REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1794 OF 2019
(Arising out of SLP(Crl.) No. 10189/2018)

P. Gopalkrishnan @ Dileep .....Appellant(s)

Versus

State of Kerala and Anr. ....Respondent(s)

J U D G M E N T

A.M. Khanwilkar, J.

1. Leave granted.

2. The conundrum in this appeal is: whether the contents of a memory card/pen-drive being electronic record as predicated in Section 2(1)(t) of the Information and Technology Act, 2000 (for short, 'the 2000 Act') would, thereby qualify as a "document" within the meaning of Section 3 of the Indian Evidence Act, 1872 (for short, 'the 1872 Act') and Section 29 of the Indian Penal Code, 1860 (for short, 'the 1860 Code')? If so, whether it is

obligatory to furnish a cloned copy of the contents of such memory card/pen-drive to the accused facing prosecution for an alleged offence of rape and related offences since the same is appended to the police report submitted to the Magistrate and the prosecution proposes to rely upon it against the accused, in terms of Section 207 of the Code of Criminal Procedure, 1973 (for short, 'the 1973 Code')? The next question is: whether it is open to the Court to decline the request of the accused to furnish a cloned copy of the contents of the subject memory card/pen-drive in the form of video footage/clipping concerning the alleged incident/occurrence of rape on the ground that it would impinge upon the privacy, dignity and identity of the victim involved in the stated offence(s) and moreso because of the possibility of misuse of such cloned copy by the accused (which may attract other independent offences under the 2000 Act and the 1860 Code)?

3. The appellant has been arrayed as accused No. 8 in connection with offence registered as First Information Report (FIR)/Crime Case No. 297/2017 dated 18.2.2017 punishable

under Sections 342, 366, 376, 506(1), 120B and 34 of the 1860 Code and Sections 66E and 67A of the 2000 Act, concerning the alleged incident/occurrence at around 2030 hrs. to 2300 hrs. on 17.2.2017, as reported by the victim.

4. For considering the questions arising in this appeal, suffice it to observe that the investigating officer attached to the Nedumbassery Police Station, Ernakulam, Kerala, after recording statements of the concerned witnesses and collecting the relevant evidence, filed police reports under Section 173 of the 1973 Code before the Judicial First Class Magistrate, Angamaly. First police report, on 17.4.2017 and the second, on 22.11.2017. When the appellant was supplied a copy of the second police report on 15.12.2017, all documents noted in the said report, on which the prosecution proposed to rely, were not supplied to the appellant, namely, (i) electronic record (contents of memory card); (ii) Forensic Science Laboratory (for short, 'the FSL') reports and the findings attached thereto in C.D./D.V.D.; (iii) medical reports; C.C.T.V. footages and (iv) Call data records of accused and various witnesses etc.

5. It is noted by the concerned Magistrate that the visuals copied and documented by the forensic experts during the forensic examination of the memory card were allowed to be perused by the appellant's counsel in the presence of the regular cadre Assistant Public Prosecutor of the Court, in the Court itself. After watching the said visuals, some doubts cropped up, which propelled the appellant to file a formal application before the Judicial First Class Magistrate, Angamaly for a direction to the prosecution to furnish a cloned copy of the contents of memory card containing the video and audio footage/clipping, in the same format as obtained in the memory card, alongwith the transcript of the human voices, both male and female recorded in it. In the said application, the appellant inter alia asserted as follows:-

> "7. It may be noted that the electronic record in the form of copy of the alleged video footage of the offending act committed by accused No.1 on the body and person of the defacto complainant is a crucial and material record relied by the prosecution in this case. It is the definite contention of prosecution that the above electronic record is both the evidence of commission of crime as well as the object of commission of crime and hence indisputably the most material piece of evidence in this case. When the injustice, in not serving such a vital piece of evidence relied on by the prosecution in the case, was immediately brought to the notice of this Hon'ble Court, without prejudice to the right of petitioner to obtain copies of the same, the defence side

was allowed to watch the alleged video footages by playing the contents of a pen drive in the lap top made available before this Hon'ble Court. Head phones were also provided to the counsel and also to the learned APP who also was throughout present during this proceedings.

8. It is most respectfully submitted that by watching the video footage, although in a restricted environment and with limited facilities in the presence of the Ld. APP and the Presiding Officer, it is shockingly realised that the visuals and audio bytes contained in the video are of such a nature which would completely falsify the prosecution case in the form presently alleged by the prosecution. As a matter of fact the video footage is not at all an evidence of commission of crime as falsely contended by the prosecution but it is rather a clear case of fabricating false evidence with intent to foist a false case. It is submitted that it is after deliberately concealing or withholding the alleged primary evidence viz. the mobile phone stated to have been used by accused No.1, by the prosecution in active connivance with accused No.1, that the prosecution has produced a memory card which evidently contains only selected audio and video recording.

9. xxx xxx xxx

10. ……The further Verification and close scrutiny of the images and audio with scientific aid will in all probability provide more significant materials necessary to find out the truth behind the recorded images and the extent of tampering and the same could only be unearthed if the mirror copy of the memory card is furnished to the petitioner which he is entitled to get without any further delay. As the prosecution is fully aware that the tampering could be detected and further female voice could be retrieved by the defense, the prosecution is trying to prevent the supply of the copy of the memory card in any form to the defense. It is illegal and the same will clearly amount to denial of a just and fair trial.

11. xxx xxx xxx

12. A close scrutiny of the contents of mahazar dated 8.3.2017 would show that on 18.2.2017 accused No.1 had entrusted a 8 GB memory card to Adv. E.G. Poulose, who had in turn produced the same before the Court of JFCM Aluva. The investigating agency thereafter obtained custody of the above electronic record and later the 8 GB memory

card was sent to FSL, where, upon examination, Dr. Sunil S.P., Assistant director (documents), FSL, Thiruvananthapuram has allegedly prepared a report in that regard. The copy of the report has not been furnished to the petitioner. The mahazar further shows that the contents of Memory card was transferred to a pen drive for the investigation purpose. The above mahazar further categorically states that the pen drive contained the data transferred from memory card and the same relates to the video footage of 17.2.2017 from 22:30:55 to 22:48:40 hrs and it is in order to check and verify whether the voice contained therein belongs to Suni that the voice sample was allegedly taken. The description in the mahazar proceeds as if there is only male voice in the video footage totally screening the fact that the video footage contains many vital and material utterances in female voice. Those utterances were revealed to the petitioner and his counsel only on 15.12.2017. Everybody present had the benefit of hearing the said clear female voice. As mentioned earlier the Ld. APP was also present. But the investigation agency which should have definitely seen and heard the same has for obvious reason screened the said material aspects from the records. The investigation, it appears did not venture to take steps to compare the female voice in the video footage with the voice of the female involved in this case, for obvious reasons. On viewing and hearing, it is revealed that clear attempt have been made by somebody to delete major portions from the video footage and from the audio recording.

13. It is respectfully submitted that utterances made by the parties involved and seen in the video footage determines the nature of act recorded in the video footage and a transcript of the utterances and human voices in the video footage is highly just and necessary especially in view of the shocking revelation, found when the video footage was played on 15.12.2017.

14. Yet another aspect which is to be pointed out is the mysterious disappearance of the mobile phone allegedly used for recording the video footage. The strong feeling of the petitioner is that the investigating agency has not so far stated the truth regarding the mobile phone allegedly used to shot the video footage. The prosecution records itself would strongly indicate that the mobile phone used to record the occurrence (which now turns out to be a drama) was with the Police or with the persons who are behind the

fabrication of the video footage as evidence to launch the criminal prosecution and false implication of the petitioner. It is revolting to common sense to assume that even after conducting investigation for nearly one year by a team headed by a very Senior Police officer like the Addl. DGP of the Stage, during which accused No.1 was in the custody of the investigating team for 14 days at a stretch and thereafter for different spells of time on different occasions the original mobile instrument used for recording the video footage could not be unearthed. It appears that the investigating team was a willing agent to suffer the wrath of such a disgrace in order to suppress the withholding of the mobile instrument.

