



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Criminal Misc(Pet.) No. 5372/2024

Mala Ram S/o Pema Ram, Aged About 40 Years, R/o Village Panoriya, Tehsil Sedwa, Dist. Barmer, Rajasthan. (Presently Lodged At Dist. Jail, Barmer)

-----Petitioner

Versus

State Of Rajasthan, Through Pp

-----Respondent

For Petitioner(s) : Mr. Siddharth Karwasra.

For Respondent(s) : Mr. Vikram Rajpurohit, P.P.

HON'BLE MR. JUSTICE ARUN MONGA

Order

04/09/2024

Application I.A. No.1/2024

1. For the reasons indicated in the application seeking early hearing, the same is allowed.
2. The matter is taken up for orders.

S.B. Criminal Misc(Pet.) No. 5372/2024

1. Under challenge before this Court is an order dated 26.07.2024, passed by the learned Additional Sessions Judge No.2, Barmer, in Session Case No.259/2024, by which the application filed by the petitioner under Section 94 of the Bhartiya Nagrik Suraksha Sanhita (hereinafter referred to as 'BNSS'), seeking the summoning of call details of four witnesses, has been dismissed.
2. Relevant facts from the petition first. Petitioner had filed an application under Section 94 of the BNSS, 2023, requesting call



details of witnesses Sendha Ram, Ishra Ram, Ramesh, and Ratan Lal, including their locations to be relied upon at the appropriate stage at the time of evidence. The petitioner states that the case is at the trial stage, and the statements of PW/1 Sendha Ram, PW/4 Ishra Ram, PW/6 Ramesh, and PW/7 Beejla have already been recorded. The learned Trial Court has called constable Ramesh and Ratan Lal for their statements. During cross-examination, Sendha Ram, Ishra Ram, Ramesh, and Ratan Lal admitted their presence at different locations. To verify these statements, the petitioner argues that obtaining the call details is essential for proper adjudication.

2.1 Additionally, the petitioner asserts that SHO Surajbhan Singh, who was the investigating officer and executed various memos, was not present during the preparation of these documents. Hence, the petitioner requests call details of witnesses Sendha Ram, Ishra Ram, Ramesh, and Ratan Lal.

2.2 Learned Trial Court, after considering arguments from both sides, rejected the application by order dated 26.07.2024. Hence this petition.

3. Heard.

4. Learned counsel for the petitioner submits that the learned trial court has dismissed the application only on the ground that Section 94 of BNSS cannot be invoked for validating the witnesses' statements through call details. The learned trial court has failed to consider the fact that their call details and location details were necessary to be produced. If the said details are not brought in



evidence, then their case will be jeopardized and serious prejudice will be caused to them.

5. Per contra, learned Public Prosecutor, while supporting the order impugned, submits that now more than one year has passed. It is not possible for the department to procure the call details. He further submits that record of the date of telecom/mobile company is self destructed after lapse of some time.

6. I have perused the case file. Before proceeding further, let us first see section 94, *ibid*, which is reproduced here in below :-

“Section 94. Summons to produce document or other thing.

(1) Whenever any Court or any officer in charge of a police station considers that the production of any document, electronic communication, including communication devices, which is likely to contain digital evidence or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Sanhita by or before such Court or officer, such Court may issue a summons or such officer may, by a written order, either in physical form or in electronic form, require the person in whose possession or power such document or thing is believed to be, to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document, or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed—

(a) to affect sections 129 and 130 of the Bharatiya Sakshya Adhinyam, 2023 or the Bankers' Books Evidence Act, 1891 (13 of 1891); or

(b) to apply to a letter, postcard, or other document or any parcel or thing in the custody of the postal authority.”

7. A perusal of the above thus reveals that Section 94 of BNSS can be invoked only either at the instance of the court or the officer in-charge of the police station, who in a given situation, may consider any document to be produced for the benefit of the Court. It was thus, not open for the accused to invoke Section 94





of BNSS. I am also of the view that technically speaking, the learned trial court committed no irregularity in law in dismissing the application filed under Section 94, *ibid*.

8. However, in the peculiar facts and circumstances of the case, I am of the considered opinion that for securing the ends of justice, the petition otherwise deserves being allowed on merits.

9. Under section 528 of BNSS, this Court has inherent powers and a corresponding duty to make such orders as may be necessary to secure the ends of justice.

10. The petitioner herein is under-trial being accused serious offence under Section 302 of IPC. If he is held guilty, the consequence thereof may result into death penalty and/or conviction for life imprisonment. Any negligence or dereliction in adducing of the evidence, needless to say, will result in miscarriage of justice and severely jeopardize the defence of the accused.

