

"C.R"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

MONDAY, THE 30TH DAY OF SEPTEMBER 2019 / 8TH ASWINA, 1941

Cr1.MC.No.4148 OF 2019(G)

AGAINST THE ORDER IN CMP NO.1308/2019 IN CP NO.9/2019 DATED
06-06-2019 ON THE FILE OF THE JUDICIAL MAGISTRATE OF FIRST
CLASS-II, ERNAKULAM

CRIME NO.1548/2018 OF ERNAKULAM CENTRAL POLICE STATION

PETITIONER/ACCUSED:

JISAL RASAK, AGED 21 YEARS,
PUTHUVITTIL PARAMBU, H.NO.20/896,
PALLURUTH POST, PALLURUTHY VELI,
PIPI LANE, KOCHI-682 006.

BY ADVS.
SRI.V.JOHN SEBASTIAN RALPH
SRI.V.JOHN THOMAS
SHRI. RALPH RETI JOHN
SHRI.VISHNU CHANDRAN
KUM. KEERTHANA SUDEV
SRI.E.A.HARIS

RESPONDENT:

THE STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682 031.

BY SRI.SUMAN CHAKRAVARTHY, SENIOR GOVT.PLEADER

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON
30.09.2019, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER

The petitioner herein is the 2nd accused in C.P. No.9 of 2019 on the file of the Judicial Magistrate of the First Class-II, Ernakulam. He has been charged for having committed offences punishable under Sections 302, 307, 120B, 143, 148, 341, 506(ii), 323, 326, 201 and 212 of the IPC.

2. In the course of investigation, the investigating officer chanced upon information that the congregation of some of the accused in and around the scene of crime immediately prior to the murder and also of the injured witness being carried away from the location had been captured in three security cams installed at nearby places. The footage was retrieved by following the procedure and the same was forwarded to the Cyber Forensic Lab for analysis and a report was obtained. The footage was produced before Court along with the final report by categorizing the same as a material object.

3. The petitioner approached the learned Magistrate and filed an application seeking to obtain copies of

- (a) the CCTV footage relied on by the prosecution,
- (b) the FSL report obtained from the Forensic Science Laboratory relating to the CCTV footage and
- (c) the report submitted by the investigating agency seeking further investigation.

4. The prosecution vehemently opposed the handing over of the CCTV footage and it was argued that the footage having been produced as a material object, the digital copies of the same cannot be furnished. The learned Magistrate ordered for the issuance of the records, which were requested for, but refused to issue digital copies of the camera footage.

5. The above order is under challenge.

6. Sri. John S. Ralf, the learned counsel appearing for the petitioner, submitted that the learned Magistrate has egregiously erred in concluding that the electronic evidence relied on by the prosecution is a material object and in refusing to furnish copies of the same to the petitioner. He would contend that Section 3 of the Indian Evidence Act, 1872 defines "evidence" as all documents, including electronic records produced for the inspection of the Court. Referring to the relevant provisions of the Information Technology Act, 2000, it was argued that a document under Section 3 of the Indian Evidence Act would definitely include electronic records as defined under Section 2(t) of the Information Technology Act.

7. The learned counsel contended that the video footage produced before Court would clearly show that the petitioner was not there at the scene of crime and that he was roped in later on the basis of cooked up versions given by planted witnesses. Realizing fully well that the footage would destroy

the very edifice of the prosecution case insofar as the petitioner is concerned, digital copies of the same is denied to him. According to the learned counsel, one of the edifices on which the Criminal Justice System in this country is built upon is "fairness in trial". The Code provides an unbridled right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution to make fair disclosure and to supply the documents demanded. He would contend that the concept of fair disclosure would take within its ambit furnishing of a document, which the prosecution relies upon, whether filed in Court or not. Relying on the decision of the Apex Court in **Sidhartha Vashisht v. State (NCT of Delhi)**¹, it is vehemently urged that even in cases where during investigation, a document is *bona fide* obtained by the investigating agency, and in the opinion of the Prosecutor concerned is relevant and would help in arriving at the truth, that document should be disclosed to the accused. The learned counsel has filed a detailed statement narrating the evolution of the Information Technology Act, 2000 and the consequential amendments made in the various enactments, including the Indian Penal Code, 1860 and the Indian Evidence Act, 1872, to bolster his submissions.

