

**IN THE COURT OF MS. SUNENA SHARMA, SPECIAL
JUDGE, (PC ACT) (CBI), ROUSE AVENUE DISTRICT
COURTS, NEW DELHI**

RC No.16(A) of 2017
CNR NO. DLCT11-000470-2019
under Section 409/420/468/471/201 IPC and
under Section 13(2) read with 13(1)(c)/13(2)
read with Section 13(1)(d) PC Act

In re :

State (CBI)

v.

Sonu

27.01.2023

(Appearances)

Sh. Rajan Dahiya, Ld. Senior Public Prosecutor (regular)
for CBI has been transferred.

Sh. Karan Sharma, Ld. Additional Public Prosecutor
(Substitute) for CBI.

Sh. Hitendra Kapur, Ld. Counsel for the accused.

ORDER

1. Vide this order, I shall dispose off the application moved on behalf of CBI for placing on record the complete screen shots of OHDTM Menu in respect of the alleged transactions entered/posted on the basis of forged bank voucher, with certificate of 65B Indian Evidence Act in support thereof and further for recalling/re-examination of PW-6 (Sh. Joginder Pal), PW-10 (Ms. Nisha Gupta), PW-12 (Sh. Ankit Pandey) and PW-14 (Ms Pooja Verma) in the light of said complete screen shots of alleged transactions which were taken from the OHDTM Menu of Finacle System through which the

transactions were used to be entered in the computer system of the bank during demonetization.

2. As per the application, during investigation, IO had collected the screen shot of the OHDTM Menu in Finacle System through which the alleged transaction was entered/posted in the bank record on the basis of forged voucher, from Bank of Baroda and same was filed by the IO with the chargesheet of this case. The alleged voucher is of Rs.2,00,000/- dated 29.11.2016 of the account no. 21420200006495 of account holder Ram Sewak Yadav. During prosecution evidence, the screen shot pertaining to aforementioned voucher was exhibited as Ex.PW17/A(colly). However, during cross-examination of prosecution witnesses, it came to the notice that said screenshot supplied by the bank was an incomplete document as the same did not reflect the transaction number corresponding to the transaction number mentioned on the corresponding Bank Voucher Ex. PW5/D.

3. It is further stated that as per OHDTM Menu, the transaction number is always mentioned on the top right corner of window of the OHDTM Menu and the details of bank officers, who made the entry/posting of the voucher, is mentioned on the bottom right corner of the said Menu. But the abovesaid screenshots as provided by the bank, was taken by scrolling down the window of OHDTM Menu for showing the bottom side without reflecting the top right portion containing the transaction number and therefore, the screen shot available on judicial record does not bear the transaction number at the top right corner. And for this reason of absence of transaction

number, PW-6 and PW-8, during their cross-examination, were unable to connect the bank voucher allegedly forged by the accused with the corresponding transaction reflected in the screenshot of OHDTM menu. It is further stated that the defence side on account of said flaw in the evidence, is now trying to create a doubt on the prosecution case by urging before the court that alleged forged voucher is not pertaining to said screenshot or with the entry of transaction mentioned in said screenshot as they nowhere mentions the transaction number endorsed on said bank voucher allegedly forged by the accused.

4. In the background of aforementioned facts and circumstances of the case, CBI has moved instant application for seeking permission to place on record the complete screenshot with certificate of 65B Indian Evidence Act in support thereof and for recalling/re-examination of related witnesses PW-6 (Sh. Joginder Pal), PW-10 (Ms. Nisha Gupta), PW-12 (Sh. Ankit Pandey) and PW-14 (Ms Pooja Verma). An oral prayer was also made for examination of bank manager who tendered said certificate of 65B of Indian Evidence Act.

5. The application has been vehemently opposed by Ld. defence counsel by filing a written reply wherein, the application has been opposed on various grounds such as that (i) the application is an abuse of process of law; (ii) CBI has failed to mention under which provision of law the application has been moved; (iii) no further investigation can be carried out by investigating agency under Section 173(8) of Cr.P.C without obtaining sanction from the court; (iv) that CBI has no legal right to file a document

allegedly obtained on 13.12.2022, at this belated stage after closure of prosecution evidence and recording of statement of accused under Section 313 Cr.P.C; (v) and that it is well settled principle of law that prosecution cannot be permitted to fill up the lacunas in the prosecution case in the garb of re-examination of witnesses after recording of statement of accused under Section 313 Cr.P.C.

