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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 12th August, 2025

+ CRL.M.C. 6745/2024 and CRL. M.A. 25774/2024

SOHAIL MALIK

.....Petitioner

Through: Mr. N. Hariharan, Senior Advocate with Mr. Subhash Gulati, Ms. Punya, Mr. Aman Akhtar, Ms. Vasundhara N., Mr. Vinayak Gautam, Ms. Vasundhra Raj Tyagi, Ms. Sima Gulati, Mr. Sharian Mukherji, Ms. Rekha Angara, Ms. Sana Singh, Mr Pankaj Yadav and Ms. Diskha Narula, Advocates.

versus

STATE NCT OF DELHI & ANR.

.....Respondents

Through: Mr. Utkarsh and Mr. Digam Singh Dagar, APPs for the State with Ms. Kumud Nijhawan, Mr. Kunal Bhardwaj, Mr. Paras, Mr. Mohit Rathee and Ms. Garima Saini, Advocates with Insp. Mr. Sunil Kumar, P.S.: Cyber/MDD. Mr. Abhay Kumar, Mr. A.K. Sharma, Mr. ShagumRuhil and Mr. Karan Chopra, Advocates for R-2.

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present petition filed under section 528 of the Bharatiya Nagarik Suraksha Sanhita 2023 ('BNSS'), the petitioner



impugns orders dated 24.04.2024 and 28.05.2024 made by the learned Metropolitan Magistrate, Patiala House Courts, New Delhi, whereby the learned Magistrate has dismissed an application dated 01.04.2024 filed by the petitioner under section 91 of the Code of Criminal Procedure 1973 ('Cr.P.C.'). *Vide* application dated 01.04.2024 the petitioner had sought preservation of certain evidence and information as detailed in paras 5(e), (f) and (g) of that application. Furthermore, the petitioner also seeks restoration of order dated 05.04.2024 passed by the learned Magistrate, whereby the Investigating Officer ('I.O.') was directed to preserve the electronic data/records/information, including Call Detail Records ('CDRs'), as referred-to in that application.

BRIEF BACKGROUND

2. Briefly, the petitioner (hereinafter "accused") is facing allegations of stalking and sexual harassment levelled by respondent No.2 (hereinafter "complainant") against him *vide* police complaint dated 16.05.2023, which complaint has culminated in the registration of FIR No. 0053/2023 dated 16.05.2023 under sections 354/354-D/506/509 of the Indian Penal Code, 1860 ('IPC') at P.S.: Parliament Street, New Delhi. Subsequently, chargesheet dated 09.03.2024 has been filed in the matter under sections 354/354-D/506/509/201/204 IPC and section 67 of the Information Technology Act, 2000.
3. It is the complainant's case that since the year 2020, the accused had been stalking and making inappropriate advances towards her, despite the complainant having given repeated warnings and a clear indication of her disinterest in the accused from the very outset. On



the other hand, it is the case of the accused that over a period of 03 years between 2020 and 2023, the engagement between the parties had gradually grown into an intimate and romantic relationship, which turned sour only when the complainant's husband came to know about their relationship.

4. Upon a preliminary hearing in the matter, *vide* order dated 29.08.2024, this court had issued notice on the petition and directed the I.O. to *forthwith* arrange for collection and preservation of records as referred-to in paras 5 (e), (f) and (g) of application dated 01.04.2024; and to continue to hold the data already preserved pursuant to orders passed by the learned Magistrate. By way of the said order it was also clarified, that none of the data and information so collected and preserved shall be disclosed to either of the parties, *at that stage*.

RECORD OF PROCEEDINGS BEFORE THE SUPREME COURT

5. The above-referred order dated 29.08.2024 was challenged by the complainant before the Supreme Court by way of a Special Leave Petition bearing SLP (Crl.) No. 12411/2024. *Vide* orders dated 01.10.2024 and 16.10.2024 passed in those proceedings the Supreme Court disposed-of the SLP, leaving it open for this court to hear the matter on merits; and to decide it without being constrained by the observations of the Supreme Court in the said orders. Furthermore, the Supreme Court also left open both the question of *fresh collection* and *preservation* of evidence, for this court to decide.
6. For sake of completeness, it ought to be recorded that an IA No. 255035/2024 filed in SLP (Crl.) No. 12411/2024 seeking



modification/clarification of order dated 16.10.2024 also stands dismissed by the Supreme Court *vide* order dated 20.01.2025

7. It must also be recorded, that in any event, in the course of the present proceedings, learned counsel for the accused has submitted that even if no direction is issued for *fresh collection, production or disclosure* of evidence, the *preservation* of evidence in itself would enable the accused to requisition the relevant evidence, if and when so required, in the course of the trial.