¹ [(2010) 6 SCC 1]

8. Sri.Suman Chakravarthy, the learned Senior Public Prosecutor, has resisted the submissions advanced by the learned counsel appearing for the petitioner. Relying on a decision of this Court in **Sherin V.John v. State of Kerala**², it was argued that the law recognises a third category of evidence in addition to oral evidence as well as documentary evidence, which is 'real evidence' or 'physical evidence' and it consists of material objects other than documents produced for inspection of the Court. It is urged that material evidence is not covered under Section 207 of the Cr.P.C. and there is no law, which provides for the issuance of a copy of a material object. Alternatively, it is argued that the electronic record having been produced as a material object, it is a piece of real evidence and will not fall in the category of an electronic record or document. If that be the case, the prosecution is not obliged to serve a copy of the same to the accused and for the self-same reason, the accused cannot clamor of prejudice and claim it as a matter of right. He submitted that CCTV footage, videos, photographs etc. may fall into the category of 'documents', but may in certain cases, become a 'material object'. Taking the analogy of an obscene book seized by the police, it is submitted that in the ordinary parlance, though the book may fall into the category of 'document', it is actually a material object and the possession of the same being an offence, the accused is not entitled to a copy. Same is the

² [2018 (3) KHC 725]

case with counterfeit currency etc. He would take much pains to point out that an information in an electronic device is a material object as long as it has a direct nexus with the offence committed. The question of privacy is also a consideration to be borne in mind by the Court, contends the learned Senior Public Prosecutor.

9. In view of the questions posed by rival sides, Sri.D.Prem Kamath, a promising young advocate, well versed in cyber law, was requested to assist the Court as *Amicus Curiae*.

10. Sri. D.Prem Kamath, the learned *Amicus Curiae*, elucidated on the reasons, which persuaded the legislature to bring in amendments to the Indian Evidence Act, 1872, and to incorporate necessary provisions regarding appreciation of digital evidence. The learned counsel very painstakingly took this Court through the relevant provisions of various enactments and it is persuasively argued that a combined reading of the definitions of "document" and "evidence" together with the provisions of the Information Technology Act unambiguously would lead to the conclusion that CCTV footage is definitely "data", which is an "electronic record" that comes within the definition of "document" and is evidence, as it has been produced for inspection before Court. According to Sri.Prem Kamath, the digital evidence produced before court would fall into the category of 'documentary evidence'.

11. I have considered the submissions advanced and have perused the records.

12. One of the basic principles of a fair hearing in a grave crime is that the individual charged with a criminal offence be informed of the evidence that supports the allegations that have been formally lodged against him in a Court of law. The provisions of the Code of Criminal Procedure recognize the said right and the accused has a right under Section 173 to obtain the documents made mention of in the said provision. Sub-section (5) of Section 173 is particularly relevant, which reads as under:

"(1) xxxxx xxxxxxx

(2) (i) xxxxx xxxxxxx

 xxxxx xxxxxxx

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements- recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses."

13. Thus, it is imperative on the part of the Investigating Officer to forward all documents and relevant extracts, which the prosecution proposes

to rely, so as to enable the learned Magistrate to hand over the same to the accused.

14. Section 207 of the Code makes it mandatory for the Court to furnish to the accused the following documents:

“(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under subsection (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under subsection (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173.”

15. In **Sidhartha Vashisht** (supra), the Apex Court held that the Code provides a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution to make fair disclosure. The same view was taken in **V.K. Sasikala v. State**³, wherein it

³ (2012) 9 SCC 771

was held that though it is only such reports which support the prosecution case that required to be forwarded to the Court under Section 173 (5) of the Cr.P.C., in every situation where some of the seized papers and documents do not support the prosecution case and, on the contrary, supports the accused, a duty is cast on the Investigating Officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. The Apex Court also had occasion to visualize a situation where the investigating officer ignores a part of the seized documents which favour the accused and forwards to the Court only those documents which support the prosecution. In such an event, the Court may have a duty to make available such documents to the accused regardless of the fact whether the same may not have been marked and exhibited by the prosecution. In other words, it will be the duty of the prosecution to disclose evidence to the accused persons, especially that, which might be potentially exculpatory or otherwise, which may have a negative impact on the weight of the evidence led by the prosecution or such evidence, which may support a proposed defence theory. The same view was taken in **Tarun Tyagi v. CBI**⁴, wherein it was held that every document relied upon by the prosecution has to be supplied to the defence / accused at the time of supply of the charge sheet to

4 (2017) 4 SCC 490

enable such an accused to demonstrate that no case is made out against him and also to enable him to prepare his cross-examination and defence strategy.

