Before Paramjeet Singh, J.

LADDI—*Petitioner*

versus

STATE OF HARYANA—*Respondent*

CRR No. 398 of 2013

May 02, 2013

Indian Penal Code, 1860 - Ss. 376, 506 - Code of Criminal Procedure, 1973 - S. 311 - Indian Evidence Act, 1872 - S. 3 - Information Technology Act, 2000 - Ss. 2, 4, & 7 - FIR was registered on 17.8.2012 u/ss 376, 506 IPC - During the pendency of the Trial, accused filed three applications (i) for re-examination of the prosecutrix; (ii). for taking the voice sample; and (iii). for sending the voice sample of the prosecutrix along with the CD for testing - Additional Sessions Judge dismissed the applications - Petitioner filed three revisions - All the aforesaid three Criminal Revisions allowed - Petitioner/accused has an indefeasible right to a fair trial and equal opportunity to prove his innocence - Right of accused to adduce defence evidence is not only a formality but an essential part of a criminal trial where every opportunity is necessary and it must be given to the accused to prove his innocence and adduce defence.

Held, that from the aforesaid provisions it becomes amply clear that the law, as it exists today, takes care of information stored on magnetic or electronic device and treats it as documentary evidence within the meaning of section 3 of the Indian Evidence Act.

(Para 20)

Further held, that in view of the above, settled legal proposition is that evidence of tape recorded conversation being primary and direct can be used to establish what was said by a person at a material time/occasion.

(Para 23)

Further held, that in the light of above, in the present case, petitioner/accused has an indefeasible right to a fair trial and equal opportunity to prove

his innocence. It is settled law that the right of accused to adduce defence evidence is not only a formality but an essential part of a criminal trial where every opportunity is necessary and it must be given to the accused to prove his innocence and adduce defence.

(Para 37)

Further held, that consequently, all the three applications moved by the petitioner for re-examination of the prosecutrix, taking the voice sample and sending voice sample of the prosecutrix along with CD to the Laboratory are allowed and the impugned orders dated 16.01.2013 passed by learned Additional Sessions Judge, Kaithal are set aside. Trial Court is directed that prosecutrix be re-examined with regard to cell phone recorded conversation only and her voice sample be taken and the same be sent for scientific analysis.

(Para 41)

Rakesh Gupta, Advocate, *for the petitioner(s).*

Sandeep S. Mann, Sr. DAG, Haryana.

D.R.Singla, Advocate, *for the complainant.*

PARAMJEET SINGH, J.

(1) By this common order, Criminal Revision Petitions viz. CRR No. 398 of 2013, CRR No. 399 of 2013 and CRR No. 400 of 2013 are being decided together as the same arise out of FIR No. 94, dated 17.08.2012, registered at Police Station Guhla, District Kaithal.

(2) CRR No. 398 of 2013 has been filed against order dated 16.01.2013 passed by the learned Additional Sessions Judge, Kaithal, whereby an application under Section 311 of the Code of Criminal Procedure (hereinafter referred to as the "Code") for re-examination of the prosecutrix has been dismissed.

(3) CRR No. 400 of 2013 has been filed against order dated 16.01.2013 passed by the learned Additional Sessions Judge, Kaithal, whereby application for taking the voice sample of the prosecutrix has been declined.

(4) CRR No. 399 of 2013 has been filed against order dated 16.01.2013 passed by the learned Additional Sessions Judge, Kaithal whereby application for sending voice sample of the prosecutrix along with CD for testing has been declined.