6. In parawise reply, it is further stated that the prosecution has miserably failed to prove even said allegedly incomplete screenshot which is already on record as part of document Ex. PW17/A1 (colly), in accordance with law. Because, despite the same being an electronic document, no certificate under Section 65-B of Indian Evidence Act or that of Section 2A of Banker's Book of Evidence, was ever placed on record with the chargesheet or even during trial by the CBI. It is further stated that the cross-examination of aforementioned witnesses was recorded way back and even at the time of their examination, prosecution was well aware about the contents of the aforementioned screenshot (part of Ex. PW17/A1), but despite that, CBI did not bother to rectify the said alleged error in its case at that stage. It is stated that since the accused by now has already been examined under Section 313 Cr.P.C and already disclosed his defence, the prosecution has lost its right to place on record any new document or to examine any new witness or re-examine any witness already examined in order to fill up the lacunas left in its case.

7. I have heard arguments addressed by Ld. Sr. PP

for CBI as well as Ld. defence counsel Sh. Hitender Kapur, Advocate. I have also gone through the entire record very carefully including the judgments relied upon by the parties.

8. Before dwelling upon the respective contentions of the parties, it is necessary to refer to relevant provision of section 311 Cr.PC which embodies the powers of the court to recall or re-examine any witness at any stage of proceedings provided such evidence appears to be essential for just decision of the case. Such powers can be invoked by the court either suo moto or at the instance of either side. However, the use of the word "just" cautions the court against taking any action which may result injustice either to the accused or to the prosecution. The section reads as under:-

Section 311 in The Code Of Criminal Procedure, 1973

311. Power to summon material witness, or examine person present:- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

9. In ***Natasha Singh v. CBI (State) Criminal Appeal No. 709 of 2013 (arising out of SLP (Crl.) No. 3271 of 2013***, the Hon'ble Apex courts after referring to its various judgments previously rendered on the same subject observed as under:-

"7. Section 311 Cr.P.C. empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under the Cr.P.C., or to summon any person

as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, the Cr.P.C. has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

8. In **Mir Mohd. Omar & Ors. v. State of West Bengal, AIR 1989 SC 1785**, this Court examined an issue wherein, after the statement of the accused under Section 313 Cr.P.C. had been recorded, the prosecution had filed an application to further examine a witness and the High Court had allowed the same. This Court then held, that once the accused has been examined under Section 313 Cr.P.C., in the event that liberty is given to the prosecution to recall a witness, the same may amount to filling up a lacuna existing in the case of the prosecution and therefore, that such an order was uncalled for.

9. In **Mohanlal Shamji Soni v. Union of India & Anr., AIR 1991 SC 1346**, this Court examined the scope of Section 311 Cr.P.C., and held that it is a cardinal rule of the law of evidence, that the best available evidence must be brought before the court to prove a fact, or a point in issue. However, the court is under an obligation to discharge its statutory functions, whether discretionary or obligatory, according to law and hence ensure that justice is done. The court has a duty to determine the truth, and to render a just decision. The same is also the object of Section 311 Cr.P.C., wherein the court may exercise its discretionary authority at any stage of the enquiry, trial or other proceedings, to summon any person as a witness though not yet summoned as a witness, or to recall or re-examine any person, though not yet summoned as a witness, who are expected to be able to throw light upon the matter in dispute, because if the judgments happen to be rendered on an inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

10. As is evident from the language employed in the provision, the discretion given by the first part is very wide and its very width requires a corresponding caution on the part of the court. But the second part does not allow any discretion; it binds the court to examine fresh

evidence and the only condition prescribed is that this evidence must be essential to the just decision of the case. Whether the new evidence is essential or not must of course depend on the facts of each case and has to be determined by the presiding Judge. Reliance placed on **Ram Jeet and ors vs. State of UP AIR 1958 All 439.**

11. In **Raja Ram Prasad v. State of Bihar & anr. (SLP (Crl.) No. 2400 of 2011**, Hon'ble Supreme Court had the occasion to comprehensively deal with the scope and ambit of the powers vested in the court by virtue of section 311 CrPC and laid down following principles which have to be borne in mind by the Courts while dealing with

1) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

2) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

3) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

4) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

5) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

6) The wide discretionary power should be exercised judiciously and not arbitrarily.

7) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just

decision of the case.

8) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

9) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

10) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

11) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

12) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

13) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

14) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

12. In the instant case, the charge was framed vide order dated 03.11.2018 and thereafter, during the course of trial, as many as 14 witnesses were examined by the prosecution. The prosecution evidence was

concluded on 09.09.2022. Statement of accused u/s 313 Cr.P.C was recorded on 06.10.2022 and the case was adjourned for defence evidence on 31.10.2022. In defence, accused examined only one witness and DE was closed on 15.11.2022. Thereafter, the case was adjourned for final arguments. Part arguments were heard on 26.11.2022, 28.11.2022, 29.11.2022, 30.11.2022 and 01.12.2022. On 02.12.2022, after the defence counsel concluded his arguments and already filed the written submissions on record, Ld. Prosecutor sought adjournment as before addressing rebuttal arguments, he wanted to place on record some additional documents. On his request, case was adjourned and on 22.12.2022, Ld. Prosecutor moved instant application on behalf of CBI.