15. It is interesting to note that even in the second final report dated 22.11.2017 the Police has stated that the investigation to obtain the original mobile phone is even now continuing. It is nothing but an attempt to be fool everybody including the Court.

16. It is most respectfully submitted that in view of the startling revelation in the video footage, the petitioner intends to make request to conduct proper, just and meaningful investigation into the matter so as to ensure that the real truth is revealed and the real culprits in this case are brought to justice. For enabling the petitioner to take steps in that regard. It is highly just and essential that the cloned copy of the contents of memory card containing the video and audio content in the same format as obtained in the Memory card and the transcript of the human voices recorded in it are produced before Court and copy of the same furnished forthwith to the petitioner.

17. As mentioned herein before, the prosecution has chosen to furnish only a small portion of the prosecution records on 15.12.2017. The petitioner is approaching this Hon'ble Court with a detailed petition stating the details of relevant documents which do not form part of the records already produced before this Hon'ble Court and the details of the other documents which are not furnished to petitioner.

18. It is submitted that the petitioner as an accused is legally entitled to get the copies of all documents including the CDs, Video footage etc., and the prosecution is bound to furnish the same to the petitioner.

> 19. In the above premises it is respectfully prayed that this Hon'ble Court may be pleased to direct the prosecution to furnish a cloned copy of the contents of Memory Card containing the video and audio content in the same format as obtained in the memory card and the transcript of human voices, both male and female recorded in it, and furnish the said cloned copy of the memory card and the transcript to the petitioner."

6. The Magistrate vide order dated 7.2.2018, rejected the said application, essentially on the ground that acceding to the request of the appellant would be impinging upon the esteem, decency, chastity, dignity and reputation of the victim and also against public interest. The relevant portion of the order dated 7.2.2018 reads thus:-

> "Heard both sides in detail.
>
> The petitioner has also filed reply statement to the objection and counter statement filed by Special Public Prosecutor in the case. The allegation against the petitioner is that he engaged the first accused to sexually assault the victim and videograph the same. On receipt of summons the petitioner entered appearance and was served with the copies of prosecution records. The learned Senior Counsel appearing for the petitioner requested for the copies of the contents of memory card. The same could not be allowed & the investigation official has already a petition filed objecting the same, with a prayer to permit them to view the same in the court. Hence they were permitted to view the video footage and subsequent to the same they had filed this petition seeking a direction to the prosecution to furnish the copies of alleged audio and video footage and its transcript. The prosecution strongly opposed the same stating that the same will add insult to the victim who had suffered a lot at the hands of not only the accused but also the media. Hence they submitted that the petitioner may be permitted to view the contents of the video during trial.

> Here the offence alleged tantamounts to a serious blow to the supreme honour of a woman. So as to uphold the esteem, decency, chastity, dignity and reputation of the victim, and also in the public interest, I am declining the prayer. But so as to ensure fairness in the proceedings and for just determination of the truth, the petitioner is permitted to inspect the contents of the video footage at the convenience of court."

7. Aggrieved by the above decision, the appellant carried the matter to the High Court of Kerala at Ernakulam (for short, 'the High Court') by way of Crl.M.C. No. 1663/2018. The learned single Judge of the High Court dismissed the said petition and confirmed the order of the Magistrate rejecting the stated application filed by the appellant. The High Court, however, after analyzing the decisions and the relevant provisions cited before it, eventually concluded that the seized memory card was only the medium on which the alleged incident was recorded and hence that itself is the product of the crime. Further, it being a material object and not documentary evidence, is excluded from the purview of Section 207 of the 1973 Code. The relevant discussion can be discerned from paragraph 41 onwards, which reads thus:-

> "41. This leads to the crucial question that is to be answered in this case. Evidently, the crux of the prosecution allegation is that, offence was committed for the purpose of

recording it on a medium. Memory card is the medium on which it was recorded. Hence, memory card seized by the police itself is the product of the crime. It is not the contents of the memory card that is proposed to be established by the production of the memory card. The acts of sexual abuse is to be established by the oral testimony of the victim and witnesses. It is also not the information derived from the memory card that is sought to be established by the prosecution. Prosecution is trying to establish that the alleged sexual abuse was committed and it was recorded. Though, in the course of evidence, contents of it may be sought to be established to prove that, it was the memory card created by the accused, contemporaneously recorded on the mobile, along with the commission of offence, that does not by itself displace the status of the memory card as a document. Memory card itself is the end product of the crime. It is hence a material object and not a documentary evidence. Hence, it stands out of the ambit of section 207 Cr.P.C.

42. **The evaluation of the above legal propositions clearly spells out that, the memory card produced in this case is not a document as contemplated under section 307 IPC [*sic* 207 Cr.P.C.]. In fact, it is in the nature of a material object. Hence, copy of it cannot be issued to the petitioner herein.**

43. Prosecution has a case that, though accused is entitled for his rights, it is not absolute and even outside section 207 Cr.P.C., there can be restrictions regarding the right under section 207 Cr.P.C. It was contended that, if the above statutory provision infringes the right of privacy of the victim involved, fundamental right will supersede the statutory right of the accused. Definitely, in case of Justice K.S. Puttaswamy (Retd.) and Another v. Union of India and Ors. (2017) 10 SCC 1 (at page 1), the Constitutional Bench of the Supreme Court had held that the fundamental rights emanate from basic notions of liberty and dignity and the enumeration of some facets of liberty as distinctly protected rights under Art. 19 does not denude Art.21 of its expansive ambit. It was held that, validity of a law which infringes the fundamental rights has to be tested not with reference to the object of state action, but on the basis of its effect on the guarantees of freedom. In Sherin V. John's case (supra), this Court had held that, when there is a conflict between Fundamental Rights of a person and statutory rights of

> another person, Fundamental Rights will prevail. The possibility of such contention may also arise. Since that question does not arise in this case in the light of finding under section 207 Cr.P.C. I do not venture to enter into that issue.
>
> 44. Having considered the entire issue, I am inclined to sustain the order of the court below in Crl.M.P. No.49 of 2018 in C.P. No.16 of 2017 dismissing the application, though on different grounds. However, this will not preclude the Court from permitting the accused to watch the memory card only in Court, subject to restrictions, to prepare defence."
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> (emphasis supplied)

8. The appellant being dissatisfied, has assailed the reasons which found favour with the trial Court, as well as the High Court. The appellant broadly contends that the prosecution case is founded on the forensic report which suggests that eight video recordings were retrieved from the memory card and that the video files were found to be recorded on 17.2.2017 between 22:30:55 hrs. and 22:48:40 hrs. The same were transferred to the stated memory card on 18.2.2017 between 09:18 hrs. and 09:20 hrs. Be it noted that the original video recording was allegedly done by accused No. 1 on his personal mobile phone, which has not been produced by the investigating agency. However, the memory card on which the offending video recording was copied on 18.2.2017 was allegedly handed over by

an Advocate claiming that the accused No. 1 had given it to him. He had presented the memory card before the Court on 20.2.2017, which was sent for forensic examination at State FSL, Thiruvananthapuram. After forensic examination, the same was returned alongwith FSL report DD No. 91/2017 dated 3.3.2017 and DD No. 115/2017 dated 7.4.2017. A pen-drive containing the data/visuals retrieved from the memory card, was also enclosed with the report sent by the State FSL.