(5) Brief facts of the case are that FIR No. 94 dated 17.08.2012, under Sections 376, 506 of the Indian Penal Code, was registered at Police Station Guhla, District Kaithal against the petitioner. It is alleged in the FIR that on 12.08.2012 the petitioner committed rape upon the prosecutrix which has been strongly denied. It is alleged that on 11.08.2012 there was a conversation between the prosecutrix and the accused-petitioner from a Cell Phone No. 96715-12799 of the accused-petitioner on the Cell Phone being used by the prosecutrix Nos. 99928-56045 and 82952-65454. The Cell Phone No. 96715-12799 is in the name of Sh. Baldev Singh, brother of the accused-petitioner in which there is facility of recording the conversation. From the Cell Phones, there was a conversation between the accused and the prosecutrix and this fact was brought to the notice of the accused by Sh. Baldev Singh on 04.01.2013. Earlier it was not in the knowledge of the accused-petitioner. From the conversation, the petitioner wants to prove that there was a love affair between the prosecutrix and the accused. The said conversation has been converted into a CD. With a purpose to confront the prosecutrix with her voice in CD, it is essential that the prosecutrix be re-examined, so that she may be confronted with the conversation recorded in the CD.

(6) In the applications, it is also prayed that voice sample of the prosecutrix be taken and the same be got compared from the Forensic Science Lab. All the three applications have been dismissed by the learned Additional Sessions Judge, Kaithal vide separate orders dated 16.01.2013, impugned in three separate criminal revisions.

(7) Learned State counsel has opposed the said applications primarily on the ground that these are not maintainable. Applications are vague and devoid of merits. Even if there is conversation between the accused and the prosecutrix on the Cell Phones, it did not give license to commit the rape upon the prosecutrix. It is, however, denied that there is a conversation between the accused and the prosecutrix.

(8) I have heard learned counsel for the parties and perused the record.

(9) First of all, I would like to consider the concept of law of evidence in view of the Information Technology era in which electronic equipments and computers have virtually taken over our lives. The law of evidence has long been guided by the rule of "best evidence" which is considered to have two basic paradigms avoidance of hearsay and production of primary evidence. The basic rule is that only authentic evidence should be believed and produced which could not reasonably be doubted. As per the Indian Evidence Act, 1872 (hereinafter referred to as the "Evidence Act"), a person who himself perceived the fact being proved can depose with respect to it, not the third person, who has just received the information. Similarly, where a document is to be used to prove a point, the original should be produced in the Court, not a copy or photograph or any other production except where it is permitted under the provisions of the Evidence Act. With the change of technology, everyday new form of evidence is coming into existence, earlier was broadly oral and documentary evidence. Oral evidence is coming with the advancement of the technology. Oral evidence can also be recorded through various electronic gadgets and the gadgets prepared from those are also many a times treated as documents. Now-a-days, records are being prepared on cassettes, compact discs, pen-drives, CCTVs footage, should these be treated as documents as per the provisions of Evidence Act as well as the the Information Technology Act, 2000 (hereinafter referred to as the "IT Act"). These types of electronic gadgets are being controlled and prepared through computers or other electronic gadgets. Increasing use of technology in everyday life, specially the Internet, social sites, cell phones can be useful for certain purposes and also are being used for criminal activities. The technology has its own advantages and disadvantages.

(10) Before dealing with the contentious issue whether conversation recorded in the electronic gadgets falls within the definition of "evidence", it would be appropriate to reproduce the relevant provisions of the Evidence Act and the IT Act:-

The Indian Evidence Act, 1872

3. Interpretation clause. - In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-

xxx xxx xxx xxx

"**Document**" - "Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

"**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.

The Information Technology Act, 2000

2. Definitions - (1) In this Act, unless the context otherwise requires, -

xxxx xxxx xxx xxx

(ha) "communication device" means cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text, video, audio or image;

(i) "computer" means any electronic, magnetic, optical or other high speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network;

(j) "computer network" means the inter-connection of one or more computers or computer systems or communication device through -

(i) the use of satellite, microwave, terrestrial line, wire, wireless or other communication media; and

(ii) terminals or a complex consisting of two or more inter-connected computers or communication device whether or not the inter-connection is continuously maintained;

xxxx xxx xxx xxx

(o) "data" means 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;

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(r) "electronic form", with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device;

