

**::: ORDER BELOW APPLICATION AT EXHIBIT NO.68 IN
SESSIONS CASE NO.48 OF 2021 :::**

Appearance :-

Mr.V.H.Kanara, learned advocate for accused No.1.

Mr.D.R.Trivedi, learned Ad.PP for the State.

With

Mr. U.D.Chavda. learned advocate for complainant.

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1. Present application has been filed by learned advocate Mr.V.H.Kanara for the accused No.1 and requested that he may be permitted to cross-examine the complainant and other witnesses on the basis of Pen Drive which is produced by him at this stage alongwith pursis at Exh.64. He has supplied the copy of the same to the Prosecution.

It is the say of the Mr.Kanara that as per witness that is Jatin Vithlani, who is owner of the 'Jalaram Restaurant', he has stated in his statement dated 04/08/2020 that CCTV footage of the alleged incident has been recorded in CCTV fitted in his Restaurant. It is further stated that Pen Drive is produced on the record is viral and circulated everywhere. That according to Mr.Kanara, complainant is aggressive and he has attacked upon accused persons and accused persons have not inflicted any knife blows. He has relied upon various authorities and asked for permission of cross-examination of the witnesses on the basis of said Pen Drive.

He has further stated that Pen Drive is important document and as per Section 145 of the Evidence Act, he may be allowed to cross-examine the witnesses without proving it.

Learned Advocate Mr.Kanara has relied upon the judgment titled as **N.Sri Rama Reddy Vs V.V. Giri, reported in AIR-1971-SC-1162**, wherein Hon'ble Apex Court has observed as under ;

*“ Having due regard to the decisions referred to above, it is clear that a previous statement, made by a person and recorded on tape, can be used not only to corroborate the evidence given by the witness in Court but also to contradict the evidence given before the Court, as well as to test the veracity of the witness and also to impeach his impartiality. Apart from being used for corroboration, the evidence is admissible in respect of the other three last- mentioned matters, under s. 146 (1), Exception 2 to s. 153 and s. 153(3) of the Evidence Act. Therefore it is not possible for us to accept the contention of Mr. Daphtary that the previous statement can be used only for purposes of corroboration but not for the purpose of contradicting the evidence given before the Court. If a previous statement made by a person can be used to corroborate his evidence given before the Court, on principle, we do not see any reason why such previous statement cannot be used to contradict and also for the other purposes referred to above. In particular the fact that the decisions of the Punjab and Calcutta High Courts *Rup Chand's Case*(1) and *Manindra Nath's Case*(2) where the previous statements have been used to contradict the evidence given before the Court has been approved by this Court in *Yusuffalli's Case*(,) clearly establishes that the contention of Mr. Daphtary that the previous statement cannot be used to contradict the evidence given*

before the Court cannot be accepted. As pointed out already, Mr. Daphtary has not challenged the correctness of the decision in Yusuffali's Case (3). Therefore the first ground of objection raised by Mr. Daphtary will have to be overruled.”

According to Mr.Kanara Pen Drive is for the use of contradiction of the witnesses and impeach his impartiality. It is further stated by Mr.Kanara that in said authority, Tape Recorder was heard for conversation and Police Officer wanted to deposition that basis and objection was raised for admissibility of that evidence. It is required to note that it was further observed by the Hon’ble Apex Court that there can not be objection against the admissibility of Tape Recorder conversation.

Mr.Kanara has further relied upon the case titled as **Pravin Vs Mrs.Pooja, reported in 2024- Supreme (Bom)-1091**, in which Hon’ble Bombay Court has held that trial Court should compel witnesses to produce the documents, if they are relevant issue and he may be permitted to cross-examine the witnesses on the basis of Pen Drive.

According to Mr.Kanara, that in present case, the prime contents of the CCTV footage of the Restaurant where alleged incident took place is relevant in issue and he may be permitted to cross-examine the witnesses on the basis of CCTV footage stored in the Pen Drive.

2. Learned APP Mr.Trivedi and learned advocate Mr.Chavda for the original complainant both have objected the present application and submitted that as per the provision of Section 65/B of the Evidence Act, certificate is not produced with Pen Driver to show that whether

contents of the Pen Drive is genuine or not and to show that it is not tampered. Learned advocate Mr.Kanara must be directed to produce certificate under the provision of Section 65/B before it is used for the purpose of cross-examination of the witnesses concerned.