16. The contention of the learned Senior Public Prosecutor is based on the decision of this Court in **Sherin V.John** (supra), wherein it was held that material evidence is not covered under Section 207 of the Cr.P.C. It was also held in that case that there is no law providing for issuance of a copy of the material objects to the accused. The following conclusions were arrived at by the learned Single Judge in paragraph No.41 of the judgment.

"41. From the foregoing discussion the following conclusions may be reached:

(i) Apart from oral and documentary evidence, there is a third category of evidence called material evidence, which consists of materials other than documents.

(ii) Only copies of documents can be given, but not of material objects.

(iii) When nothing is expressed or described upon a substance, it is only a material object.

(iv) When a matter is expressed or described upon a substance, it may be a document or a material object depending upon the purpose for which it is produced.

(v) If the identity of the author of the matter expressed or described upon a substance is relevant, it is a document; otherwise it is only a material object.

(vi) Where the only purpose for which a material object upon which a matter has been expressed or described is produced is to prove its seizure from the possession of the accused, and it is made part of the evidence by proving its seizure from his possession, the Court does not want the testimony of anyone to prove the matter since it has become a 'matter before the Court'."

17. I am of the view that **Sherin V.John** (supra) was rendered in a different fact situation and the learned Judge, who had decided the petition, had no occasion to consider the provisions of the Information Technology Act, 2000 and the sweeping changes it brought to the provisions of the Indian Evidence Act, 1872.

18. Before delving into those aspects, it would be profitable to have a look at the definition of "real evidence". In Phipson on Evidence, Sixteenth Edition (South Asian), in page No.5, the learned Author has defined 'real evidence', in the following words:

"Material objects other than documents, produced for inspection of the court are commonly called real evidence. This, when available, is probably the most satisfactory kind of all, since, save for identification or explanation, neither testimony or inference is relied upon. Unless its genuineness is in dispute, the things speaks for itself. "

Unfortunately, however, the term 'real evidence' is itself both indefinite and ambiguous having been used in three divergent senses.

- (1) EVIDENCE FROM THINGS AS DISTINCT FROM PERSONS
- (2) MATERIAL OBJECTS PRODUCED FOR INSPECTION OF THE COURT. This is the second and most widely accepted meaning of 'real evidence'. It must be borne in mind that there is a distinction between a document used as a record of a transaction, such as a conveyance, and a document as a thing. It depends on the circumstances in which classification it falls. On a charge of stealing a document, for example, the document is a thing.
- (3) PERCEPTION BY THE COURT (OR ITS RESULT) AS DISTINCT FROM THE FACTS PERCEIVED.

Although the physical production of objects is a valuable factor in juridical proof and of use in terms of technical classification, it is questionable whether the term 'real evidence' is a very helpful one by which to express it. The phrases hardly ever used in practice, material objects being referred to either by name, or, more loosely, as circumstantial evidence. In textbooks, especially when dealing with classification the phrase is occasionally convenient. Which of its meaning then should be retained? It seems advisable to adhere to the more usual definition, "material objects, other than documents, produced for the inspection of the Court".

19. Thus, essentially, material objects, other than documents produced for the inspection of the court are commonly called real evidence. If the electronic record produced for inspection before the court is a document, the question is whether the accused can be denied a copy of the same.

20. Before proceeding to decide the question raised, it would be apposite to bear in mind that major shifts in the Information Technology landscape from the mid 90's have made the collection and analysis of electronic evidence an increasingly important tool for solving crimes and to bring culprits to justice. Though digital evidence is conceptually the same as any other evidence, it has a much larger scope and the information can be used to pin people and events within the confines of a specific time and space and establish a causality in criminal cases. Great many sensational cases, wherein there is total absence of direct evidence have been solved and the culprits have been brought to book with the aid of electronic evidence. It has

to be borne in mind that electronic evidence is volatile, easily altered, damaged or destroyed, time sensitive and not bound by territorial jurisdictions. In almost all cases, call data records, chat messages, security cam videos, whatsapp profiles and facebook status messages provide valuable clues to zero in on the offender and the law enforcement agencies extensively rely on such forms of electronic evidence before court in aid of the prosecution.