(s) "Electronic Gazette" means the Official Gazette published in the electronic form;

(t) "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;

xxx xxx xxx

(v) "information" includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche;

xxx xxx xxx

4. Legal recognition of electronic records – 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.

7. Retention of electronic records – (1) Where any law provides that documents, records or information shall be retained for any

specific period, then, that requirement shall be deemed to have been satisfied if such documents, records or information are retained in the electronic form, if -

(a) the information contained therein remains accessible so as to be usable for a subsequent reference;

(b) the electronic record is retained in the format in which it was originally generated, sent or received or in a format which can be demonstrated to represent accurately the information originally generated, sent or received;

(c) the details which will facilitate the identification of the origin, destination, date and time of despatch or receipt of such electronic record are available in the electronic record:

Provided that this clause does not apply to any information which is automatically generated solely for the purpose of enabling an electronic record to be despatched or received.

(2) Nothing in this section shall apply to any law that expressly provides for the retention of documents, records or information in the form of electronic records.

(11) Prior to the amendment and coming of the IT Act, Evidence Act mainly dealt with the evidence which was in oral or documentary form. There was nothing about the admissibility, nature and evidentiary value of a conversation or statement recorded in an electro-magnetic device. Now, with the advancement of the technology and sophistication in the information technology, various challenges are coming before the Courts and the Investigation Agencies to collect and preserve the evidence. It is quality of evidence which is relevant for the purpose of conviction or acquittal in criminal cases. The advent of information technology has brought into existence a new kind of document called as "electronic record". This intangible document of new type has certain uniqueness as compared to conventional form of documents. Such documents can be preserved in the same quality and state for a long period of time through encryption processes reducing the chance of tampering of evidence.

(12) The relationship between law and technology has not always been an easy one. The law has always yielded in favour of technology whenever it is found necessary. The concern of the law courts regarding the utility and admissibility of electronically recorded conversation, from time to time found its manifestation in various pronouncements. The earliest case in which issue of admissibility of tape-recorded conversation came for consideration is ***Rup Chand*** versus ***Mahabir Prasad (1).*** The Court in this case though declined to treat tape-recorded conversation as writing within the meaning of Section 3 (65) of the General Clauses Act but allowed the same to be used under Section 155(3) of the Evidence Act as previous statement to shake the credit of witness. The Court held that there is no rule of evidence, which prevents a party, who is endeavouring to shake the credit of a witness by use of former inconsistent statement, from deposing that while he was engaged in conversation with the witness, a tape recorder was in operation, or producing the said tape recorder in support of the assertion that the statement was made in his presence.

(13) In ***S. Pratap Singh*** versus ***State of Punjab (2),*** a five Judges Bench of the Hon'ble Supreme Court considered the issue and clearly propounded that tape recorded talks are admissible in evidence and simple fact that such type of evidence can be easily tampered which certainly could not be a ground to reject such evidence as inadmissible. Possibly there is no piece of evidence, which could not be tampered with. In this case the tape recorded conversation was admitted in evidence to corroborate the evidence of witnesses who had stated that such a conversation has taken place.

(14) The Hon'ble Supreme Court in ***Yusufalli Esmail Nagree*** versus ***State of Maharashtra (3),*** considered the issue of admissibility of tape recorded conversation in case under section 165-A of Indian Penal Code. At the instance of the Investigating Agency, the conversation between accused, who wanted to bribe, and complainant was tape recorded. The prosecution wanted to use this tape recorded conversation as evidence against accused. It was opposed on the ground that the same is hit by Section 162 Cr.P.C. as well as Article 20(3) of the Constitution. In this

(1) AIR 1956 Pb. 173
(2) AIR 1964 SC 72
(3) AIR 1968 SC 147

judgment, the Hon'ble Supreme Court laid down that the process of tape recording offers an accurate method of storing and later reproducing sounds. The imprint on the magnetic tape is direct effect of the relevant sounds, like a photograph of a relevant incident. A contemporaneous tape recording of a relevant conversation is a relevant fact and is admissible under Section 7 of the Indian Evidence Act. The Hon'ble Supreme Court after examining the entire issue in the light of various pronouncements laid down as under:-