PROCEEDINGS BEFORE THE MAGISTRATE

8. The record shows that by an earlier order dated 05.04.2024, on a *prima-facie* appreciation of the matter, the learned Magistrate had issued the following direction :

“Keeping in view the limited prayer in the application as well as the fact that charge sheet has already been filed and the order is not to be construed as a direction for further investigation, it is clarified that the I.O. has to ensure only preservation of data/CDRs.”

(emphasis supplied)

9. Subsequently however, by way of impugned orders dated 24.04.2024 and 28.05.2024, the learned Magistrate has, in a sense, reversed the directions issued *vide* order dated 05.04.2024. Since substantially all the relevant observations of the learned Magistrate made in order dated 24.04.2024 have been subsumed in the subsequent order dated 28.05.2024, it is not considered necessary to extract order dated 24.04.2024. The relevant observations of order dated 28.05.2024 read as under :

“Earlier, a direction was given by this court on the basis of an incomplete report filed by the IO and on the basis of selective



facts placed before this court by the applicant. In fact, in the order dated 24.04.24, this court has noted that the applicant had concealed from the court regarding the charge of destruction of evidence against him. Be that as it may, instead of getting swayed away by the averments of the applicant, this court considered it proper to hear the complainant/victim on this application. The complainant has been heard specifically in view of the fact that the information sought by the applicant has the potential of infringing with the right of privacy of the complainant.

“The scope of an application U/s 91 Cr.P.C. has been discussed in multiple cases by the constitutional courts. It is fairly settled that ordinarily, the court has to proceed on the basis of the material produced with the chargesheet. However, if there is any material of a sterling quality, the same may be looked into even at the stage of charge. The underline (sic : underlying) condition is always the satisfaction of the court regarding the necessity and desirability of the material being sought by the applicant. An application U/s 91 Cr.P.C. on behalf of the accused is duly maintainable, however, there is no right of the accused to compel the production of the documents dehors the satisfaction of the court. The two tests relevant for deciding section 91 Cr.P.C. application are necessity and desirability of the material.

“On behalf of the complainant, it is submitted that the application has been filed by the accused with the sole objective of misrepresenting the facts of the case. It is submitted that the accused intends to misuse the material for illustrating a connection between the parties and to displace the case of the complainant pertaining to a particular point of time. It is further submitted that the departmental committee has given findings against the accused on the count of sexual harassment and the challenge raised by the accused before the Hon’ble High Court and CAT has been dismissed. Furthermore, it is submitted that the accused had erased the entire data from his mobile phone so as to destroy the evidence. It is further submitted that the accused has violated the terms of the release by sending a threatening message



to the complainant. Various other allegations regarding the past conduct of the accused and various disciplinary proceedings initiated against him are also mentioned in the reply.

* * * * *

“It is admitted case of the complainant and the accused that they were acquainted with each other since 2020 and it is quite natural that calls were exchanged between the parties from time to time. However, the mere fact that calls were exchanged between the parties does not establish the nature of a relationship between the parties. Even if, it is believed on face value that the accused and the complainant were in a relationship, the same does not make it desirable that the call detail records are preserved. For, the relationship could have gone wrong from January 2023 onwards and the complainant may have withdrawn her willingness and consent from the relationship from that point onwards. The nature of the offence is such that the victim may be aggrieved at any given point of time and existence of past conversations, without knowing the content of those conversations, may have no bearing on the merits of the allegations. In fact, the same may have the effect of stigmatizing the victim. The call detail records of the relevant period have been obtained by the IO and form part of the chargesheet. The other information sought by the accused is only meant to indicate that the parties were known to each other and the said fact has not been denied even by the complainant. The fact of prior acquaintance is of no relevance for deciding an allegation of stalking from a particular point of time. The information sought is not necessary for a fair outcome of the case and the test of necessity is not met. Even on the aspect of the desirability, it may be noted that the information is of such nature that it may subject the complainant to unnecessary harassment and may even amount to a breach of her privacy. This court is duty bound to strike a balance between the right of the accused to a fair trial and the right of the complainant to freely participate in the administration of justice without having an apprehension of breach of privacy. A delicate balance of constitutional rights is involved in the matter. The information is in



no manner essential for a fair trial of the accused and has ample potential to infringe with the right of the complainant.