3. It is required to note that recently, Hon'ble Apex Court in the case of **Arjun panditrao Khotkar Vs Kailash Kushanrao Gorantyal, reported in 2020, 7 SCC 1**, wherein it is observed by Hon'ble Apex Court that electronic evidence without a certificate under Section 65/B (4) is not admissible, unless the original electronic device itself is produced in the Court.”

4. Further, if certificate under Section 65/B of the Evidence Act is not produced then such electronic evidence can not be used even in cross-examination for the purpose of contradiction of witnesses. At this juncture, it is required to refer the judgment of Hon'ble Bombay High Court in the case of **Dhanshree Pramod Sawji vs The State Of Maharashtra pronounced on 13 January, 2020 in Criminal Writ Petition No. 1579 OF 2019**, in which Hon'ble Bombay High Court has observed as follows ;

“ 14) The evidence which accused intends to produce is an electronic evidence. Section 3 of Indian Evidence Act defines word 'Evidence'.

"Evidence" means and includes-

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.

15) Indian Evidence Act also provides that the expression 'electronic records' shall have the meaning assigned to it in Information Technology Act, 2000. Section 2(t) of IT Act defines 'electronic record' as - "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;" Therefore, accused wanted to produce 'electronic record' where the data was recorded. Learned Magistrate ought to have considered as to whether he could have allowed the production of the said record simply under the guise that accused wanted to defend himself.

16) Section 64 of Indian Evidence Act prescribes that documents must be proved by primary evidence except in the cases mentioned in subsequent provisions. That means the Courts of Law must insist upon the production of primary evidence. Section 65-A of the Evidence Act provides that the contents of electronic records may be proved in accordance with the provisions of section 65-B of the Evidence Act. Section 65-B of the Evidence Act provides for the admissibility of electronic records. Taking into consideration the nature of the electronic record, a special provision has been made as the evidence of such nature would be generated by or through computer. The section provides that any information contained in electronic record shall be deemed to be a document also, if the conditions mentioned in the section are satisfied and shall be admissible in any proceeding, without further proof or production of the original, as the evidence of any

contents of the original or of any facts stated therein of which direct evidence would be admissible. Thus, unless the conditions mentioned in the section are satisfied, the said record can not be held to be admissible. The conditions referred to in sub- section 1 of Section 65-B of the Evidence Act are enumerated in sub-section(2) as follows:

(i) *The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;*

(ii) *The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;*

(iii) *During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and*

(iv) *The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.*

Thus, when any electronic record is produced, the person producing it should at least show and state about these conditions. In Anwar P. V. V/s. P. K. Bashir [(2014) 10 SCC 473] held that,-"Any documentary evidence by way of an electronic record under the Evidence Act, in view of Section 59 and 65-A can be proved only in accordance with the procedure prescribed under Section 65-B. The purpose of this

provision is to sanctify secondary evidence in electronic form, generated by a computer. Such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. Further that electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. In the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible. However, in the case of State By Karnataka Lokayukta Police Station, Bengaluru Versus M.R. Hiremath Criminal Appeal No. 819 of 2019 decided on May 1, 2019: 2019 SCC OnLine SC 734, Hon'ble Supreme Court has held that Section 65-B (4) is attracted in any proceedings "where it is desired to give a statement in evidence by virtue of this section". Emphasizing this facet of sub-section (4) the decision in Anvar holds that the requirement of producing a certificate arises when the electronic record is sought to be used as evidence. Reliance was placed on the earlier decision in Union of India v/s. CDR Ravindra V Desai [2018 (16) SCC 273] wherein it was emphasised that non-production of a certificate under Section 65-B of Evidence Act on an earlier occasion is a curable defect. Reliance was also placed on the judgment of the Supreme Court in Sonu @ Amar v/s. State of Haryana [2017 (8) SCC 570], wherein it was held that the crucial test was whether the defect could have been cured at the stage of marking the document. Applying the said test it was held that 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. Thus, though it may be considered that the production of certificate is a curable defect; yet, accused in present case should explain from whose custody he has procured the said CCTV Footage. Unless the basic authenticity of the said document/ electronic record is shown, it can not be even used in cross-examination.”