> (a) The contemporaneous dialogue, which was tape recorded, formed part of res-gestae and is relevant and admissible under Section 8 of the Indian Evidence Act.
>
> (b) The contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under Section 7 of the Indian Evidence Act.
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> (c) Such a statement was not in fact a statement made to police during investigation and, therefore, cannot be held to be inadmissible under Section 162 of the Criminal Procedure Code.
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> (d) Such a recorded conversation though procured without the knowledge of the accused but the same is not elicited by duress, coercion or compulsion nor extracted in an oppressive manner or by force or against the wishes of the accused. Therefore the protection of the Article 20(3) of the Constitution of India was not available.
>
> (e) One of the features of magnetic tape recording is the ability to erase and re-use the recording medium. Therefore, the evidence must be received with caution. The Court must be satisfied beyond reasonable doubt that the record has not been tampered with.

(15) It is vehemently argued that the tape recorded conversation can be erased with ease by subsequent recording and insertion could be superimposed. However, this factor would have a bearing on the weight to be attached to the evidence and not on its admissibility. Ultimately, if the Court suspects that the tape recording has been tampered with that would be a good ground for the court to discard wholly its evidentiary value as

observed in ***Pratap Singh*** versus ***State of Punjab (supra).*** In the case of ***Ram Singh*** versus ***Col. Ram Singh (4),*** following guidelines were laid by the Hon'ble Supreme Court for admissibility of tape recorded conversation:

> (1) The voice of the speaker must be duly identified by the maker of the record or by others who recognize his voice. Where the maker has denied the voice it will require very strict proof to determine whether or not it was really the voice of the speaker.
>
> (2) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence directly or circumstantial.
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> (3) Every possibility of tampering with or erasure of a part of the tape recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.
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> (4) The statement must be relevant according to the rules of Evidence Act.
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> (5) The recorded cassette must be carefully sealed and kept in safe or official custody.
>
> (6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbance.

(16) The crucial question is with regard to the identification of the taped voice. Proper identification of such voice is a sine qua non for the use of such tape recording, therefore, the time, place and accuracy of the recording must be proved by a competent witness and the voice must be properly identified.

(17) The importance of having a transcript of the tape-recorded conversation cannot be under-estimated because the same ensures that the recording was not tampered with subsequently. In the case of ***Ziyauddin Burhanuddin Bukhari*** versus ***Brijmohan Ramdas Mehta (5),*** the Hon'ble Supreme Court has considered the value and use of such transcript and expressed the view that transcripts is certainly corroborative because

(4) AIR 1986 SC 3
(5) AIR 1975 SC 1788

it goes to confirm what the tape record contained. The Hon'ble Supreme Court observed that such transcripts can be used by a witness to refresh his memory under Section 159 of the Evidence Act and their contents can be brought on record by direct oral evidence in the manner prescribed by Section 160 of the Evidence Act.

(18) Tape-recorded conversation is nothing but information stored on a magnetic media. In the case of ***Rup Chand (Supra)***, though, this Court declined to treat tape recorded conversation as a writing within the meaning of section 3 (65) of the General Clauses Act, the Hon'ble Supreme Court in ***Ziyaddin Burhanuddin Bukhari*** (Supra) clearly laid down that the tape recorded speeches were "documents" as defined by Section 3 of the Evidence Act, which stood on no different footing than photographs.