9. Be that as it may, the prosecution was obviously relying on the contents of the memory card which have been copied on the pen-drive by the State FSL during the analysis thereof and has been so adverted to in the police report. The contents of the memory card, which are replicated in the pen-drive created by the State FSL would be nothing but a "document" within the meaning of the 1973 Code and the provisions of the 1872 Act. And since the prosecution was relying on the same and proposes to use it against the accused/appellant, it was incumbent to furnish a cloned copy of the contents thereof to the accused/appellant, not only in terms of Section 207 read with

Section 173(5) of the 1973 Code, but also to uphold the right of the accused to a fair trial guaranteed under Article 21 of the Constitution of India. The trial Court rejected the request of the appellant on the ground that it would affect the privacy and dignity of the victim, whereas, the High Court proceeded on the basis that the memory card is a material object and not a "document". It is well known that a cloned copy is not a photocopy, but is a mirror image of the original, and the accused has the right to have the same to present his defence effectively. In the alternative, it is submitted, that the Court could have imposed appropriate conditions while issuing direction to the prosecution to furnish a cloned copy of the contents of memory card to the accused/appellant.

10. Per contra, the respondent-State and the intervenor (the victim) have vehementaly opposed the present appeal on the argument that the appellant before this Court is none other than the master-mind of the conspiracy. Although he was not personally present on the spot, but the entire incident has occurred at his behest. It is urged that the appeal deserves to be

dismissed as the appellant has disclosed the identity of the victim in the memo of the special leave petition from which the present appeal has arisen. Further, the appellant has falsely asserted that he had himself perused the contents of the pen-drive and even for this reason, the appeal should be dismissed at the threshold. As a matter of fact, the contents of the pen-drive were allowed to be viewed by the appellant's counsel and the regular cadre Assistant Public Prosecutor of the Court. The asservation of the appellant that after viewing the contents of the pen-drive, he gathered an impression that the contents of the memory card must have been tampered with, is the figment of imagination of the appellant and contrary to forensic report(s) by the State FSL. The definite case of the respondent is that the memory card seized in this case containing the visuals of sexual violence upon the victim is a material object and the pen-drive into which the contents of memory card were documented through the process of copying by the State FSL and sent to the Court for the purpose of aiding the trial Court to know the contents of the memory card and the contents of the said pen-drive is both material object as well as "document". It is also

urged that the visual contents of the pen-drive would be physical evidence of the commission of crime and not "document" *per se* to be furnished to the accused alongwith the police report. The contents of the memory card or the pen-drive cannot be parted to the accused and doing so itself would be an independent offence. Moreover, if a cloned copy of the contents of the memory card is made available to the accused/appellant, there is reason to believe that it would be misused by the accused/appellant to execute the conspiracy of undermining the privacy and dignity of the victim. It is urged that the appellant has relied on certain decisions to contend that the contents of the memory card must be regarded as "electronic record" and, therefore, a "document". The exposition in those decisions are general observations and would be of no avail to the appellant. The appellant is facing prosecution for an offence of rape, and the trial thereof would be an in-camera trial before the Special Court. To maintain the sanctity and for upholding the privacy, dignity and identity of the victim, it is urged that the accused/appellant in such cases can seek limited relief before the trial Court to permit him and his lawyer or an expert to view the contents of the pen-drive in Court

or at best to permit him to take a second opinion of expert to reassure himself in respect of the doubts entertained by him. Such indulgence would obviate the possibility of misuse of the cloned copy of the video/audio footage/clipping and the same would be in the nature of a preventive measure while giving a fair opportunity to the accused to defend himself. The respondent and the intervenor would urge that the appeal be dismissed being devoid of merits.

11. As aforesaid, both sides have relied on reported decisions of this Court, as well as the High Courts and on the provisions of the relevant enactments to buttress the submissions. We shall refer thereto as may be required.

12. We have heard Mr. Mukul Rohatgi, learned senior counsel for the appellant, Mr. Ranjit Kumar, learned senior counsel for the respondent-State and Mr. R. Basant, learned senior counsel for the intervenor.

13. The central issue is about the obligation of the investigating officer flowing from Section 173 of the 1973 Code and that of the

Magistrate while dealing with the police report under Section 207 of the 1973 Code. Section 173 of the 1973 Code ordains that the investigation under Chapter XII of the said Code should be completed without unnecessary delay and as regards the investigation in relation to offences under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of the 1860 Code, the same is required to be completed within two months from the date on which the information was recorded by the officer in charge of the police station. The investigating officer after completing the investigation, is obliged to forward a copy of the police report to a Magistrate empowered to take cognizance of the offence on such police report. Alongwith the police report, the investigating officer is also duty bound to forward to the Magistrate "all documents" or relevant extracts thereof, on which prosecution proposes to rely other than those sent to the Magistrate during investigation. Similarly, the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses, are required to be forwarded to the Magistrate alongwith the police report. Indeed, it is open to the police officer, if in his opinion, any part

of the "statement" is not relevant to the subject matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in public interest, to indicate that part of the "statement" and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request. That discretion, however, is not given to him in respect of the "documents" or the relevant extracts thereof on which the prosecution proposes to rely against the accused concerned. As regards the documents, sub-Section (7) enables the investigating officer, if in his opinion it is convenient so to do, to furnish copies of all or any of the documents referred to in sub-Section (5) to the accused. Section 173, as amended and applicable to the case at hand, reads thus:-

> "**173. Report of police officer on completion of investigation**.—(1) Every investigation under this Chapter shall be completed without unnecessary delay.
>
> (1A) The investigation in relation to an offence under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of the Indian Penal Code (45 of 1860) shall be completed within two months from the date on which the information was recorded by the officer in charge of the police station.
>
> (2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to

take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating—

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170;

(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or section 376E of the Indian Penal Code (45 of 1860).

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report, shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(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.**
>
> **(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.**
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> **(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5).**
>
> (8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."
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> (emphasis supplied)

14. Concededly, as regards the "documents" on which the prosecution proposes to rely, the investigating officer has no option but to forward "all documents" to the Magistrate alongwith the police report. There is no provision (unlike in the case of

"statements") enabling the investigating officer to append a note requesting the Magistrate, to exclude any part thereof ("document") from the copies to be granted to the accused. Sub-Section (7), however, gives limited discretion to the investigating officer to forward copies of all or some of the documents, which he finds it convenient to be given to the accused. That does not permit him to withhold the remaining documents, on which the prosecution proposes to rely against the accused, from being submitted to the Magistrate alongwith the police report. On the other hand, the expression used in Section 173(5)(a) of the 1973 Code makes it amply clear that the investigating officer is obliged to forward "all" documents or relevant extracts on which the prosecution proposes to rely against the accused concerned alongwith the police report to the Magistrate.

15. On receipt of the police report and the accompanying statements and documents by virtue of Section 207 of the 1973 Code, the Magistrate is then obliged to furnish copies of each of the statements and documents to the accused. Section 207 reads thus:-

> " **207. Supply to the accused of copy of police report and other documents**.—In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:—
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> (i) the police report;
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> (ii) the first information report recorded under section 154;
>
> (iii) the statements recorded under sub-section (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 sub-section (6) of section 173;
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> (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:
>
> Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:
>
> Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

As regards the statements, the first proviso enables the Magistrate to withhold any part thereof referred to in clause (iii), from the accused on being satisfied with the note and the reasons specified by the investigating officer as predicated in sub-Section (6) of Section 173. However, when it comes to

furnishing of documents submitted by the investigating officer alongwith police report, the Magistrate can withhold only such document referred to in clause (v), which in his opinion, is "voluminous". In that case, the accused can be permitted to take inspection of the concerned document either personally or through his pleader in Court. In other words, Section 207 of the 1973 Code does not empower the Magistrate to withhold any "document" submitted by the investigating officer alongwith the police report except when it is voluminous. A fortiori, it necessarily follows that even if the investigating officer appends his note in respect of any particular document, that will be of no avail as his power is limited to do so only in respect of 'statements' referred to in sub-Section (6) of Section 173 of the 1973 Code.

