2025:DHC:1854

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

% *Judgment delivered on: 20.03.2025*

\+ **CRL.M.C. 7/2025**

RAVI MOHAN SHARMA .....Petitioner

Through: Mr. Pramod Kumar Dubey, Sr. Adv. with Mr. Nishank Mattoo, Ms. Pinky Dubey, Mr. Prince Kumar, Mr. Ramachandruni B. Siddhartha, Ms. Swati, Mr. Rishabh Munjal and Ms. Tanya Sharma, Advs.

versus

C.B.I. .....Respondent

Through: Mr. Ravi Sharma SPP, CBI, Mr. Swapnil Choudhary, Mr. Ishann Bhardwaj, Mr. Sagar and Ms. Madhulika Rai Sharma, Advs.

CORAM:
HON'BLE DR. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

DR. SWARANA KANTA SHARMA, J.

CRL.M.C. 7/2025 & CRL.M.A. 69/2025 (stay)

1. The petitioner assails the order dated 16.12.2024 [hereafter '***the impugned order***'] passed by the learned Special Judge (PC Act)/CBI-11, Rouse Avenue District Courts, New Delhi [hereafter '***the Trial Court***'] in CC No. 264/2019, titled '*CBI vs. Ravi Mohan Sharma & Ors.*'

2. Issue notice. Mr. Ravi Sharma, the learned SPP accepts notice on behalf of the CBI.

FACTUAL BACKGROUND

3. Background facts of the case are that a case bearing RC-11(A)/ 2014/CBI/AC-III/New Delhi was registered on 22.10.2014 by the Anti-Corruption Branch of the Central Bureau of Investigation [hereafter '***CBI***'] under Section 120B of the Indian Penal Code, 1860 [hereafter '***IPC***'] and Sections 7, 11, and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 [hereafter '***PC Act***']. The FIR contained allegations that petitioner i.e. accused no. 1, Ravi Mohan Sharma, a public servant, while serving as Director, Traffic Transportation (Coaching-1), Railway Board, Government of India, had entered into a criminal conspiracy with certain private individuals and facilitated the hiring of railway coaches in exchange for illegal gratification in the form of a cash amount of ₹5 lakhs. It is the case of the prosecution that the petitioner was caught red-handed while accepting the bribe of ₹5 lakhs at his residence.

4. The present case was registered based on source information, and during the initial course of investigation, the mobile phones of the suspected individuals, including the petitioner, were placed under surveillance. The conversations from the monitored calls were recorded, and a CD containing 182 audio files was sent for comparison with the voice samples of the accused and other suspected persons. The Central Forensic Science Laboratory

[hereafter '***CFSL***'] had examined the audio files and provided a positive report, stating that the voices in the recorded conversations were the probable voices of the individuals whose specimen samples had been sent for comparison. Upon completion of investigation, the charge-sheet was filed on 20.12.2014. Thereafter, the supplementary chargesheet was filed on 10.12.2015 and the investigation was concluded. Charges were framed against petitioner Ravi Mohan Sharma, accused no. 2 Kumar Vadilal Shah, accused no. 3 Rajesh Champaklal Jodhani, and accused no. 4 M/s Rail Tour India LLP. During the trial, sixty-five (65) prosecution witnesses were examined, and the prosecution's evidence was closed *vide* order dated 21.05.2024. Thereafter, the statements of the accused persons under Section 313 of the Code of Criminal Procedure, 1973 [hereafter '***Cr.P.C.***'] were being recorded.

5. At this stage, the CBI had filed an application under Section 91 read with Section 311 of the Cr.P.C. seeking liberty to place on record the work-sheets prepared during the spectrographic examination of the voice samples of the suspected persons, including the accused herein, conducted by Dr. Manisha Kulshrestha, Senior Scientific Officer, CFSL with the assistance of Sh. Jayesh Bhardwaj, Senior Scientific Assistant, CFSL. Directions were also sought that Sh. Jayesh Bhardwaj, Senior Scientific Assistant may be summoned and examined as an additional prosecution witness.

6. The learned Trial Court was pleased to allow the aforesaid application filed by the CBI, by way of the impugned order dated

16.12.2024. The relevant observations of the learned Trial Court are set out below:

> "13. It can be seen from the wording of Section 79A of Information & Technologies Act that it provides that the Central Government 'may', meaning thereby that a discretion is vested with the Central Government to designate any authority as an expert of electronic evidence. However, the same does not mean that in the absence of the notification in respect of a laboratory, opinion based on scientific examination given by a person well versed or skilled in such science, is not admissible in evidence. Unless such bar is specifically provided in law, it cannot be read as an extension of Section 79A of Information & Technologies Act that the report given by any other laboratory shall not be admissible in the absence of notification. Acceptance of such an argument would lead to chaos and would make the expert evidence redundant. There is nothing in Section 79A of the Information & Technology Act which bars the admission of a report given by an expert who had examined the electronic record. The provision does not say that in the absence of notification, an opinion given by a person cannot be admitted in evidence. Reliance on this issue can be placed upon the decision in the matter of ***K. Ramajayam Vs Inspector of Police, Chennai 2016 Cr. LJ 1542***, on the issue of Section 79A of Information & Technology Act, wherein it was observed as under:
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> > "It is axiomatic that the opinion of an expert, which is relevant under Section 45 of the Indian Evidence Act, 1872, when accepted by the Court graduates into the opinion of the Court. The Central Government has not yet issued notification under Section 79A of the Information Technology Act, 2000 on account of which Section 45A of the Indian Evidence Act, 1872 remains mute. Therefore, the methods evolved by Kala (PW 23) and Pushparani (PW24), Scientific Officers of the Tamil Nadu Forensic Sciences Department to analyze and give their opinions on the electronic data, are correct and cannot be faulted."
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> 14. It is obvious that notification under Section 79A of Information & Technology Act lay down a basis to accept the report of a notified expert under Section 293(4)(g) of Cr. P.C. without formal proof of the same. It is also to be appreciated that other experts such as handwriting experts have to prove