(19) After coming into force of the Information Technology Act, 2000, (w.e.f. 17.10.2000) the traditional concept of evidence stands totally reformed. Section 2(r) of this Act is relevant in this respect which defines information in "electronic form" as information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device. Under section 2(t) of this Act "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. Section 92 of IT Act read with Schedule (2) amended the definition of 'evidence' as contained in section 3 of the Indian Evidence Act. The amended definition runs as under:

> "Evidence:- 'Evidence' means and includes-
>
> (1) all statements which the court permits or requires to be made before it by witness, in relation to matters of fact under inquiry; such statement is called oral evidence;
>
> (2) all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence".

(20) From the aforesaid provisions it becomes amply clear that the law, as it exists today, takes care of information stored on magnetic or electronic device and treats it as documentary evidence within the meaning of section 3 of the Indian Evidence Act.

(21) The next question is about utility and evidentiary value of the tape-recorded information, is about utility and evidentiary value. In this respect following points require consideration:

(a) Whether such evidence is primary or secondary?

(b) Whether such evidence is direct or hearsay?

(c) Whether such evidence is corroborative or substantive?

(22) The point whether such evidence is primary and direct was dealt with by the Hon'ble Supreme Court in ***N. Sri Rama Reddy*** versus ***V.V. Giri (6)***. The Hon'ble Supreme Court held that like any document the tape record itself was primary and direct evidence admissible of what has been said and picked up by the receiver. This view was reiterated by the Hon'ble Supreme Court in ***R.K. Malkani*** versus ***State of Maharashtra (7)***. In this case the Hon'ble Supreme Court ordained that when a court permits a tape recording to be played over it is acting on real evidence if it treats the intonation of the words to be relevant and genuine. Referring to the proposition of law as laid down in ***Rama Reddy's case*** (Supra), a three Judges Bench of the Hon'ble Supreme Court in the case of ***Ziyauddin Burhanuddin Bukhari (supra)*** propounded that the use of tape recorded conversation was not confined to purpose of corroboration and contradiction only, but when duly proved by satisfactory evidence of what was found recorded and of absence of tampering, it could, subject to the provisions of the Evidence Act, be used as substantive evidence. Giving an example, the Court pointed out that when it was disputed or in issue whether a person's speech on a particular occasion, contained a particular statement there could be no more direct or better evidence of it than its tape record, assuming its authenticity to be duly established.

(23) In view of the above, settled legal proposition is that evidence of tape recorded conversation being primary and direct can be used to establish what was said by a person at a material time/occasion.

(24) Under section 157 of the Indian Evidence Act, a witness may be corroborated by his/her previous statement. Section 145 of the Act permits use of a previous statement for contradiction of a witness during

(6) AIR 1971 SC 1162
(7) AIR 1973 SC 157

cross-examination. Again clause (1) of section 146 provides that during cross examination, question may be put to a witness to test his veracity. Section 153 generally deals with exclusion of evidence to contradict answers to questions testing veracity. However, exception (2) of it permits a witness being contradicted if he has denied any fact which was put to him to impeach his impartiality. Section 155 (3) deals with impeaching the credit of a witness by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

(25) The Hon'ble Supreme Court in ***N.Sri Rama Reddy*** (Supra) after considering the matter laid down that the evidence of the tape recorded conversation/statement apart from being used for corroboration is admissible for the purposes stated in Section 146 (1), Exception (2) to section 153 and section 155 (3) of the Evidence Act

(26) The matter was also considered by the Hon'ble Supreme Court in ***State*** versus ***Navjot Sandhu (8).***

(27) The learned Trial Court while dismissing the application under Section 311 of the Code for re-examination of the prosecutrix has observed as under:-

> "... the statement of the prosecutrix was recorded on 5.11.2012 and her cross-examination has been conducted at length which is running into almost in six pages and she has been crossexamined on each and every aspect. After conclusion of the trial, the accused-applicant has also availed four effective opportunities for leading the defence evidence and also to advance the arguments. Once, the cross-examination of the prosecutrix has been recorded on all the material aspects and the court has to be cautious enough as far as recording the statement of prosecutrix is concerned and even otherwise also, recalling of witness is not a routine matter, rather discretion has to be exercised very sparingly and in the rearest among the rare cases. Once it is a matter of record that the prosecutrix has been cross-examined at length on all material counts, there is no occasion for re-calling the prosecutrix for recording her further cross-examination and it appears that since the trial of the case has already been

(8) (2005) 11 SCC 600

concluded, the present application is nothing but is an abuse of process of law as well s the court in order to prolong the proceedings...."