16. Be that as it may, the Magistrate's duty under Section 207 at this stage is in the nature of administrative work, whereby he is required to ensure full compliance of the Section. We may

usefully advert to the dictum in ***Hardeep Singh v. State of Punjab***[1] wherein it was held that:-

> "47. Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under Section 319(1) CrPC can be exercised at any time after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pre-trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind. **At this pre-trial stage, the Magistrate is required to perform acts in the nature of administrative work** rather than judicial such as ensuring compliance with Sections 207 and 208 CrPC, and committing the matter if it is exclusively triable by the Sessions Court ... ..."
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> (emphasis supplied)

In yet another case of ***Tarun Tyagi vs. CBI***[2], this Court considered the purport of Section 207 of the 1973 Code and observed as follows:-

> "8. Section 207 puts an obligation on the prosecution to furnish to the accused, free of cost, copies of the documents mentioned therein, without any delay. It includes, documents or the relevant extracts thereof which are forwarded by the police to the Magistrate with its report under Section 173(5) of the Code. Such a compliance has to be made on the first date when the accused appears or is brought before the Magistrate at the commencement of the trial inasmuch as Section 238 of the Code warrants the Magistrate to satisfy himself that provisions of Section 207 have been complied with. Proviso to Section 207 states that if documents are voluminous, instead of furnishing the accused with the copy thereof, the Magistrate can allow

1 (2014) 3 SCC 92
2 (2017) 4 SCC 490

> the accused to inspect it either personally or through pleader in the Court."

17. It is well established position that when statute is unambiguous, the Court must adopt plain and natural meaning irrespective of the consequences as expounded in ***Nelson Motis v. Union of India***[3]. On a bare reading of Section 207 of the 1973 Code, no other interpretation is possible.

18. Be that as it may, furnishing of documents to the accused under Section 207 of the 1973 Code is a facet of right of the accused to a fair trial enshrined in Article 21 of the Constitution. In ***Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)***[4], this Court expounded thus:-

> "218. The liberty of an accused cannot be interfered with except under due process of law. The expression "due process of law" shall deem to include fairness in trial. The court (sic Code) gives 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 (prosecution and the Prosecutor) to make fair disclosure. The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in court or not. That document should essentially be

3 (1992) 4 SCC 711
4 (2010) 6 SCC 1

furnished to the accused and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the accused.

219. The role and obligation of the Prosecutor particularly in relation to disclosure cannot be equated under our law to that prevalent under the English system as aforereferred to. But at the same time, the demand for a fair trial cannot be ignored. It may be of different consequences where a document which has been obtained suspiciously, fraudulently or by causing undue advantage to the accused during investigation such document could be denied in the discretion of the Prosecutor to the accused whether the prosecution relies or not upon such documents, however in other cases the obligation to disclose would be more certain. **As already noticed the provisions of Section 207 have a material bearing on this subject and make an interesting reading. This provision not only require or mandate that the court without delay and free of cost should furnish to the accused copies of the police report, first information report, statements, confessional statements of the persons recorded under Section 161 whom the prosecution wishes to examine as witnesses, of course, excluding any part of a statement or document as contemplated under Section 173(6) of the Code, any other document or relevant extract thereof which has been submitted to the Magistrate by the police under sub-section (5) of Section 173. In contradistinction to the provisions of Section 173, where the legislature has used the expression "documents on which the prosecution relies" are not used under Section 207 of the Code. Therefore, the provisions of Section 207 of the Code will have to be given liberal and relevant meaning so as to achieve its object. Not only this, the documents submitted to the Magistrate along with the report under Section 173(5) would deem to include the documents which have to be sent to the Magistrate during the course of investigation as per the requirement of Section 170(2) of the Code.**

> 220. The right of the accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial. On such matters, the accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report under Section 173(2) as per orders of the court. But certain rights of the accused flow both from the codified law as well as from equitable concepts of the constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the court under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely.
>
> 221. It will be difficult for the Court to say that the accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. A document which has been obtained bona fide and has bearing on the case of the prosecution and in the opinion of the Public Prosecutor, the same should be disclosed to the accused in the interest of justice and fair investigation and trial should be furnished to the accused. Then that document should be disclosed to the accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would affect administration of criminal justice and the defence of the accused prejudicially."
>
> (emphasis supplied)

19. Similarly, in ***V.K. Sasikala v. State***[5], this Court held as under:-

> "21. The issue that has emerged before us is, therefore, somewhat larger than what has been projected by the State and what has been dealt with by the High Court. **The**

5 (2012) 9 SCC 771

> **question arising would no longer be one of compliance or non-compliance with the provisions of Section 207 CrPC and would travel beyond the confines of the strict language of the provisions of Cr.PC and touch upon the larger doctrine of a free and fair trial that has been painstakingly built up by the courts on a purposive interpretation of Article 21 of the Constitution**. It is not the stage of making of the request; the efflux of time that has occurred or the prior conduct of the accused that is material. What is of significance is if in a given situation the accused comes to the court contending that some papers forwarded to the court by the investigating agency have not been exhibited by the prosecution as the same favours the accused the court must concede a right to the accused to have an access to the said documents, if so claimed. This, according to us, is the core issue in the case which must be answered affirmatively. In this regard, we would like to be specific in saying that we find it difficult to agree with the view taken by the High Court that the accused must be made to await the conclusion of the trial to test the plea of prejudice that he may have raised. Such a plea must be answered at the earliest and certainly before the conclusion of the trial, even though it may be raised by the accused belatedly. This is how the scales of justice in our criminal jurisprudence have to be balanced."
>
> (emphasis supplied)

20. The next seminal question is: whether the contents of the memory card/pen-drive submitted to the Court alongwith the police report can be treated as "document" as such. Indubitably, if the contents of the memory card/pen-drive are not to be treated as "document", the question of furnishing the same to the accused by virtue of Section 207 read with Section 173 of the 1973 Code would not arise. We say so because it is nobody's

case before us that the contents of the memory card/pen-drive be treated as a "statement" ascribable to Section 173(5)(b) of the 1973 Code. Notably, the command under Section 207 is to furnish "statements" or "documents", as the case may be, to the accused as submitted by the investigating officer alongwith the police report, where the prosecution proposes to rely upon the same against the accused.

21. The High Court adverted to certain judgments before concluding that the memory card would be a material object. For arriving at the said conclusion, the High Court relied on the decision of the King's Bench of United Kingdom in ***The King v. Daye***[6], wherein Darling J., adding to the majority opinion, had held thus:-

> "…**But I should myself say that any written thing capable of being evidence is properly described as a document and that it is immaterial on what the writing may be inscribed. It might be inscribed on paper, as is the common case now; but the common case once was that it was not on paper, but on parchment; and long before that it was on stone, marble, or clay, and it might be, and often was, on metal**. So I should desire to guard myself against being supposed to assent to the argument that a thing is not a document unless it be a paper writing. I should say it is a document no matter upon what material it be, provided it is writing or printing and capable of being evidence."
>
> (emphasis supplied)

6 [1908] 2 K.B. 333

The High Court also relied on the decision of the Chancery Court in ***Grant and Another v. Southwester and County Properties Ltd. and Another***[7], wherein it was observed as follows:-

> "There are a number of cases in which the meaning of the word "document" has been discussed in varying circumstances. Before briefly referring to such cases, it will, I think, be convenient to bear in mind that the derivation of the word is from the Latin "documentum": it is something which instructs or provides information. Indeed, according to Bullokar's English Expositor (1621), it meant a lesson. The Shorter Oxford English Dictionary has as the fourth meaning for the word the following: "Something written, inscribed, etc., which furnishes evidence or information upon any subject, as a manuscript, title-deed, coin, etc.," and it produces as the relevant quotation: - "These frescoes... have become invaluable as documents," the writer being Mrs. Anna Brownell Jameson who lived from 1794 to 1860.
>
> I think that all the authorities to which I am about to refer have consistently stressed the furnishing of information - impliedly otherwise than as to the document itself - as being one of the main functions of a document. Indeed, in In Re Alderton and Barry's Application (1941) 59 R.P.C. 56, Morton J. expressly doubted whether blank workmen's time sheets could be classified as documents within section 11(1)(b) of the Patent and Design Acts 1907-1939 expressly because in their original state they conveyed no information of any kind to anybody..."