their opinion or report before the court, after appearing as witness. Their reports are evaluated and appreciated by court on merits rather than being rejected on the grounds that they are not notified experts. As the CFSL was not notified under section 79A of the Information & Technology Act, the formal proof of report of such experts cannot be dispensed under Section 293(4)(g) of Cr. P.C. and the prosecution has to prove the reports by calling such experts as witnesses. However, the report cannot be discarded or be said to be inadmissible for want of notification under section 79A of Information & Technology Act. It is an altogether different matter that while appreciating the electronic evidence, certain precautions and certain checks need to be followed. Thus, in so far as the admissibility of the report of the expert is concerned, the same cannot be questioned or challenged merely due to the absence of notification under Section 79A of Information & Technology Act. In view of this, there is no merit in the argument that the CFSL report is inadmissible merely because the expert has not been notified under Section 79A of Information & Technology Act.

15. It cannot be doubted that report of CFSL on the voice samples is relevant and the same is an important piece of evidence to arrive at a fair and just decision. Section 136 of Indian Evidence Act vests power with the court to decide as to the admissibility of the evidence. It reads as under:-

> "136. Judge to decide as to admissibility of evidence.-- When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise. If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such lastmentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking. If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

16. In view of the above, I have no hesitation in holding that the CFSL report on the voice samples is relevant and admissible. Coming to the argument of the defence counsels that a person who has assisted an expert cannot be examined as a witness. It can be seen that Section 293(3) of Cr. P.C. specifically provides that if an expert is unable to attend the court personally, he may depute any responsible officer working with him to attend the court, if such officer is conversant with the facts of the case and can satisfactorily depose in the court on his behalf. Thus, it cannot be doubted that the expert can depute any other responsible officer to depose in the court if such officer is conversant with the facts of the case and he can satisfactorily depose in the court on his behalf. In the present matter, prosecution has submitted that Sh. Jayesh Bhardwaj assisted Dr. Manisha Kulshrestha in the spectrographic examination and the spectrographic comparison worksheets were also signed by him in the capacity of an Assistant. Thus, it cannot be said that the said official is not conversant with the facts of the case. It can be seen that the expert Dr. Manisha Kulshrestha has resigned from the service and settled abroad. Prosecution tried to secure the presence of this witness but failed to do so. In such circumstances, the prosecution deserves a chance to bring on record the best available evidence in respect of the findings on the voice samples and the recorded conversations. Not allowing the prosecution to do so would defeat the ends of justice as every endevour needs to be made to ensure that truth is elucidated during the trial.

17. It has been vehemently argued on behalf of accused persons that allowing the present application would infringe their fundamental right under Article 21 of The Constitution of India. I do not agree with the said line of argument. Record shows that during trial, prosecution made efforts to record the statement of Dr. Manisha Kulshrestha through video conferencing but the defence counsels did not agree for the same and insisted on the physical presence of the witness knowing fully well that the witness had settled abroad. In view of this, the testimony of this witness could not be recorded through video conferencing. Thereafter, no substantial efforts were made by the prosecution to secure the physical presence of this witness. The prosecution could have made better efforts to secure the presence of the witness or could have at least again insisted after the end of the COVID period that the

testimony of the witness be recorded through video conferencing but it failed to do so. Be that as it may, the testimony of this crucial witness could not be recorded.

18. Coming to the argument of the defence counsel that collecting of the work-sheets by the investigating officer amounts to further investigation. I do not agree with the argument of the defence counsel that the work-sheets need to be discarded because the same have been obtained without seeking the permission of the court. It is indeed correct that CBI should have taken permission from the court before collecting the said documents but once, such documents are shown to be in existence and they appear to be necessary and desirable for the purpose of trial, this court can very well summon them by invoking the discretion vested under Section 91 of Cr.P.C.