11. On a Court query, it transpires that currently prosecution testimony is being recorded by the trial court. Given the work load, it may so happen that at the stage of defence evidence, owing to the delay, the call details and location details, which the accused have been advised to adduce in their evidence, may be deleted from the data bank of the service provider of the mobile network of which the accused as well as other witnesses are subscribers.

12. Reference may be had to Section 95 of BNSS, which reads as under:-

“95. Procedure as to letters-



(1) If any document, parcel or thing in the custody of a postal authority is, in the opinion of the District Magistrate, Chief Judicial Magistrate, Court of Session or High Court wanted for the purpose of any investigation, inquiry, trial or other proceeding under this Sanhita, such Magistrate or Court may require the postal authority to deliver the document, parcel or thing to such person as the Magistrate or Court directs.

(2) If any such document, parcel or thing is, in the opinion of any other Magistrate, whether Executive or Judicial, or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the postal authority to cause search to be made for and to detain such document, parcel or thing pending the order of a District Magistrate, Chief Judicial Magistrate or Court under sub-section (1).”

13. Section 95, supra, thus allows the court to direct postal authorities to produce documents or records that are relevant to a pending trial. The section explicitly grants courts the authority to order the preservation and production of such records, irrespective of whether the documents are in the custody of the accused or not. As per Section 95, the court can direct service providers to produce and retain the required records even before the defense stage, ensuring that these documents are available when needed. This provision thus supports the petitioners' plea to secure the records to avoid their deletion later on by sheer passage of time.

13.1. I am of the view that in the modern day context, postal authority is to be read in a way so as to mean and include even the telecom authority which is a similar service provider qua the electronic data it preserves on behalf of and, delivers, to its consumers. Accordingly, any document or electronic data or a thing, which is not in custody of the accused but with the third party, i.e. postal authority or the telegraph/telecom authority/service provider, but, at the same time, it is relevant for



the purpose of the pending trial can be directed by the trial court to be produced in the court as a piece of evidence.

14. If by the time the stage of defense evidence is reached, the call details and location details, which the accused have been advised to adduce in their evidence, have already been deleted from the data bank of the service provider of the mobile network, then the petitioner would be deprived of valuable opportunity of producing their evidence and would thus be seriously prejudiced in his defence.

15. Trite it may sound, but procedure being the handmaid of justice, should not be allowed to thwart justice. Procedural rules exist to facilitate justice, not to hinder it. If strict adherence to procedural rules leads to the destruction of evidence and deprives the accused of a fair chance to defend themselves, the court should exercise its discretion to deviate from the norm. The court should use its powers to ensure that procedural delays do not result in an injustice. Allowing the preservation of electronic records before they are lost is essential for procedural fairness and the integrity of the judicial process.

16. Moreover, the right to a fair trial is enshrined in Article 21 of the Constitution of India, which guarantees the right to life and personal liberty. Personal liberty includes the right to defend oneself in a criminal prosecution. Any deprivation of the accused's ability to present crucial evidence, such as call details and location records, would constitute a violation of this fundamental right. The prosecution is expected to prove its case beyond a reasonable doubt. Similarly, the accused must be given every reasonable opportunity to contest the evidence and present their defense.



Failure to preserve critical evidence like call and location details severely hampers the accused's ability to mount a defense, undermining the concept of a fair trial. Courts are duty-bound to avoid miscarriage of justice. Allowing key evidence to be lost due to procedural delays would also result in an unfair trial, which could lead to a wrongful conviction or harsher punishment (including life imprisonment or even the death penalty in this case). By not securing crucial evidence for the defense (which is in the possession of a third party), the court would inadvertently tip the balance in favor of the prosecution, thus creating a disparity which must be obviated.

17. As an upshot of my discussion, by treating the application of the petitioner as one under Section 95 of BNSS, the same is allowed. It is directed that the learned trial Court shall issue appropriate process at the earliest for obtaining the call details and the location details of the witnesses i.e. Sendha Ram, Ishra Ram, Ramesh, and Ratan Lal, including their locations, as mentioned in the application from the quarters concerned and allow their proof and production as defence evidence, even if the trial is at the stage of prosecution evidence. Needless to say, in case the aforesaid details have already been obliterated from the data bank of the service provider, then *fate accompli* shall prevail. The petition is allowed in the above terms.

18. Pending application(s), if any, shall also stand disposed of.

(ARUN MONGA),J

237-Sumit/-

Whether Fit for Reporting: Yes / No