It can be safely deduced from the aforementioned expositions that the basis of classifying article as a "document" depends upon the information which is inscribed and not on where it is inscribed. It may be useful to advert to the exposition of this

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7 [1975] Ch. 185

Court holding that tape records of speeches[8] and audio/video cassettes[9] including compact disc[10] were "documents" under Section 3 of the 1872 Act, which stand on no different footing than photographs and are held admissible in evidence. It is by now well established that the electronic record produced for the inspection of the Court is documentary evidence under Section 3 of the 1872 Act[11].

22. It is apposite to recall the exposition of this Court in ***State of Maharashtra vs. Dr. Praful B. Desai***[12], wherein this Court observed that the Criminal Procedure Code is an ongoing statute. In case of an ongoing statute, it is presumed that the Parliament intended the Court to apply a construction that continuously updates its wordings to allow for changes and is compatible with the contemporary situation. In paragraph 14 of the said decision, the Court observed thus:-

> "**14. It must also be remembered that the Criminal Procedure Code is an ongoing statute**. The principles of interpreting an ongoing statute have been very succinctly

8 Tukaram S. Dighole v. Manikrao Shivaji Kokate, (2010) 4 SCC 329
9 Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdas Mehra & Ors., (1976) 2 SCC 17
10 Shamsher Singh Verma vs. State of Haryana, (2016) 15 SCC 485
11 Anwar P.V. vs. P.K. Basheer, (2014) 10 SCC 473
12 (2003) 4 SCC 601

set out by the leading jurist Francis Bennion in his commentaries titled *Statutory Interpretation*, 2nd Edn., p. 617:

> "It is presumed Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.
>
> ***
>
> In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters.... That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording.
>
> ***
>
> An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. **The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials**.""
>
> (emphasis supplied)

23. As aforesaid, the respondents and intervenor would contend that the memory card is a material object and not a "document"

as such. If the prosecution was to rely only on recovery of memory card and not upon its contents, there would be no difficulty in acceding to the argument of the respondent/intervenor that the memory card/pen-drive is a material object. In this regard, we may refer to ***Phipson on Evidence***[13], and particularly, the following paragraph(s):-

> **"The purpose for which it is produced determines whether a document is to be regarded as documentary evidence. When adduced to prove its physical condition, for example, an alteration, presence of a signature, bloodstain or fingerprint, it is real evidence. So too, if its relevance lies in the simple fact that it exists or did once exist or its disposition or nature. In all these cases the content of the document, if relevant at all, is only *indirectly* relevant, for example to establish that the document in question is a lease. When the relevance of a document depends on the meaning of its contents, it is considered documentary evidence.**"
> ... ..."
>
> (emphasis supplied)

Again at page 5 of the same book, the definition of "real evidence[14]" is given as under:-

> "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 nor inference is relied upon. Unless its

13 Hodge M. Malek, *Phipson on Evidence, 19th Edn*, 2018, pg. 1450
14 Hodge M. Malek, *Phipson on Evidence, 19th Edn*, 2018, pg. 5

> genuineness is in dispute [See Belt v Lawes, The Times, 17 November 1882.], the thing speaks for itself.
>
> Unfortunately, however, the term "real evidence" is itself both indefinite and ambiguous, having been used in three divergent senses:
>
> (1) … … …
>
> (2) *Material objects produced for the 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) … … …"

A priori, we must hold that the video footage/clipping contained in such memory card/pen-drive being an electronic record as envisaged by Section 2(1)(t) of the 2000 Act, is a "document" and cannot be regarded as a material object. Section 2(1)(t) of the 2000 Act reads thus:-

> "2(1)(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;"

24. As the above definition refers to data or data generated, image or sound stored, received or sent in an electronic form, it

would be apposite to advert to the definition of "data" as predicated in Section 2(1)(o) of the same Act. It reads thus:-

> "2(1)(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;"

On conjoint reading of the relevant provisions, it would be amply clear that an electronic record is not confined to "data" alone, but it also means the record or data generated, received or sent in electronic form. The expression "data" includes a representation of information, knowledge and facts, which is either intended to be processed, is being processed or has been processed in a computer system or computer network or stored internally in the memory of the computer.

25. Having noticed the above definitions, we may now turn to definitions of expressions "document" and "evidence" in Section 3 of the 1872 Act being the interpretation clause. The same reads thus:-

> **"3. Interpretation clause**.-
>
> **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.
>
> Illustrations
>
> A writing is a document;
>
> Words printed, lithographed or photographed are documents;
>
> A map or plan is a document;
>
> An inscription on a metal plate or stone is a document;
>
> A caricature is a document.
>
> **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."

On a bare reading of the definition of "evidence", it clearly takes within its fold documentary evidence to mean and include all documents including electronic records produced for the inspection of the Court. Although, we need not dilate on the question of admissibility of the contents of the memory card/pen-drive, the same will have to be answered on the basis of Section 65B of the 1872 Act. The same reads thus:-

"**65B. Admissibility of electronic records**.-(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:-

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities."

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in

clause (a) of sub-section (2) was regularly performed by computers, whether—

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,—

> (a) infomation shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
>
> (b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;
>
> (c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.
>
> Explanation.—For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

This provision is reiteration of the legal position that any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a "document" and shall be admissible in evidence subject to satisfying other requirements of the said provision.

26. It may be useful to also advert to Section 95(2)(b) of the 1973 Code, which refers to "document" to include any painting,

drawing or photograph, or other visible representation. And again, the expression "document" has been defined in Section 29 of the 1860 Code, which reads thus:-

> "**29. "Document"**.—The word "document" denotes 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, as evidence of that matter.
>
> Explanation 1.—It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.
>
> Illustrations
>
> A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.
>
> A cheque upon a banker is a document.
>
> A power-of-attorney is a document.
>
> A map or plan which is intended to be used or which may be used as evidence, is a document.
>
> A writing containing directions or instructions is a document.
>
> Explanation 2.—Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.
>
> Illustration
>
> A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature."

27. Additionally, it may be apposite to also advert to the definition of "communication devices" given in Section 2(1)(ha) of the 2000 Act. The said provision reads thus:-

> "2(1)(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"

28. We may also advert to the definition of "information" as provided in Section 2(1)(v) of the 2000 Act. The same reads thus:-

> "2(1)(v) "information" includes data, message, text, images sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche"

29. Even the definition of "document" given in the General Clauses Act would reinforce the position that electronic records ought to be treated as "document". The definition of "document" in Section 3(18) of the General Clauses Act reads thus:-

> "3(18) "document" shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter"

30. It may be apposite to refer to the exposition in Halsbury's laws of England[15] dealing with Chapter – "Documentary and Real Evidence" containing the meaning of documentary evidence and the relevancy and admissibility thereof including about the audio and video recordings. The relevant exposition reads thus:-

> "**(12) DOCUMENTARY AND REAL EVIDENCE**
>
> **1462. Meaning of documentary evidence. The term 'document' bears different meanings in different contexts. At common law, it has been held that any written thing capable of being evidence is properly described as a document[16], and this clearly includes printed text, diagrams, maps and plans[17]. Photographs are also regarded as documents at common law[18].**
>
> Varying definitions have been adopted in legislation[19]. **A document may be relied on as real evidence (where its existence, identity or appearance, rather than its content, is in issue[20]), or as documentary evidence. Documentary**

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15 Fourth Edition, 2006 reissue, Vol. 11(3) Criminal Law, Evidence and Procedure

16 R v. Daye [1908] 2 KB 333 at 340, DC, per Darling J.

17 A tombstone bearing an inscription is in this sense a document (see Mortimer v. M'Callan (1840) 6 M & W 58), as is a coffin-plate bearing an inscription (see R v. Edge (1842) Wills, Circumstantial Evidence (6th Edn.) 309).