19. In view of the discussion held in the aforesaid paras, I have reached a conclusion that the work-sheets prepared by Dr. Manisha Kulshrestha with the assistance of Sh. Jayesh Bhardwaj during the spectrographic examination of the voice samples and recorded conversations are relevant and admissible piece of evidence. These work-sheets form the basis of the final opinion contained in the report of the CFSL. The presence of expert Dr. Manisha Kulshrestha could not be secured despite various efforts as she had settled abroad. It can be seen that when the earlier application of the prosecution was dismissed on 21.05.2024, the prosecution's evidence was closed on the same day itself. Therefore, the prosecution did not get a fair opportunity to take steps for bringing these documents on record at the stage of prosecution's evidence. As observed earlier, the documents are necessary and desirable for the purpose of trial. It is a different matter as to what weight would these documents carry but the documents are indeed relevant and the same need to be brought on record. On the same grounds, the testimony of the official who has signed the documents as an Assistant of Dr. Manisha Kulshrestha during spectrographic examination of the voice samples is also relevant. In arriving at this conclusion, I draw force from the decision by the High Court of Allahabad in the matter of ***Shyam Sunder Prasad Vs. Central Bureau of Investigation in Crl. Revision No. 921/2022 decided on 15.11.2022*** wherein, on somewhat similar facts, the High Court upheld an order allowing the examination of another official in place of the official giving the expert opinion in the CFSL report.

> 20. In view of the discussions made in the afore-mentioned paras, the application of the prosecution stands allowed and the Director, CFSL is directed to produce the spectrographic work-sheets prepared in respect of report No. CFSL-2014/P-1666 dated 19.12.2014 along with copies for the accused persons. The copies of the same shall be supplied to the accused persons. The right of the accused persons can be balanced by giving directions to the prosecution that only one opportunity shall be granted to examine the said official. Sh. Jayesh Bhardwaj, Senior Scientific Assistant, CFSL be summoned as a witness for the next date of hearing. With these directions, the application stands disposed of."

7. The petitioner/accused is aggrieved by the impugned order, and has sought its setting aside by way of the present petition filed under Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023 [hereafter '***BNSS'***].

SUBMISSIONS BEFORE THE COURT

Submissions on Behalf of the Petitioner

8. The learned senior counsel for the petitioner argues that the learned Trial Court has passed an arbitrary and erroneous order dated 16.12.2024, whereby it wrongly exercised its power under Section 91 read with Section 311 of Cr.P.C. It is contended that the impugned order is illegal as it permits the Prosecution to fill lacunae in its case after the petitioner has already disclosed their defence at the stage of prosecution evidence. The learned Trial Court, it is submitted, erroneously allowed the fifth application filed by the State seeking similar relief regarding CFSL documents at the stage of recording the accused's statement under Section 313 of Cr.P.C.

9. It is further contended that the learned Trial Court failed to

appreciate that the Prosecution was essentially seeking a review of its own previous orders rejecting similar applications. The stage of prosecution evidence had already been closed, and the accused's defence had been disclosed, making the impugned order highly prejudicial to the accused. The learned senior counsel argues that the Trial Court erred in holding that it could summon documents under Section 91 of Cr.P.C. merely because they were shown to exist and appeared necessary for the trial. The Prosecution's attempt to summon spectrographic worksheets and related documents from CFSL amounts to further investigation, which requires the Court's permission. The learned senior counsel relies on the judgments of the Hon'ble Supreme Court in ***Vinubhai Haribhai Malaviya v. State of Gujarat:*** *MANU/SC/1427/2019* and ***Peethambaran v. State of Kerala:*** *(2023) 4 SCR 1144* in support of this argument.

10. It is argued that the learned Trial Court also failed to appreciate that the spectrographic worksheets existed at the time of filing of the charge-sheet, and Jayesh Bhardwaj was already a part of the investigation. However, the Investigating Officer chose not to examine him at that stage. In view of the Hon'ble Delhi High Court's decision in ***Surender @ Tannu @ Tanva v. State of NCT of Delhi:*** *2022 SCC OnLine Del 1783*, the impugned order is unsustainable in law. Furthermore, it is submitted that the additional documents filed before the learned Trial Court cannot be placed on record as they were obtained through further investigation nearly a decade after the charge-sheet and supplementary charge-sheet were filed, without

seeking the Court's permission. The learned senior counsel argues that the Prosecution is attempting to introduce these documents despite their existence at the time of the charge-sheet, which is impermissible without the Court's leave.

11. It is contended that even as per the Prosecution's case, clarifications were sought from CFSL, which led to the discovery that Jayesh Bhardwaj had assisted Dr. Manisha Kulshrestha. Seeking such clarifications, it is argued, amounts to further investigation under Section 173(8) of Cr.P.C., as there is no other provision permitting clarifications after the conclusion of the investigation. The learned Trial Court, despite agreeing that the CBI should have sought permission before collecting these documents, arbitrarily held that the Court could summon them under Section 91 of Cr.P.C. The learned senior counsel contends that this amounts to doing indirectly what the law does not permit directly, as neither Section 311 of Cr.P.C. nor Section 91 of Cr.P.C. can be used to bypass the requirement of seeking permission for further investigation. The Prosecution's issuance of a notification under Section 91 of Cr.P.C. for collecting additional documents effectively amounts to further investigation, which is impermissible after the filing of the Final Report under Section 173(2) of Cr.P.C.