13. Vide instant application, the permission has been sought for placing on record the photocopy of the screen shot (certified by the bank) in respect of alleged transaction, taken from the OHDTM Menu of the FINACLE System. As per CBI, the screen shot of alleged transaction which is part of exhibit Ex. PW17/A1 (colly), are incomplete documents as the same do not reflect the transaction number appearing on the corresponding bank vouchers allegedly forged by the accused. It is submitted by Ld. PP that the transaction number is usually mentioned on the top right corner of the window of OHDTM Menu whereas, the screen shot which is already placed on record was taken by scrolling down the window of OHDTM Menu for showing only the bottom side bearing the details of the bank officer who made the entry in respect of said transaction while the topmost portion reflecting the transaction number of the entry remained

cut out. Therefore, the screen shot available on judicial record is not complete as it does not depict the transaction number on the top right corner of OHDTM Menu corresponding with the transaction number mentioned on the alleged forged voucher. For said reason, during their cross-examination PW-6, PW-10, PW-12 and PW-14 were not able to relate the forged voucher with the alleged transaction in the OHDTM Menu and in the light of said circumstances of the case, the complete screen shot of OHDTM Menu reflecting the transaction number of the relevant entry, is necessary to be placed on record and the related witnesses are also required to be recalled for their re-examination in the light of said complete screen shot.

14. On the other hand, the application has been vehemently opposed by the Ld. Defence Counsel on the ground that the screen shot [part of document Ex. PW17/A-1 (colly)], which is alleged to be an incomplete document, was filed alongwith the chargesheet and said document was time and again referred to by the relevant witnesses examined by the prosecution during the course of trial and during their cross-examination, the defence had put specific questions to said witnesses to know as to how did said screen shot relate to the alleged transaction or with the bank voucher allegedly forged by the accused. As such, all along CBI had been well aware of the fact that the screen shot placed on record was not reflecting the transaction number appearing on the alleged bank voucher but despite that, no steps were taken by CBI to rectify said flaw in its case at any stage till conclusion of defence arguments. Further more, even the incomplete screen shot [part of Ex. PW17/A-1(colly)], which is

already part of court record, was also never proved in accordance with the law as no certificate under Section 65-B of Indian Evidence Act or u/s 2-A of Banker's Book of Evidence was ever placed on record in support of said document.

15. Ld. Defence Counsel vehemently argued that by now moving the present application, CBI is trying to fill up the lacuna left in their case. It is further argued that the accused has already disclosed his defence at the time of SA as well as at the time of final arguments. Even the written submissions have already been placed on record by the accused and this application has been moved by CBI only at the time of rebuttal arguments. Even after examination of PW10, who specifically pointed out about aforementioned flaw in the screen shot, the prosecution continued with recording of rest of prosecution evidence, recording of SA and addressing final arguments. Now the application has been moved at this fag end of the matter to fill up the lacunas which the prosecution did not plug in deliberately at the appropriate stage or at the earliest available opportunity. Further, the re-examination of four witnesses who were examined way back between 2019 to 2022, will lead to denovo trial of the matter which would seriously prejudice the accused.

16. Ld. Defence Counsel has pointed out that during the cross-examination of PW-10 Ms. Nisha Gupta conducted on 18.10.2019, she has specifically stated that there was no transaction number mentioned on the screen shot [part of Ex. PW17/A1 (Colly)] shown to her to connect the same with the relevant voucher Ex.PW5/D (allegedly

forged voucher) in respect of transaction entry dated 29.11.2016 for the sum of Rs. 2 lakh in the account no. 21420200006495 (account of Ram Sewak). As such, from said deposition of witness PW-10, prosecution became well aware of the flaw in said document. But despite that, no efforts were made by CBI to rectify said flaw in its case and instead CBI went ahead in recording evidence of other remaining witnesses, who also deposed consistently on the same lines pointing out to the same flaw in the case of the CBI as the documents on record were not able to connect the forged vouchers with the data fed in the computer system of the bank. It took more than 3 years for CBI to move the court with the aforementioned application, which if allowed at this stage, may gravely prejudice the case of the accused, who has already disclosed his defence before the court by not only examining himself under 313 Cr.P.C but also by examining the defence witness as well as by placing his written arguments on record. It is further argued that the judgment of Hon'ble Apex Court in **Varsha Garg vs. The State of Madhya Pradesh and ors. 2022 Live Law (SC) 662** on which strong reliance has been placed by the prosecution to urge that section 311CrPC can be taken recourse of or invoked even to fill up the lacunas in the case, is distinguishable on facts in as much as in said case, the application was moved prior to closing of prosecution evidence.