18 See also Lyell v. Kennedy (No. 3) (1884) 27 ChD 1, 50 LT 730, Senior v. Holdsworth, ex p. Independent Television News Ltd. [1976] QB 23, [1975] 2 All ER 1009, Victor Chandler International Ltd. v. Customs and Excise Comrs. [2000] 1 All ER 160, [1999] 1 WLR 2160, ChD.

19 For the purposes of the Police and Criminal Evidence Act 1984, 'document' means anything in which information of any description is recorded: s. 118 (amended by the Civil Evidence Act 1995 S. 15(1), Sch 1 para 9(3)). For the purposes of the Criminal Justice Act 2003 Pt. 11 (ss. 98-141) (as amended) (evidence), the definition is the same (see s. 134(1)), save that for the purposes of Pt. 11 Ch. 3 (ss 137-141) (which includes the provision relating to refreshing memory (see s. 139; and para 1438 ante)) it excludes any recording of sounds or moving images (see s. 140).

20 See eg R. v. Elworthy (1867) LR 1 CCR 103, 32 JP 54, CCR; Boyle v. Wiseman (1855) 11 Exch 360. Documents produced by purely mechanical means may constitute real evidence even where reliance is placed on the content: The Statute of Liberty, Sapporo Maru (Owners) vs. Statue of Liberty (Owners) [1968] 2 All ER 195, [1968] 1 WLR 739 (film

evidence denotes reliance on a document as proof of its terms or contents[21]. The question of the authenticity of a document is to be decided by the jury[22].

1463. The primary evidence rule. Under the 'primary evidence rule' at common law[23], it was once thought necessary for the contents of any private document to be proved by production of the original document[24]. A copy of an original document, or oral evidence as to the contents of that document, was considered admissible only in specified circumstances, namely: (1) where another party to the proceedings failed to comply with a notice to produce the original which was in his possession (or where the need to produce it was so clear that no such notice was required)[25]; (2) where production of the original was shown to be impossible[26]; (3) where the original appeared to have been lost or destroyed[27]; and (4) where a third party in possession of the original lawfully declined to produce it[28]....

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of radar echoes); R. v. Wood (1982) 76 Cr.App. Rep. 23, CA (computer used as calculator); Castel v. Cross [1985] 1 All ER 87, [1984] 1 WLR 1372, DC (printout of evidential breath-testing device). See also Garner v. DPP (1989) Crim. LR 583, DC; R. v. Skinner [2005] EWCA Crim. 1439, [2006] Crim. LR 56, [2005] ALL ER (D) 324 (May). As to real evidence generally see para 1466 post.

21 R. v. Elworthy (1867) LR 1 CCR 103, 32 JP 54, CCR.

22 R. vs. Wayte (1982) 76 Cr.App. Rep. 110 at 118, CA. The admissibility of a document is, following the general rule, a question for the judge: See para 1360 ante. A document which the law requires to be stamped, but which is unstamped, is admissible in criminal proceedings: Stamp Act 1891 s. 14(4) (amended by the Finance Act 1999 s. 109(3), Sch 12 para 3(1), (5)).

23 As to the related 'best evidence rule' see para 1367 ante.

24 As to the admissibility of examined or certified copies of public documents at common law see EVIDENCE vol. 17(1) (Reissue) para 821 et. seq.

25 A-G v. Le Merchant (1788) 2 2 Term Rep 201n; R. v. Hunter (1829) 4 C & P 128; R v. Elworthy (1867) LR 1 CCR 103, 32 JP 54, CCR.

26 Owner v. Be Hive Spinning Co. Ltd. [1914] 1 KB 105, 12 LGR 421; Alivon v. Furnival (1834) 1 Cr.M. & R 277.

27 R. v. Haworth (1830) 4 C & P 254

28 R. v. Nowaz (1976) 63 Cr.App. Rep 178, CA. A further possibility was that contents of a document might be proved by an admission or confession: Slatterie v. Pooley (1840) 6 M & W 664

1466. Real evidence. Material objects or things **(other than the contents of documents)** which are produced as exhibits for inspection by a court or jury are classed as real evidence[29]. The court or jury may need to hear oral testimony explaining the background and alleged significance of any such exhibit, and may be assisted by expert evidence in drawing inferences or conclusions from the condition of that exhibit[30].

Where a jury wishes to take an exhibit, such as a weapon, into the jury room, this is something which the judge has a discretion to permit[31]. Jurors must not however conduct unsupervised experiments[32], or be allowed to inspect a thing which has not been produced in evidence[33].

Failure to produce an object which might otherwise have been admissible as real evidence does not preclude the admission of oral evidence concerning the existence or condition of that object, although such evidence may carry far less weight[34].

xxx xxx xxx

1471. Audio and video recordings. An audio recording is admissible in evidence provided that the accuracy of the recording

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29 This include animals, such as dogs, which may be inspected to see if they are ferocious (Line v. Taylor (1862) 3 F & F 731) or whether they appear to have been ill-treated, etc. Note however that statements (such as statements of origin) printed on objects may give rise to issues of hearsay if it is sought to rely on them as true: Comptroller of Customs v. Western Lectric Co. Ltd. [1966] AC 367, [1965] 3 All ER 599, PC.

30 Expert evidence may often be essential if the court or jury is to draw any kind of informed conclusions from their examination of the exhibit. It would be dangerous, for example, for a court or jury to draw its own unaided conclusions concerning the identity of fingerprints or the age and origin of bloodstains: Anderson v. R. [1972] AC 100, [1971] 3 All ER 768, PC.

31 R. v. Wright [1993] Crim. LR 607, CA; R. v. Devichand [1991] Crim. LR 446, CA.

32 R. v. Maggs (1990) 91 Cr. App. Rep 243, CA, per Lord Lane CJ at 247; R. v. Crees [1996] Crim. LR 830, CA; R. v. Stewart (1989) 89 Cr. App. Rep. 273, [1989] Crim. LR 653, CA.

33 R. v. Lawrence [1968] 1 All ER 579, 52 CR. App. Rep. 163, CCA.

34 R. v. Francis (1874) LR 2 CCR 128, 43 LJMC 97, CCR; Hocking v. Ahlquist Bros. [1944] KB 120, [1943] 1 All ER 722, DC. See also R. v. Uxbridge Justices, ex. P. Sofaer (1987) 85 Cr.App. Rep. 367, DC. If the object in question is in the possession of the prosecutor or of a third person, its production may generally be compelled by issue of a witness order under the Criminal Procedure (Attendance of Witnesses) Act, 1965 s. 2 (as substituted and amended) or under the Magistrates' Court Act, 1980 s. 97 (as substituted and amended) (see para 1409 ante). The defendant cannot, however, be served with such an order, lest he be forced to incriminate himself: Trust Houses Ltd. v. Postlethwaite (1944) 109 JP 12.

can be proved, the recorded voices can be properly identified, and the evidence is relevant and otherwise admissible[35]. However, that evidence should always be regarded with caution and assessed in the light of all the circumstances[36].