* * * * *

*“In light of this discussion, I am of the considered view that the material forming the part of the chargesheet deals with all material aspects of the case and **no material has been selectively left out.** The material sought by the applicant is neither necessary nor desirable at this stage. Accordingly, the application is devoid of merits and is, dismissed.”*

(emphasis supplied)

10. The court has heard Mr. N. Hariharan, learned senior counsel appearing for the accused; Mr. Utkarsh and Mr. Digam Singh Dagar, learned APPs appearing for respondent No. 1 (State); as well as Mr. Abhay Kumar, learned counsel appearing for complainant.

SUBMISSIONS ON BEHALF OF THE ACCUSED

11. Mr. Hariharan, learned senior counsel appearing for the accused has made the following principal submissions in the matter :

- 11.1. It has been submitted that the accused had made the following limited prayers by way of his application under section 91 Cr.P.C. before the learned Magistrate, which hold specific relevance in the context of the allegations¹ made against the accused and the nature of the relationship between the parties prior to registration of the subject FIR :

“a. To issue directions to the mobile phone service providers to preserve the Call Detail Records (CDRs) of the Mobile Numbers [REDACTED] (Previously BSNL and presently Airtel), [REDACTED] (Airtel) and [REDACTED] (Airtel) from 01.04.2020 to 15.05.2023.

¹ Section 6, 7 & 8 of Indian Evidence Act 1872



*b. To issue directions to the aforementioned companies/portals and applications (Apps) as mentioned in **para 5 (e) and (f)** of the present application to preserve /provide the data/information mentioned therein;”*

(underscoring supplied; bold in original)

11.2. It has been pointed-out that the reference in prayer (b) above, to the data and information referred-to in paras 5(e) and (f) of the application, was a reference to the CDRs of the complainant's as well as the accused's cellphone numbers for the period from 01.04.2020 to 15.05.2023, as well as to certain activities and transactions undertaken by the complainant on online platforms, as detailed in the application. Furthermore, learned senior counsel has submitted that infact in para 5(g) of the application, they had also set-out certain other CCTV footage of the Delhi Airport and records of Indigo Airlines, which were also sought to be preserved, though not specifically mentioned in the prayers contained in the application. It has been submitted that the period from 01.04.2020 to 15.05.2023 is the period during which, according to the accused, an intimate relationship had developed between the complainant and the accused; and therefore, the conduct, nature and level of engagement of the parties *throughout* that period was relevant for a fair and just decision of the case;

11.3. Learned senior counsel has explained that the accused had sought preservation of the data relating to the activities of the complainant on certain online platforms, in order to show that



the *complainant* had sent to the *accused* and even to his family in Maharashtra, food, gifts, personal and household articles, vegetables, grocery *etc.* through online platforms such as Zomato, BigBasket, Myntra, Cleartrip, Domino's Pizza, Wefast/Borzo Delivery, Amazon, Flipkart, Biryani By Kilo, Swiggy and Ferns-N-Petals, as detailed in the application; and that the complainant had also come to see-off and receive the accused at the Indira Gandhi International Airport, New Delhi; and had even booked air-tickets for the accused and his family;

11.4. Learned senior counsel has argued that it is necessary to *preserve* the aforesaid data and information, since it is the contention of the accused, that such data and information would prove the true nature of the relationship between the complainant and the accused, which would be relevant for examining the allegations being made by the complainant against the accused in the subject FIR. It has been argued that this gains significance, especially since the complainant had initially denied any acquaintance with the accused; though she has subsequently changed that stand;

11.5. In this backdrop, learned senior counsel has argued, that though in order dated 05.04.2024 the learned Magistrate had duly appreciated the need for preservation of the aforesaid data and information, in the subsequent orders dated 24.04.2024 and 28.05.2024, the learned Magistrate changed his view; and by the later orders, has erroneously dismissed the application under section 91 Cr.P.C. filed by the accused;



- 11.6. Learned senior counsel has submitted, that to be clear, the accused was not seeking disclosure or production of any of the records by way of the application in question, but was only seeking preservation of those records, since, considering the nature of the records in question, such records would be weeded-out by the concerned service providers after their stipulated time-periods and subsequently would not be retrievable at all;
- 11.7. It has been submitted on behalf of the accused that the CDRs and other material sought to be preserved, would be exculpatory evidence; and would be of absolute necessity and relevance for a fair trial in the matter;
- 11.8. Answering the allegation that since the accused has himself deleted data from his mobile phone and is therefore facing a charge under section 201 IPC, it does not lie with the accused to now demand preservation of data, it has been pointed-out that the data on the phone of the accused was forcibly deleted at the behest and instance of the complainant and her husband; and a complaint dated 16.05.2023 to that effect has already been made by the accused to the concerned police station;
- 11.9. On point of law, it has been argued on behalf of the accused that in case of contestation between the right to privacy *and* the right to fair trial, both arising from Article 21 of the Constitution of India, the right to fair trial must trump the right to privacy, on considerations of public justice. The argument is that the right to privacy must yield to the right to the fair trial,



since the former is essentially a personal right whereas the latter is a right that affects public justice and has wider ramifications;