21. The importance of production of scientific and electronic evidence in court after complying with the procedural formalities was highlighted by the Apex Court in **Tomaso Bruno and Other v. State of U.P.**⁵, wherein it was held as follows:

"25. With the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become relevant to establish the guilt of the accused or the liability of the defendant. Electronic documents strictu sensu are admitted as material evidence. With the amendment to the Indian Evidence Act in 2000, Sections 65A and 65B were introduced into Chapter V relating to documentary evidence. Section 65A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65B is complied with. The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by Section 65B of the Evidence Act. Sub-section (1) of Section 65B makes admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfillment of the conditions specified in sub-section (2) of Section 65B. Secondary evidence of contents of document can also be

5 [2015 (7) SCC 178]

led under Section 65 of the Evidence Act. PW-13 stated that he saw the full video recording of the fateful night in the CCTV camera, but he has not recorded the same in the case diary as nothing substantial to be adduced as evidence was present in it.

26. Production of scientific and electronic evidence in court as contemplated under Section 65B of the Evidence Act is of great help to the investigating agency and also to the prosecution. The relevance of electronic evidence is also evident in the light of *Mohd. Ajmal Mohammad Amir Kasab vs. State of Maharashtra*, (2012) 9 SCC 1, wherein production of transcripts of internet transactions helped the prosecution case a great deal in proving the guilt of the accused. Similarly, in the case of *State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru*, (2005) 11 SCC 600, the links between the slain terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers.

27. The trial court in its judgment held that non-collection of CCTV footage, incomplete site plan, non-inclusion of all records and sim details of mobile phones seized from the accused are instances of faulty investigation and the same would not affect the prosecution case. Non- production of CCTV footage, non-collection of call records (details) and sim details of mobile phones seized from the accused cannot be said to be mere instances of faulty investigation but amount to withholding of best evidence. It is not the case of the prosecution that CCTV footage could not be lifted or a CD copy could not be made."

22. In **Tomaso Bruno** (supra), the Apex Court deprecated the prosecution for not producing the CCTV footage and call records which would have been invaluable to establish the prosecution case. In landmark cases such as in **Mohd. Ajmal Mohammad Amir Kasab v. State of Maharashtra**⁶, and in **State (NCT of Delhi) v. Navjot Sandhu @ Afsan**

⁶ [(2012) 9 SCC 1]

Guru⁷, electronic evidence was called in aid to pin point the guilt of the accused. It has to be recognized, therefore, that electronic records are created with every day actions of individuals and in criminal offences, it is extensively used to establish the guilt of the accused.

23. In **State v. S.J. Choudhury**⁸, the Apex Court had occasion to observe that the Indian Evidence Act, 1872 by its very nature is an “ongoing Act”. In view of the rapid advances in technology, the extant statutes will have to be interpreted in such a manner so as to increase its acceptability. The courts will not be justified in placing unnecessary roadblocks in the acceptability of evidence, particularly of the digital variety. Keeping in mind these aspects, the legislature enacted the Information Technology Act, 2000 and later harmonized the Evidence Act to seamlessly accept electronic evidence to advance the cause of justice. Conventional means of records and data processing have become outdated and the rules relating to admissibility of electronic evidence and its proof were incorporated into Indian Laws. The legislature, it appears, was cognizant of the fact that if the procedural and substantive laws do not keep pace with the speed of change in the society, the casualty would be the interest of justice.

⁷ [(2005) 11 SCC 600]

⁸ [(1996) 2 SCC 428]

24. In the above background, we may have a glance at the relevant provisions of the Information Technology Act, 2000.

“Section 2(t), defines “electronic record” to mean data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche. (Micro fiche is nothing but a flat piece of film containing micro-photographs of the pages of a newspaper, catalogue, or other document). In other words, any data, record or data generated, image or sound stored, received or sent in electronic form is an electronic record.

Section 2(r) defines “electronic form” to mean any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device. Thus, any relevant information, if retained in the above media, then it can very well be said to be kept in electronic form.

“Information” has been defined under Section 2(v) to include data, message, text, images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche.

“Data” has been defined under Section 2(o) to mean 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.”

25. The Information Technology Act also defines computer resource, computer network, computer system and computer device. Thus, data, information or any other content generated kept stored, sent, received, and communicated through electronic, magnetic, optical and digital media has to be dealt with as per the provisions of the Information Technology Act, 2000 and such electronic evidence can be admitted and proved in courts in accordance with the special provisions as to evidence relating to electronic record as provided under Section 65B of the Indian Evidence Act, 1872.