(28) In the present case, applications for taking the voice sample of the prosecutrix and sending it along with CD to an authorized Government Laboratory to check and verify its authenticity have also been dismissed.

(29) It is the case of the complainant/prosecutrix that while her statement was being recorded in Court she was never cross-examined about the alleged tape recorded conversation between her and the petitioner.

(30) Before proceeding further, it would be relevant to consider about the admissibility of recorded conversation and allowing the application for taking voice samples of the parties. As early as 1956, in ***Rup Chand's case supra*** it has been categorically held that a tape recorded version of a former statement of a witness is admissible in evidence to shake the credit of the witness. Hon'ble Supreme Court in ***S. Pratap Singh's case (supra)*** held that the tape recorded version of a conversation was admissible in evidence to corroborate the evidence of witness who had stated that such a conversation had taken place.

(31) In ***RM Malkani*** versus ***State of Maharashtra (9),*** the Hon'ble Supreme Court has observed as under:

"23. Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape-record. A contemporaneous tape- record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is res gestae.....

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29. It was said that the admissibility of the tape recorded evidence offended Arts. 20(3) and 21 of the Constitution. The submission was that the manner of acquiring the tape recorded conversation was not procedure established by law and the appellant was

(9) AIR 1973 SC 157

incriminated. The appellant's conversation was voluntary. There was no compulsion. The attaching of the tape recording instrument was unknown to the appellant. That fact does not render the evidence of conversation inadmissible. The appellant's conversation was not extracted under duress or compulsion. If the conversation was recorded on the tape it was a mechanical contrivance to play the role of an eavesdropper. In R v. Leatham, (1861) 8 Cox C.C. 198 it was said "It matters not how you get it if you steal it even it would be admissible in evidence" as long as it is not tainted by an inadmissible confession of guilt: evidence even if it is illegally obtained is admissible."

(32) The Hon'ble Supreme Court in ***K.K. Velusamy*** versus ***N. Palanisamy (10),*** considered about the telephonic conversation recording and came to a conclusion that a disc containing recording of telephonic conversation could be a valid evidence according to Section 3 of the Evidence Act and Section 2 (t) of the IT Act. The Hon'ble Supreme Court has observed that electronically recorded conversation is admissible in evidence, if the conversation is relevant to the matter in issue and the voice is identified and the accuracy of the recorded conversation is proved by eliminating the possibility of erasure, addition or manipulation. The relevant para of the judgment is reproduced as under:

"7. The amended definition of "evidence" in section 3 of the Evidence Act, 1872 read with the definition of "electronic record" in section 2(t) of the Information Technology Act 2000, includes a compact disc containing an electronic record of a conversation. Section 8 of Evidence Act provides that the conduct of any party, or of any agent to any party, to any suit, in reference to such suit, or in reference to any fact in issue therein or relevant thereto, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. In **R.M. Malkani v. State of Maharastra, AIR 1973 SC 157**, this court made it clear that electronically recorded conversation is admissible in evidence, if the conversation is relevant to the matter in issue and the voice is identified and the accuracy of the recorded conversation is

(10) (2011) 11 SCC 275

proved by eliminating the possibility of erasure, addition or manipulation. This Court further held that a contemporaneous electronic recording of a relevant conversation is a relevant fact comparable to a photograph of a relevant incident and is admissible as evidence under Section 8 of the Act. There is therefore no doubt that such electronic record can be received as evidence."

