

KAUP010011152022



**IN THE COURT OF THE II ADDITIONAL DISTRICT AND
SESSIONS JUDGE, UDUPI**

Present

Sri.A.SAMIULLA.

B.Sc, LL.B.,

**II Additional District & Sessions Judge,
Udupi**

Dated: 18th day of January, 2025

SC.No.21 of 2022

Between:

Sri.Nasir Abdul Khadri Byari,
S/o Late Abdul Khadar,
Age; 55 years,
R/at No.2-48, Karandadi,
Majuru Village,
Udupi.

**..... Applicant/Accused
(In person)**

Versus

The State,
Udupi Women Police Station,
Udupi District.

**..... Respondent
(Learned PP)**

:Orders on application under Section 91 of CrPC:

Accused moved this application seeking to summon
the following documents;

i) Mobile Phone Nos.9036559907 & 6364637546, all call records and Whats App messages of complainant (Rashmi Dias) from 15th January, 2022 to 9th May 2022, exchanged with his (petitioner) old Mobile No.8296369321 in the possession of Cw.1 and in the possession of Cw.19, Jayantha.M (IO), which are necessary to defend the case, to cross-examine and contradict the prosecution witnesses.

ii) Mobile Phone No.9141835100 Call Records/SMS Messages of Cw.19 (IO) from 08.05.2022 and 09.05.2022, as Cw.19 sent SMS messages to mobile number 8296369321 of complainant and further she communicated with him through her another Mobile Number five times on 22.04.2022 from 9:00 AM to 8:00 PM in the possession of Cw.19 (IO), which are necessary to defend the case, to cross-examine and contradict the prosecution witnesses.

iii) CCTV Footage with hard disk dated 16.01.2022 from 9:30 AM to 3:00 PM, the technical material and scientific evidence collected from the vicinity of the alleged crime location in the possession of Cw.19 (IO), which are necessary to defend the case, to cross-examine and contradict the prosecution witnesses.

iv) Mobile Phone No.8296369321 call records and mobile call location track record on the day of alleged incident i.e., 16.01.2022 from 9:00 AM to 9:00 PM in the possession of Cw.19 (IO), which are necessary to defend the case, to cross-examine & contradict the prosecution witnesses and to prove alibi.

v) Copy of videography recorded on 24.03.2022 of the statement of Cw.2 recorded by Cw.17 Ashok.N.M., under Section 164(5)(A) of CrPC in the possession of Cw.19 (IO), which enable him to prove procedural irregularity, to conduct cross-examination & to contradict

the prosecution witnesses & further to prove the conduct of Cw.1 and other prosecution witnesses involved in this legal proceedings on the said day.

vi) Video and Photos of Cw2's birthday celebration dated 16.01.2022 in the possession of Cw19; to conduct cross-examination & to contradict prosecution witnesses which will prove that who were all present on the alleged day of incident.

vii) Statements of Juhi Damodar, Hina (elder daughter of Juhi Damodar) and Damodar and Lt Col E.D.Ayesha (grandparents of Hina) & further statements of Cw1 recorded by Cw19 on 23.03.2022 during investigation, wherein Cw1 makes separate serious and grave allegations in the possession of Cw19; to conduct cross-examination and to contradict the prosecution witnesses, further this will prove how unfounded, baseless, false, frivolous and malicious case was built up.

2. Accused submitted that; the said documents are very much relevant either to the relevant facts or facts in issue; they have bearing upon the case; which are required to defend the allegations, to conduct effective & efficient cross-examination of the prosecution witnesses including to contradict them; to disprove the charge leveled against him and also having relevance to prove his complete innocence in the case. Further such production of documents is necessary and desirable for the free, fair, just trial and to arrive at the correct decision of the case, which may have been withheld by the prosecution and investigation officer.

These documents are a tool by virtue of Section 91 of CrPC is given in the hands of this Court to discover the truth of the controversy before it, which is precisely applicable and relevant in the present case. He is willing and ready with all humility to oblige to conclude the trial

in speedy and fair manner without delaying the legal proceedings. Hence, prayed to summon the documents.

3. Prosecution resisted the application filing statement of objections by contending that; the application is not maintainable, as the accused can produce said documents during his evidence as provided under Section 315 CrPC, as such at this stage the application cannot be entertained; if it is accepted then the prosecution lose its opportunity to cross-examine the accused relating to said documents. Hence, prayed to reject the application.

4. Heard both side; perused records.

5. Following point arises for consideration;

Whether the accused has made out a case to summon the documents as prayed?

6. Answer to the above point is in ***affirmative*** for the following:-

REASONS

7. At the outset; the allegations leveled against the accused is that; he (accused) and Cw1 are college friends; he used to visit her house; her daughter aged 18 years is physically disabled; on 16.01.2022 it was her (daughter) birthday; on that day accused visited her (Cw1) house; at two o' clock in the afternoon she (Cw1) went to take bath and housemaid went outside to throw garbage, at that time accused sexually assaulted her daughter.

On the basis of complaint, accused is charge sheeted for the offences punishable under Section 375(b)(d), 376(2)(L) of IPC. After committal of case; same is registered in SC.No.21/22, presence of accused was secured; charge framed; he pleaded not guilty; trial was fixed.

8. At this stage, accused filed the application at hand for the relief stated *supra*; by stating that; the said

documents are relevant to defend his case and for effective cross-examination of prosecution witnesses to disprove the charges leveled against him and also said documents are necessary for the free, fair, just trial and to arrive at correct conclusion.

9. It is well settled that to exercise power under Section 91 of CrPC the first and foremost requirement is about the document being necessary or desirable. In the case at hand the careful scrutiny of charges leveled against the accused and the nature of documents sought to produce stated *supra*; one can say that the said documents are necessary for fair and just trial and also to arrive at correct conclusion.

10. Prosecution argued that; at the stage of defence evidence the accused is at liberty to produce documents and at this stage he cannot maintain the present application. This contention is not tenable because the

power given under Section 91 of CrPC is a general and wide power which empower the Court, the production of any document or any other thing at any stage of any investigation, inquiry or other proceedings under the CrPC.

Accused relied on a decision reported **2006 Criminal Law General 2151** (Raj), Neelesh Jain Vs. State of Rajasthan; dated 20.12.2005, wherein it is held that; *it is no argument to claim that the accused can ask for the documents withheld by the prosecution at the time of entering his defence. The defence has to be built up from day one of the trial and not an adhoc basis. Unless all the evidence collected during the course of the investigation is given to the accused, he is prevented from constructing a proper defence. The right to defend, which flows from the fundamental right to life and personal liberty enshrined in article 21 of the Constitution of India, is not an illusionary right, but a substantive one.*

11. In case of Nitya Dharmananda Vs. Sheelum Reddy, **(2018) 2 SCC 93**, it is held that; *Court being under the obligation to impart justice, is not debarred from exercising its power under Section 91 CrPC, if the interest of justice in a given case requires.*

12. Thus, considering the facts and circumstances of the case coupled with the fact that the Prosecution has not denied the very existence of documents sought to produce and the proposition laid in the decisions *supra* this Court is of the opinion that; application deserves to be considered; if not the accused will be subjected to hardship which cannot be compensated by any means. Hence, above point is answered in affirmative and proceeds to pass the following;

ORDER

Application filed by the accused under
Section 91 CrPC is allowed.

Accordingly, documents are summoned as
prayed in the application.

(Dictated to the stenographer, transcribed by her, corrected and signed by
me and then pronounced in open court on this the 18th day of January, 2025)

(A.Samiulla)
II Addl. District & Sessions Judge,
Udupi