Thus, as per above ratio, the person who prepare to produce electronic evidence is required to submit 65B certificate to prove its basic authenticity. Herein, present case no such certificate is produced. Learned advocate Mr.Kanara was given time to produce certificate as per 65B, but not produced. It may be noted that as per submission of Mr.Kanara, he has produced ‘Viral’ video through Pen Drive before the Court. That he is not in position to submit such certificate and hence he can not be allowed such Pen Drive for cross-examination also.

5. It is relevant to note that earlier judgment of **N.Sri Rama Reddy (Supra)**, under particular facts and circumstances that witness heard the Tape Recorder wanted to gave his his deposition, whereas in present case, accused persons wants to use Pen Drive which is available to him from unknown sources. It is required to note that in case of **Pravin (Supra)**, the Hon’ble Apex Court has held that a party can not be permitted to cross-examine without pleading and in absence of certificate under Section 65/B of the Evidence Act. And thus, in the event, said authority is the contrary to the submission of Mr.Kanara and further in absence of certificate under 65/B, if accused is allowed to cross-examine, then it will in violation of ratio of Hon’ble Apex Court in **Arjun panditrao Khotkar (Supra)**.

6. At this juncture, it is also relevant to refer the case titled as **Balbir Singh V/s Shiromani Panth Akali Budha Dal Panjwan Takhat and others, reported in AIR-2025**, Punjab and Haryana - 130, wherein Hon'ble Punjab and Haryana High Court has observed as follows ;

“ 16. The Hon'ble Supreme Court then went on to examine the provisions of the Information Technology Act, 2000 (hereinafter referred to as the “IT Act”) and the Evidence Act. While referring to the Statement of Objects and Reasons, the Supreme Court of India held as under ;

13. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed u/s 65B, Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned Under Sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions u/s 65B(2). Following are the specified conditions u/s 65B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity,

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

14. u/s 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned u/s 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

15. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

16. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A-opinion of examiner of electronic evidence

17. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements u/s 65B of the Evidence Act are not complied with, as the law now stands in India.” The three Judges Bench of the Supreme Court of India was once again seized of a similar issue in the case of Arjun Panditrao Khotkar (supra), wherein the said position of law that a certificate was required

as a condition precedent for the admissibility of electronic evidence was reiterated. It was held that the certificate would be unnecessary if the original document itself was produced. For example, if the owner of a laptop computer, computer tablet or mobile phone steps into the witness box and proves that the concerned device on which the original information was stored was owned and/or operated by him.”

7. Further, in the case titled as **R.V.E. Venkatachala Gounder vs Arulmigu Viswesaraswami & V.P. Temple & ... on 8 October, 2003 in Appeal (civil) 10585 of 1996**, the Hon’ble Apex Court has made observation that at the stage of furnishing document before the Court, concerned party is require to raise objection regarding admissibility of document, which is done in present case.

“ The objections as to admissibility of documents in evidence may be classified into two classes:- (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test

is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court.”

8. It is required to note that defence wants to cross-examine complainant and other witness on the basis of viral and/or circulated video stored in the Pen Drive and Prosecution has raised the objection that without producing the certificate u/s.65B of the Evidence Act, genuineness of the video or contents stored in the Pen Drive becomes suspicious and such permission can not be granted to defence.

9. It is required to note that as per above decision notwithstanding anything contained in Evidence Act, as per provision of Section 65/B the certificate is mandatory and till then, it can not be used as “document” to put before witness in cross-examination. Hence, it can be concluded that in absence of such certificate, defence is not permitted to use Pen Drive for the purpose of cross-examination of any witness. Under these facts and circumstances, following final order is hereby passed ;

::: FINAL ORDER :::

1. Present application seeking cross-examination of complainant as well as witness on the basis of Pen Drive produced alongwith pursis at Exh.65 is hereby **dismissed**.
2. It will be open for the accused to produce necessary evidence at his defence stage.

The order is pronounced in the open Court on this 17th day of September -2025 under my hand and seal.

Date: -17/09/2025
Place: - Jamnagar.
A J RAVAL/PS

(Nehalkumar Rajeshbhai Joshi)
Sessions Judge, Jamnagar
Code No.: GJ01318