- 11.10. It has also been argued on behalf of the accused that he is a victim of a pre-planned conspiracy, whereby the complainant and her husband are attempting to shield the actions of the complainant, by pressurising the accused and by seeking to frustrate his efforts to bring on record evidence which would show the true nature of the relationship between the accused and the complainant; and would absolve the accused of any blame. It has been alleged that the accused was physically assaulted and suffered grievous injuries at the behest and instance of the complainant and her husband. That apart, the data from the mobile phone of the accused was also forcibly deleted by the complainant's husband, all of which is subject matter of complaint dated 16.05.2023 lodged by the accused with the police;
- 11.11. It has been submitted that by scuttling the process of collection and preservation of exculpatory evidence, the complainant is trying to conceal and deny the intimate, romantic relationship that she had with the accused, since such evidence would falsify the allegations contained in the subject FIR;
- 11.12. That apart, it has been submitted, that in any case, the learned Magistrate could not have 'reviewed' his own order by changing the view taken on 05.04.2024 by the subsequent orders dated 24.04.2024 and 28.05.2024; and



11.13. It has also been pointed-out on behalf of the accused that in affidavit dated 04.02.2025 filed by the I.O. pursuant to the orders made by this court, the I.O. has stated that the CDRs pertaining to the concerned mobile phones have been received from Airtel *only* for the period *01.09.2022 to 15.05.2023*; but insofar as the CDRs for the period *01.04.2020 to 31.08.2022* are concerned, Airtel has said that that data is not available in their *CDR Frontend module system*. It has been argued that CDRs for the entire period *01.04.2020 to 15.05.2023* are relevant for the purposes of the present matter; and that Airtel cannot simply deny sharing that data by citing its unavailability in their systems.

SUBMISSIONS ON BEHALF OF THE STATE

12. Appearing on behalf of the State, Mr. Utkarsh and Mr. Dagar, learned APPs have contended as follows :

12.1. It has been submitted that the prayer for preservation of the CDRs and other material made by the accused is beyond the scope of section 91 Cr.P.C when tested on the anvil of ‘necessity’ and ‘desirability’ of the evidence sought to be preserved;

12.2. It is the case of the State that since the accused himself has been accused of destroying evidence at the time of his questioning, which they say has been confirmed by FSL Gandhinagar, Gujarat and FSL Rohini, New Delhi; and he has been charge-sheeted *inter-alia* for the offence under section 201 IPC, the prayer for preservation of evidence is not



maintainable at his instance. Furthermore, it has been argued that even at best, the material which the accused prays should be preserved, would *only* reveal that the parties were acquainted with each other, which in any case has not been denied by the complainant. Learned APPs have also submitted, that it must be noted that the accused is attempting to mislead the court by seeking preservation of such evidence;

- 12.3. It has also been submitted that the material sought to be preserved is not of sterling quality; and would therefore not hold any relevance at the present stage, which is the stage of framing of charge; and *may at best only be required at the time of cross examination of prosecution witnesses or at stage of leading defence evidence*;²
- 12.4. It has also been submitted that the CDRs that are subject matter of the application under section 91 Cr.P.C. were not collected by the I.O. in the course of investigation, since, in the I.O.'s understanding, those were not required for purposes of investigation. It has been clarified that the I.O. has collected the CDRs for the period 01.01.2023 to 16.05.2023, which have been filed alongwith the charge-sheet;
- 12.5. Lastly, the State has submitted that it is of utmost relevance to note, that the learned Magistrate has recorded that at the time of passing the earlier order dated 05.04.2024, the I.O.'s report was incomplete, and most importantly, the accused had concealed

² *State of Orissa vs. Debendra Nath Padhi*, (2005) 1 SCC 568



material information from the court. The learned Magistrate has also noticed the conduct of the accused *after* filing of the subject FIR, since the complainant had informed the investigating agency that on 18.05.2023, the accused had sent her an unsolicited gift alongwith a note, also threatening her to withdraw the subject FIR; and

- 12.6. For completeness, it may also be recorded, that the State has confirmed in the proceedings before the learned Magistrate that no Internet Protocol Data Records (IPDRs) were collected in the course of the investigation; and that there are no ‘un-relied upon documents’ available with the I.O., and therefore, the question of supplying any IPDRs or un-relied-upon documents to the accused does not arise. This has been recorded by the learned Magistrate in order dated 22.04.2025.