(33) The issue in question has already been considered in various cases i.e. ***K.K. Velusamy's case (supra), Navjot Sandhu's case (supra), Ram Singh's case (supra)*** etc. that if the recorded version is adequate and statement is produced in evidence, the same is relevant and admissible in evidence provided such recording is not tempered with and the voice is properly identified.

(34) The Hon'ble Supreme Court in ***Vikas Kumar Roorkewal*** versus ***State of Uttarkhan (11)***, has held:

"22. The necessity of fair trial hardly needs emphasis. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases. The learned Judge has failed to take participatory role in the trial. He was not expected to act like a mere tape recorder to record whatever has been stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confers vast and wide powers on Court to elicit all necessary materials by playing an active role in the evidence collecting process. However, the record does not indicate that the learned Judge presiding the trial had exercised powers under Section 165 of the Evidence Act which is in a way complimentary to his other powers." Section 165 of the Evidence Act reads as under:

"***165. Judge's power to put questions or order production.-***

The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to

(11) 2011 (2) SCC 178

any such question or order, nor, without the leave of the Court to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved.

Provided also that this Section shall not authorize any Judge to compel any witness to answer any question or produce any document which such witness would be entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases herein before excepted."

(35) This section is intended to arm the Judge with the most extensive power for the purpose of getting at the truth. The effect of this section is that in order to go to the root of the matter before it, the court has to look at and enquire into every fact before it. The exceptions to this wide power of judge are that the witness cannot be compelled to answer any question or produce any document contrary to Sections 121 to 131 Evidence Act or any question contrary to Section 148 or 149, Evidence Act and the Judge shall not dispense with primary evidence of any document except as provided in the Act.

(36) The Hon'ble Supreme Court in ***Zahira Habibulla H. Sheikh and another*** versus ***State of Gujarat and others (12),*** observed as under:

"43. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings

(12) 2004 (4) SCC 158

in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

44. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Courts to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In Mohan Lal v. Union of India this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, "any Court" "at any stage", or "any enquiry or trial or other proceedings" "any person" and "any such person" clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent

to abandon or abdicate. Object of the Section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to upheld the truth.

45. It is not that in every case where the witness who had given evidence before Court wants to change his mind and is prepared to speak differently, that the Court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate Court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the Court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the Court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The Court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in."

(37) In the light of above, in the present case, petitioner/accused has an indefeasible right to a fair trial and equal opportunity to prove his innocence. It is settled law that the right of accused to adduce defence evidence is not only a formality but an essential part of a criminal trial where every opportunity is necessary and it must be given to the accused to prove his innocence and adduce defence.

(38) Hon'ble Supreme Court in the case of ***Kalyani Baskar (Mrs)*** versus ***M.S. Sampoornam (Mrs) (13),*** has held as under:-

> "12....The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. "Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and the courts should be jealous in seeing that there is no breach of them...."

(39) In the case in hand, the petitioner in the aforesaid three petitions has moved three separate applications, one for re-examination of the prosecutrix, other for taking the voice sample of the prosecutrix and their comparison to prove his innocence and false implication in this case. By doing so the petitioner can prove the conversation and the transcripts of the conversation which are relevant and admissible evidence in accordance with law subject to the satisfaction of conditions as mentioned by the Hon'ble Supreme Court in various decisions.

(40) In view of the above, in my opinion, it would be just and fair to grant an opportunity to the petitioner to prove his innocence.

(41) In the result, all the aforesaid three criminal revision petitions stand allowed. Consequently, all the three applications moved by the petitioner for re-examination of the prosecutrix, taking the voice sample and sending voice sample of the prosecutrix along with CD to the Laboratory are allowed and the impugned orders dated 16.01.2013 passed by learned Additional Sessions Judge, Kaithal are set aside. Trial Court is directed that prosecutrix be re-examined with regard to cell phone recorded conversation only and her voice sample be taken and the same be sent for scientific analysis.

A. Jain

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(13) (2007) 2 SCC 258