

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

S.B. Criminal Misc(Pet.) No. 3672/2023

1. Chotha Ram S/o Shri Lumbha Ram, Aged About 23 Years,
R/o Dhadhaniya P.S. Balesar District Jodhpur.
2. Shyam Lal S/o Shri Jhunjhar, Aged About 25 Years, R/o
Parkhanda P.S. Arnod District Pratapgarh.

-----Petitioners

Versus

State Of Rajasthan, Through PP

-----Respondent

For Petitioner(s)	:	Mr. Ravindra Singh
For Respondent(s)	:	Mr. Mukhtiyar Khan, P.P.

HON'BLE MR. JUSTICE FARJAND ALI

Order

Reportable :

04/03/2024

1. The instant criminal misc. petition under Section 482 Cr.P.C. has been preferred by the petitioners challenging the order dated 17.05.2023 passed by the learned Special Judge, NDPS Cases, Pratapgarh (hereinafter to be referred as 'the trial court') in Criminal Misc. Case No.73/2023 (Special Sessions Case No.31/2022), wherein the application filed by the petitioners under Sections 91 and 311 of Cr.P.C. and Section 165 of Evidence Act has been rejected.
2. Bereft of elaborated details, the brief facts necessary for disposal of the instant criminal misc. petition are that the petitioners are facing a judicial proceedings for committing an

offence under the penal provision of NDPS Act and they have been charge-sheeted for the offences under Sections 8/18 and 8/29 of the NDPS Act.

3. A plea has been raised at the behest of petitioners to the effect that a false case has been foisted upon them. The arrest memos and the seizure memos were not prepared at the time mentioned on it and this fact can be verified from the production of the documents, which are in the form of electronic evidence. It was contended that the police officers, whose names are mentioned in the seizure memo, were not present at the time and place as they have been portrayed in papers and as such the memos are farce since at the relevant point of time, neither the petitioners nor the police officers, whose names are mentioned in the application, were present at the crime place. In fact all the papers were prepared by the police at Police Station at a time different to what has been mentioned.

4. It is pleaded that the above fact can be verified from the production of call data record and tower locations of the mobile phones, which were with the police officers. A prayer was made for summoning the call details and tower locations of the mobile phones of police officers, names of which are given in the application, of the dates of 16.05.2022 and 17.05.2022, so as to elicit the truth. The said application has been rejected by the trial court vide the order under assail.

5. Heard learned counsel for the petitioners as well as learned Public Prosecutor and gone through the niceties of the matter.

6. Defending oneself is not only a statutory but a fundamental right guaranteed by the Constitution of India. Article 21 of the Constitution of India provides that no person shall be deprived for his/her life and personal liberty except in accordance with the procedure established by law.

7. In the case of **Maneka Gandhi Vs. Union of India** reported in **AIR 1978 SC 597**, Hon'ble the Supreme Court has emphasized that the procedure established by law must always be fair, just and reasonable and it cannot be arbitrary, oppressive or unreasonable.

8. The basics of criminal jurisprudence is that always the onus lies upon the prosecution to prove its case beyond every shadow of reasonable doubt. Although in some of the statute a reverse burden theory has also been adopted but this is not the case here. When the prosecution brings a case to try and punish an accused for certain culpable act, then it is imperative upon the prosecution; rather, it is an obligation to prove the charges by producing cogent, reliable and unimpeachable evidence, which may be in the form of oral or documentary evidence. When it is the case of the prosecution that the accused persons were apprehended from a particular place at a particular time, then it would be incumbent upon them to establish the fact beyond reasonable doubt.

9. Here, it is made clear that there is no burden upon the accused to disprove the above facts; rather, the stage of proving, disproving or not proving has not been reached till now.

10. It is the stand of the defence that a false story has been cooked up by the prosecution by fabricating false evidence and the entire story set out in the charge-sheet is a bundle of lies. It is his stand that if the material, prayer for which is made for summoning, is taken on record then the entire case of the prosecution would fall on earth.

11. This Court feels that if for the purpose of reserving and saving the right of the accused and for the sake of justice, if a prayer is made to summon the electronic evidence so as to elicit the truth behind the story, then such prayer ought not to have been declined. When the assertion is made that what is wrong may be proved to be wrong and *vice-versa* in the end so that the oil and truth must come out, then the defence must be given an opportunity because not giving an opportunity would mean denying them to counter the charges or to defend themselves as well as closing the door of justice for truth to enter in.