17. It is pertinent to note here that re-examination of aforementioned 4 witnesses would become necessary only in case the prosecution's request for filing the complete screen shots is allowed by the court. Although, the prayer in this regard has been made at a very belated

stage but keeping in view the fact that document (screenshot) sought to be placed on record is not a new document but a complete copy of an incomplete document already on record, I find no reason to decline the prosecution request even at this belated stage as the same would not incur any expense on the part of accused in the form of any prejudice except that he would no longer be able to urge said technical flaw in the prosecution case to his favour. Rather in absence of complete copy of said document, prosecution case would suffer gravely because, in absence of transaction number on said screenshot, same cannot be attributable to the alleged forged voucher on the basis of which the alleged entry was made in OHDTM Menu.

18. Here, I would refer to the judgement of Hon'ble Apex in **Rajendra Prasad v. Narcotic Cell through its Officer-in- Charge (supra)**, wherein the Hon'ble Apex Court observed that "Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting, errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

19. Even in the instant case, it was a non-deliberate fault on the part of IO that he placed incomplete copy of the screenshot of the relevant transactions with the chargesheet and an oversight in the management of the prosecution led to delay in moving the instant application for placing the complete copy of said document on record. The flaw in the documents came into the notice of prosecution at the time of examination of PW10, who was examined in way back in 2019 but, the steps to rectify said defect were taken after considerable delay in 2023. However, we can not lose sight of the fact that after the outbreak of pandemic in March, 2020, the courts remained closed for a considerable time and after transfer of my predecessor in Nov, 2021, this court also remained vacant till end of April,2022 and during said period the earlier prosecutor also got transferred to some other court. Hence, all said factors also became the reasons for the delay in moving the application.

20. The contention of the defence counsel that the provisions of Cr.P.C do not provide for filing of the additional documents after commencement of trial is not convincing for the reason that the document sought to be placed on record is not any new document but the same is merely a complete copy of an incomplete screenshot which is already on record. Even otherwise, the rules of procedure are designed as means of fair and just trial because the real purpose of criminal trial is to unravel the truth and ascertainment of real facts. In my considered view, Section 311 Cr.P.C which is analogous to section 540

of old Code of Criminal Procedure empowers the court to allow not only the additional evidence at any stage of trial but to also allow any additional document in evidence at any stage of proceedings provided the same is considered essential for just decision of case and does not lead to any prejudice to the accused. Reliance in this regard is placed on case titled "**Chandu Veeraiah And Ors. vs State Of Andhra Pradesh, (DOD 16 November, 1959) AIR 1960 AP 329, 1960 Cri LJ 791.**" Though the Prosecution has committed mistake by filing an incomplete copy on record and by not taking steps to rectify the defect at the appropriate stage but, Section 311 CrPC gives wide powers to the court to act as the exigency of the case would require provided no prejudice is caused to the accused.

21. The witnesses cited for re-examination in the application are pertaining to the entries made in OHDTM menu of the bank computer and since earlier they were shown only the incomplete copy of the screenshot of the relevant transaction, their re-examination would also become necessary for examining them in respect of complete screenshot so as to give them an opportunity to clarify the dispute pertaining to transaction number of the alleged entry. Further, as observed in above referred judgment in **Mohanlal Shamji Soni v. Union of India & Anr., AIR 1991 SC 1346**, courts should avoid rendering judgments on an inchoate, inconclusive and speculative presentation of facts, as the same would otherwise defeat the ends of justice. Therefore, for bringing clarity on record, the complete screenshot of the alleged transaction as well re-examination of aforementioned witnesses is

necessary for just decision of the case. No prejudice will be caused to accused as he would get the opportunity to cross-examine said witnesses on newly placed document.

22. In the light of aforementioned discussion, I am inclined to allow the application. Accordingly, the copy of complete screenshot and the certificate of Section 65B of Indian Evidence Act are taken on record. All the four witnesses mentioned in the application are allowed to be recalled for their re-examination by CBI subject to availability of said witnesses and subject to cost of Rs.3000/- to be deposited with DSLSA. Since, the complete screen shot has been filed with the certificate of Section 65B of Indian Evidence Act of the Bank Manager, the prosecution is also allowed to examine said person as an additional witness to prove said document in accordance with law.

23. In above terms, application stands disposed of.

(SUNENA SHARMA)
SPECIAL JUDGE (PC ACT) (CBI)
ROUSE AVENUE DISTRICT COURTS
NEW DELHI/27.01.2023