26. In this context, it would be relevant to take note of the fact that electronic records are not limited to mere computer outputs such as scanned documents or printouts, which are ordinarily used in the course of business. It includes any data, information or other record stored in electronic medium irrespective of when, how or by whom such record was created. It may include sound recordings of intercepted communications or video footage of crimes. It may also comprise of voluminous data stored on cloud services wherein the device and storage infrastructure are indeterminable. It may also be stored in third party storage platforms, or in social media platforms like Facebook, Twitter, Whatsapp etc. or in e-mails and Camera Footage or

photographs. Thus the wide scope of obtaining digital evidence yields a commensurate potential for recoverable evidence.

27. Section 4 of the Information Technology Act provides for legal recognition of electronic records. It states that where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is--

- (a) rendered or made available in an electronic form; and
- (b) accessible so as to be usable for a subsequent reference.

28. Now, let us have a glance at the relevant provisions of the Indian Evidence Act, 1872.

"Evidence" has been defined to mean and include.-

- 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."

29. Thus, after the amendment which was brought into effect from 17.10.2010, electronic records have been placed in the category of documentary evidence.

30. Section 22A of the Indian Evidence Act states that oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question. Section 59 of the Indian Evidence Act speaks about proof of facts by oral evidence. It states that all facts, except the contents of documents or electronic records, may be proved by oral evidence.

31. A combined reading of Sections 22A and 59 of the Indian Evidence Act would unmistakably show that the contents of electronic records are not expected to be proved by oral evidence. The provisions also say that oral admissions of the contents of electronic records are not relevant, unless its genuineness is in question.

32. The provision in the Indian Evidence Act which enables the Court to require for the production of material thing for its inspection is Section. The principle underlying Section 60 is that all facts except the contents of documents may be proved by oral evidence, which must in all cases, be direct. That is, it must consist of a declaration by the witness that he perceived by his own senses the fact to which he testifies. The effect of the section is, subject

to the proviso, to exclude opinions given at second hand, which is otherwise called heresay. The second proviso to Section 60 reads as follows:

“Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.”

33. In other words, if the oral evidence refers to the existence or condition of a material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection. Thus, when material objects such as weapon of offence, clothes or other personal items of the victim or any other thing which is referred by the witnesses are produced in Court, it is regarded as a thing and it can be relied on as it is. It is next to impossible to supply copies of the same to the accused. However, after the advent of technology, the line between categorizing a thing as a ‘material thing’ or a document has become more or less obliterated. If a hard disk or a magnetic disk containing data is stolen and the same is seized and produced in court, it may sometimes be difficult to categorize it as ‘a thing’ produced for inspection of the court or a ‘document’. One way of distinguishing it is by asking a question as to whether the item is relevant in itself or whether the item is relevant because of the information that can be retrieved from it. In other words, if a material thing is produced in court to rely on the data that it contains, it is probably a document and it has to be regarded as such. On the

other hand, if the material thing is brought to court in order to rely on it as it is, it is a thing and may be exhibited as a material object.

34. In **Tarun Tyagi** (supra) on the allegation that the accused had stolen source codes of a software, a search was conducted in his house and hard disks were seized. At the stage of Section 207 of the Code of Criminal Procedure, all other records except for the cloned copies of the Hard Disk were supplied to the accused. The accused approached the Apex Court and contended that the copies of the hard disks are to be supplied to demonstrate during trial that no case is made out against him. He also contended that the cloned copies are required for enabling him to prepare his cross examination and a proper defense strategy. The CBI opposed the prayer and it was urged that the accused would misuse the same. The Apex Court repelled the contention and the cloned copies of the hard disk were ordered to be supplied to the accused.

35. In view of the above discussion and on a proper understanding of the provisions of the Information Technology Act, 2000 and the Indian Evidence Act, 1872, it can be deduced that the CCTV footage in the instant case is "data" as defined under Section 2(o) of the Information Technology Act, 2000 and it is an electronic record as defined under Section 2(t) of the I.T. Act. If that be the case, the electronic record produced for the inspection of the Court has to be regarded as documentary evidence. In that view of the

matter, I am unable to accept the logic of the prosecution in producing the CCTV footage as a material object and in refusing to supply a copy of the same to the accused. I hold that cloned Digital copies of the footage relied on by the prosecution have to be made available to the accused, unless it is impracticable or unjustifiable. For instance, in a case of brutal sexual abuse, if the incident has been videotaped, in view of the element of privacy or to prevent misuse, copy may be refused. In a case in which the accused is being prosecuted for possessing pedophilic material, copies of the same can be refused. In such cases, the Court may grant permission to the counsel or the accused to have a private screening to have a proper defense. Same is the case in a terrorism prosecution, wherein national security interests demands non-disclosure of the digital evidence, which has been collected. These are merely illustrative and not exhaustive. As an adversarial system is followed in our country, the accused is entitled to a copy of the records so that he can bring to the notice of the courts exculpatory material or such other aspects in the prosecution case, which may be to his advantage.