SUBMISSIONS ON BEHALF OF THE COMPLAINANT

13. Mr. Kumar, learned counsel appearing for the complainant has strongly opposed the relief sought by way of the present petition. Supporting the submissions made on behalf of the State, learned counsel for the complainant has principally raised the following four contentions :

- 13.1. *One*, it has been argued on behalf to the complainant that it is neither ‘necessary’ nor ‘desirable’ to direct the preservation of the evidence referred to in the application under section 91 Cr.P.C. filed by the accused, since that evidence is neither material nor relevant for a just decision of the matter. It has been argued that since it is the admitted case that the



complainant was acquainted with the accused, the data and information sought would not be required to establish that admitted fact. It has been argued that the allegations in the subject FIR pertained to a particular period of time and the past acquaintance of the parties is of no relevance for that purpose. The contention is that the nature of the relationship between the accused and the complainant, prior to that point of time, is irrelevant and in order dated 28.05.2024 the learned Magistrate has correctly taken the view that the relationship “*could have gone wrong from January 2023 onwards and the complainant may have withdrawn her willingness and consent from the relationship from that point onwards*” ;

- 13.2. *Two*, it has been argued that an order directing the ‘preservation’ of the data and information asked-for would amount to directing ‘further investigation’ and ‘disclosure of evidence’, which was not the prayer in the application before the learned Magistrate and cannot be directed in proceedings under section 91 Cr.P.C. or even by this court in the present proceedings under section 528 BNSS ;
- 13.3. *Three*, an order directing preservation of the data and information sought-for would result in serious breach of the complainant’s privacy, which would prejudice her rights and interests as a victim of a crime at the hands of the accused; and
- 13.4. *Four*, that it is settled law that an accused cannot seek a direction under section 91 Cr.P.C. to collect evidence at the stage when charges are yet to be framed, since an accused is not



even entitled to be heard at that stage. It is the submission on behalf of the complainant, that an accused may invoke his rights and remedies at the stage of leading defence evidence;³

13.5. In support of his submissions, the complainant has relied on order dated 12.02.2024 passed by the Supreme Court in *State of Rajasthan vs. Swarn Singh @ Baba*,⁴ arguing that in the said case, the Supreme Court has observed that *necessity* and *desirability* are the only tests for deciding an application under section 91 Cr.P.C.; and that an accused does not have a right to invoke section 91 Cr.P.C. at the stage of framing of charge, which is the next stage in the present case; and

13.6. The principal objection raised by the complainant is that no case is made-out for even allowing *preservation* of the evidence as set-out in the application under section 91 Cr.P.C., since that evidence does not meet the twin criteria of ‘*necessity*’ and ‘*desirability*’ as required under the law.

DISCUSSION & CONCLUSIONS

14. Upon a conspectus of the matter, and after hearing learned counsel for the parties at length, in the opinion of this court, the following aspects need to be considered and answered :

14.1. The *limited prayer* in the application filed by the accused under section 91 Cr.P.C. was *to preserve* the CDRs and other electronic data as detailed in that application; and the accused

³ *State of Orissa vs. Debendra Nath Padhi*, (2005) 1 SCC 568

⁴ Criminal Appeal No. 856/2024



had *not sought the production or disclosure* of any of that material. A perusal of the impugned orders shows, that after having first issued a direction to the I.O. to preserve the data and information as requested in the application, the learned Magistrate subsequently recalled that direction, *inter-alia* being persuaded by the allegation that the accused himself had erased some data from his mobile phone with the intention of destroying evidence; and that the accused was intending to misuse the data and information that he was seeking by way of the application, against the complainant. Without getting into the aspect of whether the learned Magistrate could have recalled his earlier direction, it is important to note that the accused had called for the CDRs *not just of the complainant's* mobile phone numbers *but also of his own* mobile phone number. In the application under section 91 Cr.P.C., the accused had said this :

“... .. It is stated that the locations, dates and timings of their above-mentioned frequent meetings can be verified from the respective Call Detail Records (CDRs) of the Mobile Numbers [REDACTED] and [REDACTED] (Complainant's Numbers) and 8800903483 (Applicant's Number) from 01.04.2020 to 15.05.2023. Moreover, during the conversations, the complainant used to inform the applicant that her mobile number [REDACTED] was rarely used by her, especially after April 2022, as she suspected that her phone had been hacked by her husband. Therefore, the above-mentioned CDRs are essentially required for placing the true facts and circumstances before the court, during the trial and before other ongoing proceedings.”



