidence Act.

(7) Though in view of Three-Judge Bench judgments in Tomaso Bruno and Ram Singh (supra), it can be safely held that electronic evidence is admissible and provisions under Sections 65A and 65B of the Evidence Act are by way of a clarification and are procedural provisions. If the electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under Section 65B(h).

(8) Sections 65A and 65B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In Anvar P.V. (supra), this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65A and 65B of the Evidence Act. Primary evidence is the document produced before Court and the expression “document” is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

(9). The term “electronic record” is defined in Section 2(t) of the Information Technology Act, 2000 as follows:

> “Electronic record” means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.” (10). Expression “data” is defined in Section 2(o) of the Information Technology Act as follows.

“Data” means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer.” (11) The applicability of procedural requirement under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(h) is not always mandatory. (12) Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies.

(13) To consider the remaining aspects, including finalisation of the road-map for use of the videography in the crime scene and the Standard Operating Procedure (SOP), we adjourn the matter to 13th February, 2018. (14) We place on record our deep appreciation for the valuable assistance rendered by learned amicus, Mr. Jayant Bhushan, senior advocate, Ms. Meenakshi Arora, senior advocate, who was assisted by Ms. Ananya Ghosh, Advocate, as well as by Mr. Yashank Adhyaru, learned senior counsel, and Ms. Shirin Khajuria, learned counsel, appearing for Union of India.

.....J. (ADARSH KUMAR GOEL) .....J. (UDAY UMESH LALIT) New Delhi, January 30, 2018.

ITEM NO.2 COURT NO.11 SECTION II-C

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Crl.) No(s). 2302/2017

(Arising out of impugned final judgment and order dated 26-06-2014 in CRL.A. No. 404/2009 passed by the High Court of Himachal Pradesh, Shimla) SHAFHI MOHAMMAD Petitioner(s) VERSUS THE STATE OF HIMACHAL PRADESH Respondent(s) (FOR CONDONATION OF DELAY IN FILING - IA 4230/2017, FOR EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT - IA 4958/2017) WITH SLP(Crl) No. 9431/2011 (II-B) (FOR GRANT OF BAIL - IA 24253/2011, FOR PERMISSION TO FILE ANNEXURES - IA 5326/2012) SLP(Crl) No. 9631-9634/2012 (II-B) (FOR EXEMPTION FROM FILING O.T. - IA 26736/2012) Date: 30-01-2018 These matters were called on for hearing today. CORAM :

HON'BLE MR. JUSTICE ADARSH KUMAR GOEL HON'BLE MR. JUSTICE UDAY UMESH LALIT Mr. Jayant Bhushan,Sr.Adv. (A.C.) Mr. Ketan Paul,Adv.

Ms. Reeja Varghese,Adv.

Mr. Tushar Bhushan,Adv.

Ms. Meenakshi Arora,Sr.Adv.(A.C.) Ms. Ananya Ghosh,Adv.

Mr. Rituj Chopra,Adv.

For Dr. Arun Mohan,Sr.Adv. (A.C.) For Petitioner(s) Ms. E. R. Sumathy, AOR (SCLSC) Mr. Bharat Bhushan, AOR Ms. Jaspreet Gogia, AOR Mr. Raj Kamal,Adv.

Ms. Mandakini Singh,Adv.

For Respondent(s) Mr. Yashank Adhyaru,Sr.Adv.

(M.H.A)

Ms. Shirin Khajuria,Adv.
Ms. Sanskriti Bhardwaj,Adv.
Ms. Ayushi Gaur,Adv.
Mr. B.V. Balaram Das,AOR

Ms. V. Mohana,Sr.Adv.
Ms. Asha G. Nair,Adv.
Mr. Zoheb Hussain,Adv.
Ms. Rukmini Bobde,Adv.
Mr. Kumar Shashank,Adv.
Mr. B.V. Balaram Das,AOR

Mr. Ajay Marwah,Adv.
Ms. Seema Sharma,Adv.
Mr. Varinder K. Sharma,Adv.
Mr. Karan Thakur,Adv.

Mr. Vikas Mahajan,Adv.
Mr. Vinod Sharma,Adv.
Mr. Arun Singh,Adv.
Ms. Anuradha Mutatkar, AOR

Ms. Jaspreet Gogia, AOR
Mr. Raj Kamal,Adv.
Ms. Mandakini Singh,Adv.

Mr. Bharat Bhushan, AOR

UPON hearing the counsel the Court made the following O R D E R In terms of the signed reportable order, legal position on the subject is clarified and the matter is adjourned to 13th February, 2018:

"(10) Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced, such party cannot be required to produce certificate under Section 65B(4) of the Evidence Act.

(11) To consider the remain aspects including finalisation of the road-map for use of the videography in the crime scene and the Standard Operating Procedure (SOP), we adjourn the matter to 13th February, 2018.

(12) We place on record our deep appreciation for the valuable assistance rendered by learned amicus, Mr. Jayant Bhushan, senior advocate, Ms. Meenakshi Arora, senior advocate, who was assisted by Ms. Ananya Ghosh, Advocate, as well as by Mr. Yashank Adhyaru, learned senior counsel, and Ms. Shirin Khajuria, learned counsel, appearing for Union of India." (MAHABIR SINGH) (PARVEEN KUMARI PASRICHA) COURT MASTER BRANCH OFFICER (Signed Reportable Order is placed on the file)