36. At this stage, the question of certification under Section 65B of the Indian Evidence Act was raised by the learned counsel appearing for the petitioner.

37. Any documentary evidence by way of an "electronic record" under the Indian Evidence Act can be proved only in accordance with the procedure

prescribed under Section 65B of the Indian Evidence Act, 1872. This is what is provided under Sections 59 and 65A of the Indian Evidence Act. Section 59 provides that all facts except the contents of document or “electronic evidence”, may be proved by oral evidence. Section 65A provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B of the Act. Section 65B deals with the admissibility of “electronic records”. Section 65A and Section 65B were introduced into the Evidence Act in 2000 providing special processes for proving copies of extracts of electronic records. It provided a method of certifying the authenticity of the copy and the integrity of the content of such copy. In other words, any electronic record, which is printed, stored, recorded or copies made on to an optical or magnetic media and produced by a computer will be deemed to be a document only if the conditions set out in Section 65B(1) of the Evidence Act are satisfied and it was held so in **Anwar P.V. v P.K. Basheer**⁹. However, in **Shafhi Mohammed v. State of H.P.**¹⁰ the Apex Court revisited the principles laid down in **Anwar P.V.** (supra) and it was held that the applicability of procedural requirement under Section 65B(4) of the Evidence Act for furnishing certificate is not always mandatory. Later, in the case of **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal** (Civil Appeal No(s). 2407 of 2018 and connected cases) by interim order dated 26.7.2019,

⁹ (2014)10 SCC 473

¹⁰ (2018) 5 SCC 311

their Lordships of the Apex Court had ordered that in view of **Anwar P.V.** (supra), the pronouncement of this Court in **Shafhi Mohammad** (supra) needs reconsideration and the matter was referred to be considered by a larger Bench. However, in the instant case, the said question is merely academic as Sri.Suman Chakravarthy, the learned Senior Public Prosecutor, submitted that the requisite certification under Section 65B of the Indian Evidence Act has been obtained for the electronic evidence. In that view of the matter, there is no embargo in providing to the accused a copy of the CCTV Footage, which is relied on by the prosecution in the subject case.

38. In the case on hand, I have no doubt in my mind that the investigating agency has committed a grave error by producing the CCTV footage as a material object and also in refusing to give a copy of the same to the accused. The accused is entitled to a digital copy of the CCTV footage, which is relied on by the prosecution to prove the charge. That being the case, the order passed by the learned Magistrate will stand set aside.

39. This petition will stand allowed. The digital copies of the electronic record relied on by the prosecution and sought for by the petitioner shall be issued to him by imposing appropriate safeguards that the jurisdictional court may deem fit and proper.

Before parting, I place on record my deep sense of appreciation to Sri.John S. Ralph, the learned counsel appearing for the petitioner, Sri.Suman Chakravarthi, the learned Senior Public Prosecutor and Sri. D.Prem Kamath, the learned Amicus curiae, for their invaluable assistance.

Sd/-

**RAJA VIJAYARAGHAVAN V.,
JUDGE**

ps/17/9/2019

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P.A. TO JUDGE

APPENDIX

PETITIONER'S/S EXHIBITS:

- ANNEXURE 1 ORDER DATED 6.6.2019 IN CMP NO.1308/2019 IN C.P NO.9/2019 ON THE FILE OF JUDICIAL FIRST CLASS MAGISTRATE COURT II, ERNAKULAM.
- ANNEXURE 2 MAHAZAR DATED 12.7.2018.
- ANNEXURE 3 PETITION IN CMP 1308/2019 IN CP 09/2019 FILED BY THE PETITIONER BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT II, ERNAKULAM.
- ANNEXURE 4 REPORT FILED BY THE INVESTIGATING OFFICER IN CMP NO.1308/2019 IN CP NO.09/2019 BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT II, ERNAKULAM.

RESPONDENT'S EXHIBITS:-NIL