12. It is further argued that the withdrawal of the previous application after extensive arguments and the subsequent filing of a similar application after a change in the Presiding Officer amounts to forum shopping. Additionally, it is pointed out that neither the

Prosecution nor the learned Trial Court has explained the relevance of Jayesh Bhardwaj's testimony in proving the CFSL report, as he did not personally examine the voice samples and had no independent knowledge beyond providing purported assistance. Without prejudice to the petitioner's rights and contentions, it is submitted that Dr. Manisha Kulshrestha did not depute Jayesh Bhardwaj to depose before the Trial Court on her behalf. While the learned Trial Court correctly observed that under Section 293(3) of Cr.P.C., an expert may deputize a responsible officer conversant with the facts to depose on their behalf, it failed to consider that no such deputation was made by Dr. Kulshrestha. Moreover, Jayesh Bhardwaj did not sign the CFSL report, but only the spectrographic worksheets, which merely suggest his role as an assistant without detailing his specific contributions to the examination.

13. It is further argued that the learned Trial Court erred in holding that the Prosecution did not get a fair opportunity to bring these documents on record during the Prosecution Evidence stage, as the Prosecution had already moved four similar applications since 24.09.2021. On these grounds, it is prayed that the present petition be allowed and the impugned order be set aside.

Submissions on Behalf of the CBI

14. The learned SPP for the CBI appears on advance notice, and vehemently opposes the prayers made in the petition. It is argued by him that the prosecution's case significantly relies on the CFSL report, which provides expert analysis of the voice samples. It is

submitted that although Dr. Manisha Kulshrestha, Senior Scientific Officer (Grade-II), Physics, CFSL, had originally examined the voice samples and submitted a positive report, she could not be examined during the trial due to unavoidable circumstances. It is argued that the official had resigned from service and settled abroad, making it impossible to secure her presence despite the prosecution's sincere efforts, including attempts to record her testimony through video conferencing. However, it is further submitted that the spectrographic examination was conducted with the assistance of Mr. Jayesh Bhardwaj, SSA, who had co-signed the spectrographic comparison work-sheets. Therefore, it was prayed by the CBI before the learned Trial Court that it be permitted to place the said worksheets on record and to examine Mr. Bhardwaj as a prosecution witness, as his testimony is essential for establishing the authenticity and credibility of the CFSL report.

15. It is further argued that the CFSL report is a crucial piece of evidence, and in the interest of a fair trial, the prosecution should be allowed to present all relevant and material evidence. The learned SPP for the CBI argued that under Section 293(1) of Cr.P.C., reports prepared by government scientific experts are admissible as evidence in a trial without the need for further investigation or filing of a supplementary charge-sheet. Additionally, under Section 311 Cr.P.C., the Court is empowered to summon any witness at any stage of the proceedings if his testimony is essential for a just decision. It is contended that examining Mr. Jayesh Bhardwaj, who assisted in the

expert analysis, is necessary to bring forth the truth and to meet the ends of justice.

16. The learned SPP for the CBI also contends that prosecution's effort to produce vital evidence should not be obstructed, even if it is sought at a later stage of trial, and allowing the prosecution's application to summon witness does not amount to filling the lacunae in the case but rather ensures that all relevant evidence is brought on record. It is contended that the accused would not suffer any prejudice, as he would have the opportunity to cross-examine Mr. Jayesh Bhardwaj. In support of his submissions, the learned SPP places reliance on several case laws. Therefore, it is prayed that the present petition be dismissed and the impugned order be upheld.

17. This Court has **heard** arguments addressed on behalf of both the parties and has carefully perused the material available on record, and the case laws relied upon by either side.

ANALYSIS & FINDINGS

18. The controversy in the present case, as apparent from the records, primarily pertains to the CFSL report dated 19.12.2014, prepared by Dr. Manisha Kulshrestha, Senior Scientific Officer, CFSL, CBI, New Delhi. As per prosecution, the petitioner (accused no. 1), a public servant, while being posted as a Director, Traffic Transportation (Coaching-1), Railway Board, Government of India, had allegedly entered into a criminal conspiracy with some private individuals and had facilitated the hiring of railway coaches in lieu of

obtaining illegal gratification in the form of cash amount of ₹5 lakhs. Allegedly, the petitioner was caught red handed while accepting the bribe of ₹5 lakhs at his residence. It is the prosecution's case that the present case had been registered on the basis of a source information and during the course of initial investigation, the mobile phones of the suspected individuals, including that of the petitioner, had been put under surveillance. The mobile phone numbers of accused no. 1, accused no. 3, and other suspects were intercepted, and certain conversations were captured; and the prosecution relies significantly on these recorded conversations to establish the alleged conspiracy. In furtherance of the investigation, specimen voice samples of the accused and other suspected individuals were collected and subsequently forwarded to CFSL for forensic examination. The report, authored by Dr. Manisha Kulshrestha, concluded that the voices in question and specimen voices exhibited similarities, thereby supporting the prosecution's case.

19. It is material to note that Dr. Manisha Kulshrestha, Senior Scientific Officer, CFSL *was cited as one of the prosecution witnesses i.e. PW-27* in the chargesheet. She had been summoned by the learned Trial Court during the course of trial on 20.01.2020. However, it had then come to the notice of CBI that Dr. Manisha Kulshreshtha had already resigned from the CFSL, New Delhi and she had been relieved from her duties with effect from 20.09.2016. It was also informed by the CFSL officials that Dr. Manisha Kulshreshtha had settled in United States of America. The learned

Trial Court has noted in the impugned order that throughout the trial, *the prosecution had made multiple attempts to examine Dr. Manisha Kulshrestha as a witness*. However, it was found that she had relocated to USA.