Furthermore, even if there was any ambiguity in the prayer, it obviously would have been just and fair for the learned Magistrate to call for the CDRs of the accused's mobile phone number, which would have revealed information about who the accused had called and who had called the accused, thereby revealing the communications, *if any*, that the parties had had with each other over mobile phones.

- 14.2. It may be observed that CDRs can reveal information such as the number of times that calls are exchanged between parties, the number of times one party calls the other and *vice-versa*, the time of day when phone-calls are made or received, and the duration of phone-calls exchanged between parties, etc., which can be interpreted in the course of trial to examine the nature of the engagement of parties with each other. To be clear, the CDRs could turn-out to be elements of evidence, which are either *inculpatory* or *exculpatory*, when examined in conjunction with other evidence that may come on record. Furthermore, the mere allegation that the accused had erased data from his mobile phone while in police custody, in and of itself, is no ground to have denied preservation of the data and information requested by way of the application, especially in view of complaint dated 16.05.2023 stated to have been filed by the accused, alleging that the complainant's husband had forcibly destroyed the data from his phone. *It is pertinent to note that the forensic report in respect of the mobile phone of*



the accused says that the phone was 'factory reset' on 17.05.2023 at 10:11:51 AM at PS: Parliament Street.

- 14.3. It is also elementary, that if data and information such as CDRs and other electronic records, are not preserved *at this stage*, they would quite definitely be weeded-out by the service providers or be over-written in their information technology systems; and would therefore subsequently become *completely irretrievable and unavailable*. In fact, it is appropriate to note, that according to the telecom service provider, the CDRs for a substantial part of the relevant period relating to the above-referenced mobile numbers, have already been weeded-out by them, statedly in compliance with the terms of their license. Furthermore, as noted in the learned Magistrate's order dated 24.04.2024, even the requested CCTV footage of the Indira Gandhi International Airport, New Delhi has already been wiped-out or erased by the authorities since it is only retained for a limited period of 30 days.
- 14.4. In the course of submissions, there has been fierce contestation on whether the CDRs and the data sought to be preserved satisfy the test of 'necessity' and 'desirability' required under section 91 Cr.P.C. The complainant and the State, both have argued that the CDRs and other data in question fails the test of necessity or desirability. The learned APPs have in effect argued, that the data and information sought by way of section 91 Cr.P.C. application would only be needed, if at all, at the stage of defence evidence; but since the matter before the



learned Magistrate is at the stage of framing of charge, the application under section 91 Cr.P.C. was premature; nor could the learned Magistrate have considered the question of defence evidence at this stage. Learned counsel appearing for the complainant has also contended that disclosure of the data and information sought by the accused would amount to a breach of the complainant's privacy and should therefore not be permitted.

- 14.5. However, this court views the foregoing submissions in a different light. In the opinion of this court, the rival submissions show that at the very least, the data and information sought to be preserved by the accused *may be required* for purposes of the trial, *even if* at the stage of defence evidence. The accused contends that the data and information would be necessary for him to show the nature of the relationship between him and the complainant, both contemporaneously with the time of registration of the subject FIR *as well as* in the past period. It is the contention of the accused that the complainant engaged in a very close and intimate relationship with him, which factor would be relevant to construe and decide the veracity of the allegations that the complainant is making against him. Whether or not this contention has substance *cannot* be determined *at this nascent stage*, and it cannot be said that the data and information sought to be preserved is unnecessary or undesirable for purposes of a fair trial.



14.6. In the opinion of this court therefore, the data and information sought fulfils the *test of necessity* under section 91 of the Cr.P.C. It also appears obvious, and beyond doubt, that the data and information in question are perishable, in the sense that these are bound to be weeded-out or overwritten over a period of time. It can therefore hardly be contended with any seriousness, that it is not *desirable to preserve* that data and information right-away. It would be a travesty of justice to tell the accused, that we know that the data and information is bound to disappear for-good if it is not preserved at this stage, but since the proceedings are only at the stage of framing of charge, so at this stage, you have no right to ask that the data and information which will disappear subsequently, *even be preserved*. If evidence, claimed to be exculpatory, is allowed to dissipate in this manner, with the court being fully aware that such evidence would become irretrievable subsequently, it could prejudice a fair trial.