A video recording of an incident which is in issue is admissible[37]. **There is no difference in terms of admissibility between a direct view of an incident and a view of it on a visual display unit of a camera or on a recording of what the camera has filmed. A witness who sees an incident on a display or a recording may give evidence of what he saw in the same way as a witness who had a direct view[38].**"

(emphasis supplied)

31. In order to examine the purport of the term "matter" as found in Section 3 of the 1872 Act, Section 29 of the 1860 Code and Section 3(18) of the General Clauses Act, and to ascertain

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35 R. v. Maqsud Ali, R v. Ashiq Hussain [1966] 1 QB 688, 49 Cr.App. Rep 230, CCA. For the considerations relevant to the determination of admissibility see R. v. Stevenson, R. v. Hulse, R. v. Whitney [1971] 1 All ER 678, 55 Cr.App. Rep 171; R. v. Robson, R. v. Harris [1972] 2 All ER 699, 56 Cr.App. Rep 450. See also R. v. Senat, R. v. Sin (1968) 52 Cr. App. Rep 282, CA; R. v. Bailey [1993] 3 All ER 513, 97 Cr.App. Rep 365, CA. Where a video recording of an incident becomes available after the witness has made a statement, the witness may view the video and, if necessary, amend his statement so long as the procedure adopted is fair and the witness does not rehearse his evidence: R. v. Roberts (Michael), R. v. Roberts (Jason) [1998] Crim. LR 682, 162 JP 691, CA.

36 R. v. Maqsud Ali, R. v. Ashiq Hussain [1966] 1 QB 688, 49 Cr.App. Rep 230, CCA. As to the use of tape recordings and transcripts see R. v. Rampling [1987] Crim. LR 823, CA; and see also Buteria v. DPP (1986) 76 ALR 45, Aust. HC. As to the tape recording of police interviews see para 971 et seq ante; and as to the exclusion of a tape recording under the Police and Criminal Evidence Act, 1984 s. 78 (as amended) (see para 1365 ante) as unfair evidence see R. v. H [1987] Crim. LR 47, Cf R. v. Jelen, R. v. Karz (1989) 90 Cr. App. Rep 456, CA (tape recording admitted despite element of entrapment).

37 Taylor v. Chief Constable of Cheshire [1987] 1 All ER 225, 84 Cr.App. Rep 191, DC.

38 Taylor v. Chief Constable of Cheshire [1987] 1 All ER 225, 84 Cr.App. Rep 191, DC. As to the admissibility of video recordings as evidence identifying the defendant see also R. v. Fowden and White [1982] Crim. LR 588, CA; R. v. Grimer [1982] Crim. LR 674, CA; R. v. Blenkinsop [1995] 1 Cr.App. Rep 7, CA. A recording showing a road on which an incident had occurred was admitted in R. v. Thomas [1986] Crim. LR 682. As to the identification of the defendant by still photographs taken by an automatic security camera see R. v. Dodson, R. v. Williams [1984] 1 WLR 971, 79 Cr.App. Rep 220, CA; as to identification generally see para 1455 ante; and as to the admissibility of a copy of a video recording of an incident see Kajala v. Noble (1982) 75 Cr.App. Rep 149, CA.

whether the contents of the memory card can be regarded as "document", we deem it appropriate to refer to two Reports of the Law Commission of India. In the 42nd Law Commission Report[39], the Commission opined on the amendments to the 1860 Code. Dealing with Section 29 of the 1860 Code, the Commission opined as under:-

> "2.56. The main idea in all the three Acts is the same and the emphasis is on the "matter" which is recorded, and not on the substance on which the matter is recorded. We feel, on the whole, that the Penal Code should contain a definition of "document" for its own purpose, and that section 29 should be retained."

The said observation is restated in the 156th Report[40], wherein the Commission opined thus:-

> "11.08 Therefore, the term 'document' as defined in Section 29, IPC may be enlarged so as to specifically include therein any disc, tape, sound track or other device on or in which any matter is recorded or stored by mechanical, electronic or other means ... ... The aforesaid proposed amendment in section 29 would also necessitate consequential amendment of the term "document" under section 3 of the Indian Evidence Act, 1872 on the lines indicated above."

Considering the aforementioned Reports, it can be concluded that the contents of the memory card would be a "matter" and

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39 Forty-Second Report, Law Commission India, Indian Penal Code, June, 1971, 32-35

40 One Hundred Fifty-Sixth Report on the Indian Penal Code (Volume I), August, 1997, Law Commission of India, Chapter-XI

the memory card itself would be a "substance" and hence, the contents of the memory card would be a "document".

32. It is crystal clear that all documents including "electronic record" produced for the inspection of the Court alongwith the police report and which prosecution proposes to use against the accused must be furnished to the accused as per the mandate of Section 207 of the 1973 Code. The concomitant is that the contents of the memory card/pen-drive must be furnished to the accused, which can be done in the form of cloned copy of the memory card/pen-drive. It is cardinal that a person tried for such a serious offence should be furnished with all the material and evidence in advance, on which the prosecution proposes to rely against him during the trial. Any other view would not only impinge upon the statutory mandate contained in the 1973 Code, but also the right of an accused to a fair trial enshrined in Article 21 of the Constitution of India.

33. We do not wish to dilate further nor should we be understood to have examined the question of relevancy of the

contents of the memory card/pen-drive or for that matter the proof and admissibility thereof. The only question that we have examined in this appeal is: whether the contents of the memory card/pen-drive referred to in the chargesheet or the police report submitted to Magistrate under Section 173 of the 1973 Code, need to be furnished to the accused if the prosecution intends to rely on the same by virtue of Section 207 of the 1973 Code?

34. Reverting to the preliminary objection taken by the respondent for dismissing the appeal at the threshold because of the disclosure of identity of the victim in the memo of the special leave petition forming the subject matter of the present appeal, we find that the explanation offered by the appellant is plausible inasmuch as the prosecution itself had done so by naming the victim in the First Information Report/Crime Case, the statement of the victim under Section 161, as well as under Section 164 of the 1973 Code, and in the chargesheet/police report filed before the Magistrate. Even the objection regarding incorrect factual narration about the appellant having himself viewed the contents of the memory card/pen-drive does not take the matter any

further, once we recognize the right of the accused to get the cloned copies of the contents of the memory card/pen-drive as being mandated by Section 207 of the 1973 Code and more so, because of the right of the accused to a fair trial enshrined in Article 21 of the Constitution of India.

35. The next crucial question is: whether parting of the cloned copy of the contents of the memory card/pen-drive and handing it over to the accused may be safe or is likely to be misused by the accused or any other person with or without the permission of the accused concerned? In the present case, there are eight named accused as of now. Once relief is granted to the appellant who is accused No. 8, the other accused would follow the same suit. In that event, the cloned copies of the contents of the memory card/pen-drive would be freely available to all the accused.

36. Considering the principles laid down by this Court in ***Tarun Tyagi*** (supra), we are of the opinion that certain conditions need to be imposed in the fact situation of the present

case. However, the safeguards/conditions suggested by the appellant such as to take help of experts, to impose watermarks on the respective cloned copies etc., may not be sufficient measure to completely rule out the possibility of misuse thereof. In that, with the advancement of technology, it may be possible to breach even the security seals incorporated in the concerned cloned copy. Besides, it will be well-nigh impossible to keep track of the misuse of the cloned copy and its safe and secured custody.

37. Resultantly, instead of allowing the prayer sought by the appellant in toto, it may be desirable to mould the relief by permitting the appellant to seek second expert opinion from an independent agency such as the Central Forensic Science Laboratory (CFSL), on all matters which the appellant may be advised. In that, the appellant can formulate queries with the help of an expert of his choice, for being posed to the stated agency. That shall be confidential and not allowed to be accessed by any other agency or person not associated with the CFSL. Similarly, the forensic report prepared by the CFSL, after

analyzing the cloned copy of the subject memory card/pen-drive, shall be kept confidential and shall not be allowed to be accessed by any other agency or person except the concerned accused or his authorized representative until the conclusion of the trial. We are inclined to say so because the State FSL has already submitted its forensic report in relation to the same memory card at the instance of the investigating agency.