20. This Court notes that initially, on 24.09.2021, the prosecution had moved an application seeking to record the testimony of Dr. Manisha Kulshrestha through video conferencing. This application was later withdrawn on 09.03.2022 upon the prosecution's submission that the said witness had indicated her willingness to return to India. Subsequently, on 22.08.2022, a fresh application was filed for recording her testimony *via* video conferencing, but it was again withdrawn on 31.03.2023, as the defence counsel did not consent to such an examination. Following these developments, the prosecution, on 31.03.2023, had filed an application under Section 311 of Cr.P.C. seeking permission to examine Sh. Jayesh Bhardwaj, another Senior Scientific Officer at CFSL, in place of Dr. Manisha Kulshrestha, on the ground that her immediate examination was not feasible due to her residence abroad. However, this application too was withdrawn on 22.05.2023, with liberty to file afresh. Later, on 15.03.2024, the prosecution had filed another application under Section 91 of Cr.P.C., seeking production of rough worksheets prepared during the forensic examination of the voice samples. This application was also withdrawn on 21.05.2024 with liberty to file afresh, and the prosecution evidence was formally closed on the same day.

21. Eventually, the application in question was filed by the prosecution on 03.10.2024 under Section 91 read with Section 311 of Cr.P.C. to place on record the additional documents i.e., the letter no. CFSL-2014/P-1666/2684 dated 18.07.2024 along with the certified copies of the spectrographic worksheets and to summon and examine one Sh. Jayesh Bhardwaj who is purported to have assisted Dr. Manisha Kulshreshtha in the purported examination of the electronics record.

22. At this juncture, when the argument of the learned senior counsel for the petitioner – that the subject application could not have been allowed since four similar applications had been previously dismissed – is considered, this Court finds the same unmerited, since the learned Trial Court has clearly taken note of all the previous applications filed by the prosecution, relating to the similar issue and the fact that the same had been withdrawn, while passing the impugned order. Further, it is also to be noted that in two of the applications filed previously by the CBI, it had only sought recording of the statement of Dr. Manisha Kulshreshtha through video-conferencing. In the third application, the prosecution sought examination of Sh. Jayesh Bhardwaj as a witness in place of Dr. Manisha Kulshreshtha; however, the same application was dismissed as withdrawn, *with liberty to file an application afresh*. In fourth application, the prosecution had sought summoning of documents under Section 91 from CFSL which would show that some expert had assisted Dr. Manisha Kulshreshtha. This application was also

dismissed as withdrawn. However, it is clear that the present application moved by the prosecution had sought a different relief i.e. taking on record the additional documents such as rough worksheets prepared during the forensic examination of the voice samples and calling of witness Sh. Jayesh Bhardwaj.

23. Now, the primary contention of the petitioner revolves around the proposition that by seeking an explanation from CFSL alongwith the rough worksheets prepared at the time of forensic examination of the voice samples, the CBI had conducted 'further investigation', and that too, without the permission of the Trial Court, after the trial had already begun. This Court, however, finds no merit in the said argument at this stage.

24. In this regard, this Court's attention was drawn by the learned counsel for CBI, firstly, to the decision of High Court of Andhra Pradesh in case of ***Pinninti Satyanarayana v. State of Andhra Pradesh:*** *2004 (1) A.P.L.J. 114 (HC).* In this case, it was argued on behalf of the accused therein that calling for the opinion of an expert and recording his evidence amounts to further investigation and the prosecution cannot be allowed to summon the expert to give evidence for marking the expert's report without filing a further chargesheet. This contention was rejected by the High Court and it was held that under Section 293(1) of Cr.P.C., a report prepared by a Government scientific expert on any matter duly submitted for examination or analysis may be used as evidence in an inquiry, trial, or other proceedings under the Code and there is no legal bar to admitting

such expert opinions as evidence. Additionally, under Section 311 of Cr.P.C., the Court has the discretion to summon or examine any witness at any stage of the proceedings if his/her testimony is deemed essential for a just decision in the case. The relevant observations are extracted hereunder:

> "5. He further submits that under Section 173(8) of the Criminal Procedure Code, no doubt the police has got power for further investigation in respect of an offence even after filing of the report under Section 172 of the Criminal Procedure Code, any such further evidence, oral or documentary, shall be forwarded to the Magistrate by - a further report regarding such evidence and thus he submits that the expert's opinion and his evidence is a further investigation and therefore, the prosecution cannot be allowed to summon the expert to give evidence for marking the expert's report without filing the further report as contemplated under Section 173 Cr.P.C.
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> 6. I cannot accept the said contention of the learned counsel appearing for petitioner, as certain Government scientific experts reports are admissible in evidence under Section 293 of the Code of Criminal Procedure. Under Section 293 of the Code of Criminal Procedure, any document purporting to be a report under the hands of a Government scientific expert, upon any matter or thing duly submitted to him for examination or analysis and the said report in the course of any proceedings under this Code, may be used as evidence in an inquiry, trial or other proceeding under this Code. Thus, under Section 293(1) Cr.P.C, the expert opinion may be used as evidence in an inquiry, trial or other proceedings under the Code and therefore, there is no bar for receiving the expert opinion Under Section 293 of the Code of Criminal Procedure. Under Section 311 of the Code of Criminal Procedure, the Court is empowered, at any stage of any inquiry, trial or other proceeding, to summon any person as a witness, or examine any person in attendance, though not summoned, as a witness, if his evidence appears to be essential to the just decision of the case. In the instant case, the learned Additional Public Prosecutor of the Court below rightly filed such an application under Section 311 of the

> Code of Criminal Procedure to summon the expert for the purpose of marking expert's opinion. Hence, I am of the view that there is no bar under Section 173(8) of the Code of Criminal Procedure, to summon the expert as a witness for the purpose of marking the expert opinion as it is not a further investigation or a further evidence but it was part of the evidence that was investigated by the Investigating officer and therefore, there is no need for filing the further report. Therefore, I do not see any merits in the Criminal Revision Petition."

25. It is also relevant to note that in the above-mentioned decision of ***Pinninti Satyanarayana v. State of A.P.*** *(supra)*, the expert who was called for examination had not been cited as a witness in the chargesheet. Whereas in the case at hand, *undisputedly*, Dr. Manisha Kulshrestha, Senior Scientific Officer, CFSL, had been cited as a prosecution witness but it was due to her moving abroad and not being available in India for recording her testimony and the objection of accused to the recording of her testimony through video-conferencing, that the need arose for summoning another witness in her place alongwith relevant worksheets.

26. In this regard, the second decision relied upon by the CBI was ***Varsha Garg v. State of Madhya Pradesh and Ors.:*** *2022 SCC OnLine SC 986*. In this case, after concluding the investigation, the charge-sheet and supplementary charge-sheet had been filed. The supplementary charge-sheet included certificates obtained from nodal officers of various cellular companies. Later, the prosecution had filed one application under Section 311 of Cr.P.C. for summoning the decoding registers. Another application under Section 311 of Cr.P.C.

was also filed to summon the nodal officer of Idea and to produce call data records of two mobile numbers under Section 91 of Cr.P.C. However, both these applications came to be rejected by the Trial Court concerned. The application seeking summoning of the decoding register was dismissed on the ground that the said document was neither part of the investigation nor had it been obtained during investigation. Consequently, the prosecution evidence stood closed. The appellant had challenged this order before the High Court of Madhya Pradesh under Section 482 of Cr.P.C., but the said petition was dismissed, holding that (i) the decoding registers were not part of the case diary or charge-sheet, (ii) the prosecution had already closed its evidence, and (iii) the application was filed at a belated stage without confirming the availability of the decoding register with the service provider. In appeal, the Hon'ble Supreme Court set aside the orders of the High Court and the Trial Court, and allowed the prosecution's application for production of the decoding register and for summoning of witnesses of the cellular companies for that purpose. The Hon'ble Supreme Court explained the scope of Section 311 and 91 of Cr.P.C., and observed that effort of the prosecution in producing the decoding registers, which is a crucial and vital piece of evidence, ought not to be obstructed and in terms of Section 311 of Cr.P.C., the summoning of witnesses for said purpose was essential for just decision of the case. It was also held that the argument – that allowing such an application under Section 311 of Cr.P.C. would amount to filling the lacunae of prosecution's case –

cannot be a ground to now allow the application, since the Court's decision should only be based on the test of essentiality of the evidence. The observations of the Hon'ble Supreme Court are set out below:

> "31. Having clarified that the bar under Section 301 is inapplicable and that the appellant is well placed to pursue this appeal, we now examine Section 311 of CrPC. Section 311 provides that the Court "may": (i) Summon any person as a witness or to examine any person in attendance, though not summoned as a witness; and (ii) Recall and re-examine any person who has already been examined.
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> 32. This power can be exercised at any stage of any inquiry, trial or other proceeding under the CrPC. The latter part of Section 311 states that the Court "shall" summon and examine or recall and re-examine any such person "if his evidence appears to the Court to be essential to the just decision of the case". Section 311 contains a power upon the Court in broad terms. The statutory provision must be read purposively, to achieve the intent of the statute to aid in the discovery of truth.
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> 33. The first part of the statutory provision which uses the expression "may" postulates that the power can be exercised at any stage of an inquiry, trial or other proceeding. The latter part of the provision mandates the recall of a witness by the Court as it uses the expression "shall summon and examine or recall and reexamine any such person if his evidence appears to it to be essential to the just decision of the case". Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.
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> 37. The power of the court is not constrained by the closure of evidence. Therefore, it is amply clear from the above discussion that the broad powers under Section 311 are to be governed by the requirement of justice. The power must be exercised wherever the court finds that any evidence is essential for the just decision of the case. The statutory provision goes to emphasise that the court is not a hapless

bystander in the derailment of justice. Quite to the contrary, the court has a vital role to discharge in ensuring that the cause of discovering truth as an aid in the realization of justice is manifest.