14.7. The other objection strenuously raised on behalf of the complainant is that the CDRs and other data and information relating to the period *prior to 01.01.2023* is irrelevant and of no consequence. In the opinion of this court, that contention is too broad to be accepted, since this court cannot lose sight of the stand of the accused that the complainant and the accused were in a relationship prior to that period, and to support that submission, the accused has sought preservation of the CDRs



and other data and information for the entire period from 01.04.2020 to 15.05.2023. This court also cannot ignore the concept of *res-gestae* contained in sections 6, 7 and 8 of the Indian Evidence Act, 1872 ('Evidence Act') which makes even the past conduct of parties relevant, in the following words :

6. Relevancy of facts forming part of same transaction.—Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

7. Facts which are the occasion, cause or effect of facts in issue.— Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

8. Motive, preparation and previous or subsequent conduct.— Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

14.8. It must also be observed that, in any case, the 'relevance' or 'admissibility' of the data and information in question, is not to be examined at this stage. Section 91 Cr.P.C. hinges on two tests : namely of 'necessity' and 'desirability'; and whether or



not the data and information sought would be ‘relevant’ or ‘admissible’ in the course of trial; and whether the data and information would have any *persuasive value* in aid of the defence of the accused, are not aspects that would enter this court’s consideration while deciding an application under section 91 Cr.P.C. At the risk of repetition, it must be noticed that the accused is *only seeking* that the data and information in question *be preserved*; and whether or not such data and information is relevant or admissible, or whether it would amount to breach of the complainant’s privacy are all matters to be considered subsequently in the course of the trial.

15. This court is constrained to note that in our process of criminal justice dispensation, there is *no formal system* for an accused to collect exculpatory evidence⁵, and an accused rarely has any *effective means* of collecting such evidence. Since the means for an accused to collect exculpatory evidence are woefully missing, investigating officers, who invariably have an upper-hand at least at the stage of investigation, fall into the temptation of keeping back evidence that may be helpful to the defence. It is not uncommon for an investigating agency to disclose only their side of the case, and regardless of the repeated articulation by the Supreme Court of the true role of a public prosecutor in *Shiv Kumar vs. Hukam Chand*⁶ and in *Manoj vs. State*

⁵ *Noor Aga vs. State of Punjab*, (2008) 16 SCC 417, para 71

⁶ (1999) 7 SCC 467, paras 13 and 14



*of M.P.*⁷, the proclivity of the prosecuting agencies is to secure conviction at any cost, which shatters the concept of a fair trial.

16. Though the Supreme Court has said in *Nirmal Singh Kahlon vs. State of Punjab*⁸ that “*fair investigation and fair trial are concomitants to preservation of fundamental right of an accused under Article 21 of the Constitution of India*”; and that, clearly, the right of an accused to a fair trial can only emanate from a fair investigation, the ground reality is quite different.
17. In these circumstances, it is *de rigueur* that the *preservation of evidence claimed to be exculpatory must be the rule*, unless the claim is *ex-facie* baseless.
18. Preservation of exculpatory evidence is of the *utmost sanctity* for purposes of ensuring a fair trial guaranteed under Article 21 of the Constitution of India; and a narrow construction or interpretation of section 91 Cr.P.C. must not stand in the way of *preservation* of such evidence, whilst of course leaving it to the trial court to subsequently decide whether such evidence is relevant and admissible.
19. In the present case, the accused *contends* that the communings between the complainant and him from April 2020 upto May 2023 are all relevant for examining the conduct, closeness and nature of their engagement; and the allegations against him must be examined in the context of the past relationship between the parties. This does not appear to be an argument that can be rejected out-of-hand. Whether or

⁷ (2023) 2 SCC 353, para 199

⁸ (2009) 1 SCC 441, para 28



not the trial court allows the accused to marshal those CDRs, data and information in his defence, would be best left to the judgment of the trial court.

20. A crucial aspect that has been raised on behalf of the complainant is that the I.O. has already collected the CDRs and other data and information for the period 01.01.2023 to 16.05.2023; and that such data and information for any period prior to the aforementioned period is wholly irrelevant and unnecessary for the purposes of the trial. On the other hand, the accused has contended that his relationship with the complainant began sometime in April 2020; and soured sometime before the filing of the subject FIR on 16.05.2023. The accused contends that the incidents that are the basis of the allegations levelled against him must not be viewed in isolation; and that the alleged criminality of his actions is required to be appreciated in the context of the past relationship between the parties. This court would refrain from commenting on this contention, except to point out that on the concept of *res gestae* as contained in sections 6 and 7 of the Evidence Act read with section 8 of the Evidence Act, even the past conduct of the parties *may* be relevant in relation to a fact in issue.
21. This court is accordingly of the view, that whether or not the CDRs and other data and information for the period *prior to* 01.01.2023 is relevant, cannot be prejudged at this stage. Admittedly, it is the complainant's case that her acquaintance with the accused dates-back to sometime in April 2020; therefore, in the opinion of this court, the preservation of CDRs and other related data and information for the



period from 01.04.2020 to 15.05.2023, as contended by the accused, is necessary and desirable.