38. Needless to mention that the appellant before us or the other accused cannot and are not claiming any expertise, much less, capability of undertaking forensic analysis of the cloned copy of the contents of the memory card/pen-drive. They may have to eventually depend on some expert agency. In our opinion, the accused, who are interested in reassuring themselves about the genuineness and credibility of the contents of the memory card in question or that of the pen-drive produced before the trial Court by the prosecution on which the prosecution would rely during the trial, are free to take opinion of an independent expert agency, such as the CFSL on such matters as they may be advised, which information can be used

by them to confront the prosecution witnesses including the forensic report of the State FSL relied upon by the prosecution forming part of the police report.

39. Considering that this is a peculiar case of intra-conflict of fundamental rights flowing from Article 21, that is right to a fair trial of the accused and right to privacy of the victim, it is imperative to adopt an approach which would balance both the rights. This principle has been enunciated in the case of ***Asha Ranjan v. State of Bihar***[41] wherein this Court held thus:-

> "**57.** The aforesaid decision is an authority for the proposition that there can be a conflict between two individuals qua their right under Article 21 of the Constitution and in such a situation, to weigh the balance the test that is required to be applied is the test of larger public interest and further that would, in certain circumstances, advance public morality of the day. **To put it differently, the "greater community interest" or "interest of the collective or social order" would be the principle to recognise and accept the right of one which has to be protected**.
>
> xxx xxx xxx
>
> **61**. Be it stated, circumstances may emerge that may necessitate for balancing between intra-fundamental rights. It has been distinctly understood that the test that has to be applied while balancing the two fundamental rights or inter fundamental rights, the principles applied may be different than the principle to be applied in intra-conflict between the same fundamental right … … … Thus, there can be two individuals both having legitimacy to

41 (2017) 4 SCC 397

claim or assert the right. The factum of legitimacy is a primary consideration. It has to be remembered that no fundamental right is absolute and it can have limitations in certain circumstances … … … Therefore, if the collective interest or the public interest that serves the public cause and further has the legitimacy to claim or assert a fundamental right, then only it can put forth that their right should be protected. There can be no denial of the fact that the rights of the victims for a fair trial is an inseparable aspect of Article 21 of the Constitution and when they assert that right by themselves as well as the part of the collective, the conception of public interest gets galvanised. The accentuated public interest in such circumstances has to be given primacy, for it furthers and promotes "Rule of Law". It may be clarified at once that the test of primacy which is based on legitimacy and the public interest has to be adjudged on the facts of each case and cannot be stated in abstract terms. It will require studied scanning of facts, the competing interests and the ultimate perception of the balancing that would subserve the larger public interest and serve the majesty of rule of law. … … …

xxx xxx xxx

86.1. The right to fair trial is not singularly absolute, as is perceived, from the perspective of the accused. It takes in its ambit and sweep the right of the victim(s) and the society at large. These factors would collectively allude and constitute the Rule of Law i.e. free and fair trial.

86.2. The fair trial which is constitutionally protected as a substantial right under Article 21 and also the statutory protection, does invite for consideration a sense of conflict with the interest of the victim(s) or the collective/interest of the society. **When there is an intra-conflict in respect of the same fundamental right from the true perceptions, it is the obligation of the constitutional courts to weigh the balance in certain circumstances, the interest of the society as a whole, when it would promote and instil Rule of Law.** A fair trial is not what the accused wants in the name of fair trial. Fair trial must soothe the ultimate justice which is sought individually, but is subservient and would not prevail when fair trial requires transfer of the criminal proceedings."

(emphasis supplied)

40. This Court in ***Mazdoor Kisan Shakti Sangathan v. Union of India***[42] has restated the legal position in the following terms:-

> "61. Undoubtedly, right of people to hold peaceful protests and demonstrations, etc. is a fundamental right guaranteed under Articles 19(1)(a) and 19(1)(b) of the Constitution. The question is as to whether disturbances, etc. caused by it to the residents, as mentioned in detail by the NGT, is a larger public interest which outweighs the rights of protestors to hold demonstrations at Jantar Mantar Road and, therefore, amounts to reasonable restriction in curbing such demonstrations. Here, we agree with the detailed reasoning given by the NGT that holding of demonstrations in the way it has been happening is causing serious discomfort and harassment to the residents. At the same time, it is also to be kept in mind that for quite some time Jantar Mantar has been chosen as a place for holding demonstrations and was earmarked by the authorities as well. **Going by the dicta in Asha Ranjan [Asha Ranjan v. State of Bihar, (2017) 4 SCC 397 : (2017) 2 SCC (Cri) 376] , principle of primacy cannot be given to one right whereby the right of the other gets totally extinguished. Total extinction is not balancing. Balancing would mean curtailing one right of one class to some extent so that the right of the other class is also protected.**"

(emphasis supplied)

41. We are conscious of the fact that Section 207 of the 1973 Code permits withholding of document(s) by the Magistrate only if it is voluminous and for no other reason. If it is an "electronic record", certainly the ground predicated in the second proviso in

42 (2018) 17 SCC 324

Section 207, of being voluminous, ordinarily, cannot be invoked and will be unavailable. We are also conscious of the dictum in the case of ***Superintendent and Remembrancer of Legal Affairs, West Bengal vs. Satyen Bhowmick & Ors.***[43], wherein this Court has restated the cardinal principle that accused is entitled to have copies of the statements and documents accompanying the police report, which the prosecution may use against him during the trial.

42. Nevertheless, the Court cannot be oblivious to the nature of offence and the principle underlying the amendment to Section 327 of the 1973 Code, in particular sub-Section (2) thereof and insertion of Section 228A of the 1860 Code, for securing the privacy of the victim and her identity. Thus understood, the Court is obliged to evolve a mechanism to enable the accused to reassure himself about the genuineness and credibility of the contents of the memory card/pen-drive from an independent agency referred to above, so as to effectively defend himself during the trial. Thus, balancing the rights of both parties is imperative, as has been held in ***Asha Ranjan*** (supra) and

43 (1981) 2 SCC 109

Mazdoor Kisan Shakti Sangathan (supra). The Court is duty bound to issue suitable directions. Even the High Court, in exercise of inherent power under Section 482 of the 1973 Code, is competent to issue suitable directions to meet the ends of justice.

43. If the accused or his lawyer himself, additionally, intends to inspect the contents of the memory card/pen-drive in question, he can request the Magistrate to provide him inspection in Court, if necessary, even for more than once alongwith his lawyer and I.T. expert to enable him to effectively defend himself during the trial. If such an application is filed, the Magistrate must consider the same appropriately and exercise judicious discretion with objectivity while ensuring that it is not an attempt by the accused to protract the trial. While allowing the accused and his lawyer or authorized I.T. expert, all care must be taken that they do not carry any devices much less electronic devices, including mobile phone which may have the capability of copying or transferring the electronic record thereof or mutating the contents of the memory card/pen-drive in any manner. Such

multipronged approach may subserve the ends of justice and also effectuate the right of accused to a fair trial guaranteed under Article 21 of the Constitution.

44. In conclusion, we hold that the contents of the memory card/pen drive being electronic record must be regarded as a document. If the prosecution is relying on the same, ordinarily, the accused must be given a cloned copy thereof to enable him/her to present an effective defence during the trial. However, in cases involving issues such as of privacy of the complainant/witness or his/her identity, the Court may be justified in providing only inspection thereof to the accused and his/her lawyer or expert for presenting effective defence during the trial. The court may issue suitable directions to balance the interests of both sides.

45. In view of the above, this appeal partly succeeds. The impugned judgment and order passed by the trial Court and the High Court respectively stand modified by giving option to the appellant/accused to the extent indicated hitherto, in particular paragraphs 37, 38 and 43.

46. Resultantly, the application filed by the appellant before the trial Court being Crl.M.P. No. 49/2018 in C.P. No. 16/2017 is partly allowed in the aforementioned terms.

47. We direct the trial Court to ensure that the trial in C.P. No. 16/2017 is concluded expeditiously, preferably within six months from the date of this judgment.

.....J
(A.M. Khanwilkar)

.....J
(Dinesh Maheshwari)

New Delhi;
November 29, 2019.