38. Section 91 CrPC empowers inter alia any Court to issue summons to a person in whose possession or power a document or thing is believed to be, where it considers the production of the said document or thing necessary or desirable for the purpose of any investigation, inquiry, trial or other proceeding under the CrPC.

39. Section 91 forms part of Chapter VII of CrPC which is titled "Processes to Compel the Production of Things". Chapter XVI of the CrPC titled "Commencement of Proceedings before Magistrates" includes Section 207 which provides for the supply to the accused of a copy of the police report and other documents in any case where the proceeding has been instituted on a police report. Both operate in distinct spheres.

40. In the present case, the application of the prosecution for the production of the decoding registers is relatable to the provisions of Section 91 CrPC. The decoding registers are sought to be produced through the representatives of the cellular companies in whose custody or possession they are found. The decoding registers are a relevant piece of evidence to establish the co-relationship between the location of the accused and the cell phone tower. The reasons which weighed with the High Court and the Trial Court in dismissing the application are extraneous to the power which is conferred under Section 91 on the one hand and Section 311 on the other. The summons to produce a document or other thing under Section 91 can be issued where the Court finds that the production of the document or thing "is necessary or desirable for the purpose of any investigation, trial or other proceeding" under the CrPC. As already noted earlier, the power under Section 311 to summon a witness is conditioned by the requirement that the evidence of the person who is sought to be summoned appears to the Court to be essential to the just decision of the case.

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42. The relevance of the decoding register clearly emerges from the above statement of PW-41. Hence, the effort of the prosecution to produce the decoding register which is a crucial and vital piece of evidence ought not to have been obstructed.

In terms of the provisions of Section 311, the summoning of the witness for the purpose of producing the decoding register was essential for the just decision of the case.

43. Having dealt with the satisfaction of the requirements of Section 311, we deal with the objection of the respondents that the application should not be allowed as it will lead to filling in the lacunae of the prosecution's case. However, even the said reason cannot be an absolute bar to allowing an application under Section 311.

44. In the decision in *Zahira Habibullah Sheikh (5) v. State of Gujarat*, which was more recently reiterated in *Godrej Pacific Tech. Ltd. v. Computer Joint India Ltd.*, the Court specifically dealt with this objection and observed that the resultant filling of loopholes on account of allowing an application under Section 311 is merely a subsidiary factor and the Court's determination of the application should only be based on the test of the essentiality of the evidence. It noted that:

> "28. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. **Sometimes the examination of witnesses as directed by the court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account.** Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.
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> **(emphasis supplied)**

45. The right of the accused to a fair trial is constitutionally protected under Article 21. However, in *Mina Lalita Baruwa (supra)*, while reiterating *Rajendra Prasad (supra)*, the Court observed that it is the duty of the criminal court to allow the prosecution to correct an error in interest of justice. In *Rajendra Prasad (supra)*, the Court had held that:

> "8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. **No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.** After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."
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> **(emphasis supplied)**

46. In the present case, the importance of the decoding registers was raised in the examination of PW-41. Accordingly, the decoding registers merely being additional documents required to be able to appreciate the existing evidence in form of the call details which are already on record but use codes to signify the location of accused, a crucial detail, which can be decoded only through the decoding registers, the right of the accused to a fair trial is not prejudiced. The production of the decoding registers fits into the requirement of being relevant material which was not brought on record due to inadvertence.

47. Finally, we also briefly deal with the objection of the respondents regarding the stage at which the application under Section 311 was filed. The respondents have placed reliance on *Swapan Kumar (supra)*, a two judge Bench decision of this Court, to argue that the application should not be allowed as it has been made at a belated stage. The Court in *Swapan Kumar (supra)* observed:

> "11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has wide power under this Section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be

> exercised if the court is of the view that the application has been filed as an abuse of the process of law. 12. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision."

48. In the present appeal, the argument that the application was filed after the closure of the evidence of the prosecution is manifestly erroneous. As already noted above, the closure of the evidence of the prosecution took place after the application for the production of the decoding register and for summoning of the witness under Section 311 was dismissed. Though the dismissal of the application and the closure of the prosecution evidence both took place on 13 November 2021, the application by the prosecution had been filed on 15 March 2021 nearly eight months earlier. As a matter of fact, another witness for the prosecution, Rajesh Kumar Singh, was also released after examination and cross-examination on the same day as recorded in the order dated 13 November 2021 of the trial court.