12. It is true that after commencement of the trial, the opportunity is being given to the prosecution to lead or adduce evidence in support of charges, whereafter an explanation under Section 313 of Cr.P.C. will be sought from the accused and then the stage of entering into defence under Section 233 of Cr.P.C. would come. It is also true that until the stage of taking the evidence of the defence on record comes, the defence evidence is not required to be taken on record and for that purpose no defence material would be summoned but here is not the question of taking or tendering the defence evidence or relying upon that rather it is observed that, as per the Rules and Regulations of the

Telecom Regulatory Authority of India, the data of call record is deleted automatically after lapse of one year, then it becomes the duty of the Court to save the data so as to enable the defence or any other party to take use of it at the appropriate stage. In fact, ordering saving/storing/preserving data from destroy would not mean that at the premature stage defence evidence is taken.

13. It does not mean that allowing an application under Section 91 of Cr.P.C. for protection of electronic records from deletion and summoning the same to keep on record would mean taking evidence of defence at a nascent stage; rather, it is being done only for the purpose of saving and protecting the evidence from being destroyed. In fact, the defence evidence shall be taken and considered after the stage of Section 233 of Cr.P.C. would come. The Court of Law and Justice is not supposed to tolerate vanishing or damaging the evidence of vital importance, the presence of which would be displaying the truth which would further mean that the truth will prevail, that the truth will be separated and set aside from the lies.

14. It is not comprehensible that what is the harm if the evidence of vital importance, which may play a key role in adjudicating the charges, is saved, stored, preserved and protected from being destroyed till the actual stage of consideration of that evidence would come.

15. This Court is of the firm opinion that if the accused persons are taking risk in making prayer for summoning call data record and tower locations record of the police officers, who claim that they apprehended the accused persons from a particular place and

at a particular time, which if produced and found genuine then it may be a further piece of evidence against them as the story of the prosecution shall be proved genuine, however, imagine that if the call data record and tower locations of the police officers are not found to be matching with the time and place mentioned in the seizure memo, then it may be a serious dent in the story set out in the charge-sheet and so then there is no legal impediment in summoning the material even at a premature stage just for the purpose of saving the same from deletion. The main object of the courts are meant to impart justice and for that very object it is established. If something suggesting for truth to come on record then in my opinion not allowing the same would mean hiding the truth.

16. Why an opportunity could not be granted to the accused to disprove the charges, though such evidence would neither be considered before its actual stage nor any finding would be given on it but at least an order for protection/preservation of the evidence can certainly be passed.

17. A plain reading of Sections 91 and 311 of Cr.P.C. if read together would elucidate that whenever it appears to the Court that any evidence is essential for the just decision of the case, then it may call or recall such evidence or witness at any stage of the trial. Even after culmination of trial and during pendency of the appeal, such task can be undertaken by the Court by taking resort to Section 391 of the Cr.P.C. as the ultimate object of the Court is to impart justice and justice only.

18. For the purpose of making differentiation between truth and lie, the course of law is supposed to provide ample opportunities to the parties of the lis so that the ultimate task of securing the ends of justice can be achieved.

19. In view of the above discussions, it is felt just appropriate to allow the application dated 12.05.202 moved on behalf of the accused petitioners before the trial court under Sections 91 and 311 of Cr.P.C. and Section 65 of Evidence Act.

20. Accordingly, this criminal misc. petition is allowed.

21. It is ordered that the order dated 17.05.2023 passed by the trial court in Criminal Misc. Case No.73/2023 is quashed and set aside and the application dated 12.05.2023 moved by the petitioners before the trial court under Sections 91 and 311 of Cr.P.C. and Section 165 of Evidence Act is allowed.

22. Learned trial court shall pass necessary directions to the respondent-State, police officers as well as the service provider company of the respective mobile numbers for providing requisite call details and tower locations of the police officers, names of which are mentioned in Para Nos.4, 5 and 6 of the application dated 12.05.2023. The police officer of the concerned Police Station shall also be directed to procure the above evidence at the earliest so as to prevent them from destroying, vanishing and deletion. After receiving the above evidence, the trial court is directed to keep it on record of the case along with certification under Section 65-B of Indian Evidence Act and the same could be utilized by both the parties during the examination of the witnesses. The accused shall be permitted to ask questions from

the concerned police officers by confronting them with the electronic record produced. The above task is permitted only with a view to ascertain or shake the credibility of the witnesses and to enable the parties to bring the truth on record and which would not mean leading the defence evidence rather it would be a cross check of the prosecution evidence.

23. Stay petition also stands disposed of.

(FARJAND ALI),J

Abhishek Kumar
S.No.741