22. As for the apprehension that mere preservation of the CDRs, data and information sought by the accused, would amount to breach of the complainant's privacy or would stigmatize her, this court is of the view that this submission requires a calibrated response. It may be observed that this court is not blind to the concerns of the complainant; however, in the opinion of this court, such concerns cannot stand in the way of at least *preserving* what the accused claims to be exculpatory evidence. As a measured approach, this court would direct that insofar as the CDRs are concerned, in order to obviate unnecessary exposure of the complainant's CDRs, *only the CDRs of the accused* for the period from 01.04.2020 to 15.05.2023 shall be preserved, which would be adequate to show the communications, if any, between the parties for that period. As for the other apprehensions expressed by the complainant, suffice it to say that those can be adequately protected by holding *in-camera* proceedings and adopting such other measures, at the appropriate stage, if so warranted, as the learned trial court may consider proper.
23. This court is at pains to reiterate, that all that is being sought by the accused is that certain CDRs, data and information be *preserved*, so that it is not irretrievably lost by the time the stage comes for the accused to marshal defence evidence. Whether the evidence preserved is relevant or admissible, or whether it should be taken on record, considering the complainant's privacy and such other aspects, would



be considered at the appropriate stage by the learned trial court. The right of the accused to adduce defence evidence cannot be foreclosed.

24. Coming next to the argument that the application under section 91 of the Cr.P.C. was premature, since the accused had no right to be heard before the stage of framing of charge, in the opinion of this court, in the day and age of electronic evidence, it would be a travesty of justice if the court takes the view that it would not direct even preservation of electronic evidence, until the time comes for recording defence evidence. Since the court is aware that such evidence would inevitably be erased or deleted within certain time frames, declining to preserve such evidence would be a recipe for disaster of a fair trial. This position can never be countenanced by the court.
25. Insofar as the present proceedings are concerned, in any event, this court would not hesitate to exercise its inherent powers under section 528 of the BNSS, to allow the preservation of the data and information sought by the accused-petitioner in the present case, *ex-debito - justitiae*.
26. Now, a perusal of order dated 24.04.2024 shows that in the compliance report filed by the I.O. pursuant to order dated 05.04.2024 made by the learned Magistrate, the I.O. has confirmed that the CDRs for the relevant period had already been preserved; and that the CCTV footage from the various places has been seized, though the CCTV footage from the Indira Gandhi International Airport, New Delhi was already weeded-out.
27. Pursuant to various orders made in the present proceedings, *vidé* affidavits dated 04.02.2025 and 02.04.2025, the I.O. has stated that he



has received the requested data/information from *all* concerned entities *except* Cleartrip; and that insofar as Zomato, Big Basket, Myntra, Wefast/Borzo and Amazon Delivery are concerned, the data/information has been received but without a certificate as required under section 65B of the Evidence Act.

28. As a sequitur to the above, this court is inclined to partly allow the present petition, thereby setting-aside orders dated 24.04.2024 and 28.05.2024, and restoring order dated 05.04.2024 passed by the learned Magistrate with certain modifications.
29. It is hereby directed that the CDRs – *only of the accused* – and all other data and information as set-out in para 5(e) to 5(g) of the application filed by the accused under section 91 of the Cr.P.C., *be preserved* along with requisite certificates as required under section 65-B of the Evidence Act. The CDRs of the complainant that have been received be destroyed by the learned Magistrate. If, and to the extent, that some of the data and information sought, or an adequate response, has not yet been received from the concerned entities, the learned Magistrate is directed to take requisite steps to ensure that such data, information or response is received expeditiously, *for being preserved*.
30. As a further caveat, it may be observed that the complainant's data and information received from the entities referred-to above, pertaining *only* to her transactions *with the accused and his family*, is required to be preserved.
31. It is made clear that, once received, the CDRs, data and information will be filed with the learned Magistrate and shall be retained in that



court, after the learned Magistrate has verified that the data is accessible, without disclosing it to either the accused or the complainant, *at this stage*. Both the accused and the complainant shall be at liberty to file appropriate applications before the learned Magistrate, seeking disclosure or production of such CDRs, data and information, at the appropriate stage, as may be permissible, in accordance with law.

32. The petition is disposed of in the above terms.
33. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J.

AUGUST 12, 2025

HJ