49. The Court is vested with a broad and wholesome power, in terms of Section 311 of the CrPC, to summon and examine or recall and re-examine any material witness at any stage and the closing of prosecution evidence is not an absolute bar. This Court in *Zahira Habibulla H. Sheikh (supra)* while dealing with the prayers for adducing additional evidence under Section 391 CrPC at the appellate stage, along with a prayer for examination of witnesses under Section 311 CrPC explained the role of the court, in the following terms:

> "43. The courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of court to elicit all necessary materials by playing an active role in the evidence-collecting process. **They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in**

> **some ways, it can control the proceedings effectively so that the ultimate objective i.e. truth is arrived at. This becomes more necessary where the court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency.** The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness."
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> **(emphasis supplied)**
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> 53. For the above reasons, we have come to the conclusion that the decision of the High Court which is impugned in the appeal is unsustainable. We accordingly allow the appeal and set aside the impugned judgment and order of the High Court dated 8 April 2022 in Misc. Criminal Case No. 57152 of 2021 as well as the order of the Second Additional Session Judge, Dr. Ambedkar Nagar, District Indore dated 13 November 2021 in Sessions Trial 227 of 2016 dismissing the application filed by the prosecution. The application filed by the prosecution for the production of the decoding registers and for the summoning of the witnesses of the cellular companies for that purpose is allowed. The Second Additional Sessions Judge, Dr. Ambedkar Nagar, District Indore is directed to conclude Sessions Trial No. 227 of 2016 by 31 October 2022."

27. Insofar as the argument of learned senior counsel for petitioner, that application should not be allowed in this case since prosecution evidence has already been closed, is concerned, the same can be of no help to the petitioner, as the Hon'ble Supreme Court in ***Varsha Garg v. State of Madhya Pradesh and Ors.*** *(supra)* has held that the Court is vested with broad and wholesome power to summon or recall or re-examine any material witness at any stage and the closing of prosecution evidence is not an absolute bar.

28. Further, the attention of this Court as well as the learned Trial Court was also drawn by the CBI to the decision dated 15.11.202 of High Court of Allahabad in case of ***Shyam Sunder Prasad v. Central Bureau of Investigation:*** *Crl. Revision No. 921/2022*, wherein under similar facts and circumstances, the High Court had upheld an order allowing the examination of another official in place of the official giving the expert opinion in the CFSL report. It is relevant to note that in the said case also, the CFSL report had been prepared by Dr. Manisha Kulshreshtha, as in the present case.

29. Lastly, insofar as the arguments regarding mis-application or misinterpretation of provisions of Section 79A of Information & Technology Act, 2000, Section 45, 45A and 136 of Indian Evidence Act, and Section 293 of Cr.P.C. is concerned, the same also cannot come to the rescue of petitioner at this stage. A perusal of the impugned order reveals that the learned Trial Court has dealt with the said provisions of Cr.P.C. and Indian Evidence Act, and apparently, has followed the decision of High Court of Allahabad in ***Shyam Sunder Prasad v. Central Bureau of Investigation*** *(supra)* in this regard. In this Court's opinion, there is no infirmity with the finding of the learned Trial Court that Section 79A of Information & Technology Act uses the word 'may' which means that a discretion is vested with the Central Government to designate any authority as an expert of electronic evidence. However, the same cannot be construed to mean that in the absence of the notification in respect of a laboratory – such as CFSL – opinion based on scientific

examination given by a person well versed or skilled in such science, is not admissible in evidence, and there is nothing in Section 79A which bars the admission of a report given by an expert who had examined the electronic record. The learned Trial Court has also rightly observed that since CFSL was not notified under Section 79A of the Information & Technology Act, the formal proof of report of such experts cannot be dispensed with under Section 293(4)(g) of Cr.P.C. and the prosecution has to prove the reports by calling such experts as witnesses; but such reports cannot be discarded or held as inadmissible only on the ground that there is no notification issued under Section 79A in respect of CFSL. Therefore, there is no infirmity in allowing the concerned expert (who had assisted Dr. Manisha Kulshreshtha) to depose before the learned Trial Court and attempt to prove the evidence in accordance with law.

30. Clearly, it emerges from the record that the CFSL report had been obtained by the CBI, which as per prosecution, was supportive of its case against the accused (including present petitioner). It is also clear that the fulcrum of the case of the prosecution rests upon the recordings of the intercepted conversations of the accused persons, *qua* which the said CFSL opinion was obtained. The said report was prepared by Dr. Manisha Kulshreshtha, and she had been cited as one of the witnesses i.e. PW-27 in the chargesheet itself. It is in these circumstances, that the prosecution had initially attempted to get her statement recorded through video-conferencing, and later had sought clarification from CFSL as to whether any assistance was provided to

her by any Forensic Expert in the completion of the Voice Examination report and whether any rough work or any worksheets had been prepared while preparing the said report. After receiving the reply from the CFSL, the prosecution had filed the application in question under Section 311 and 91 of Cr.P.C. for summoning Sh. Jayesh Bhardwaj.

31. In this Court's view, considering the scope of Section 311 and 91 of Cr.P.C. and discretion of the Courts, especially in the given set of peculiar facts and circumstances, the attempt of the prosecution to examine Dr. Jayesh Bhardwaj as a witness and to take on record the worksheets prepared by him while assisting in preparation of the CFSL report, cannot be scuttled or refused.

32. In view of the foregoing discussion, this Court finds no ground to interfere with the impugned order, and the same is accordingly upheld.

33. The present petition, alongwith pending application, is dismissed.

34. Nothing expressed hereinabove shall tantamount to an expression of opinion on the merits of the case.

35. The judgment be uploaded on the website forthwith.

DR. SWARANA KANTA SHARMA, J

MARCH 20, 2025/ns