

IN THE COURT OF SH. AJAY KUMAR KUCHAR,
ASJ/SPECIAL JUDGE (PC ACT) (CBI)-09, (MP/MLA
CASES) ROUSE AVENUE DISTRICT COURTS,
NEW DELHI.

SC No.05/2019

State vs. Dr. Shashi Tharoor

Date of Argument : 07.01.2020

Date of Order : 30.01.2020

ORDER

1. By this order I shall decide the application under Section 91 Cr.P.C moved by the accused for summoning of documents mentioned in paragraph No.6 of the application.
2. It is stated in the application that the chargesheet has been filed against the applicant / accused Dr. Shashi Tharoor on 14.05.2018 for the offences under Section 306 and 498 A IPC. The matter is now at the stage of framing of charges. It is stated that while going through the record, applicant has come across the documents which although have been relied upon and are in the custody of the prosecution but have not been made a part of the charge sheet.
3. The applicant seeks summoning of “*Twitter timeline / Tweets from the Twitter handle of Sunanda Pushkar from the handle*”

'@sptvrock'".

4. It is further stated that these documents are of sterling quality and need perusal by the court as they will assist the court in framing the charge or discharge the applicant / accused Dr. Shashi Tharoor. It is further stated that deceased was not having any 'suicidal ideations' rather she was in positive frame of mind and was quite optimistic about her relationship with the applicant / accused Dr. Shashi Tharoor, despite that, Investigating Agency has concluded that the deceased committed suicide due to her differences with the applicant / accused Dr. Shashi Tharoor. The applicant has referred to the judgments in case titled as **Nitya Dharmananada @ K. Lenin and Anr. vs. Gopal Sheelum Reddy**, (2018) 2 SCC 93 and **Shakuntala vs. The State of Delhi**, 139 (2007) DLT 178, in the application in support of his prayer.

5. Notice of this application was given to the State and a reply thereof has been filed wherein it is stated that the prosecution has not suppressed any information. It was submitted that the alleged documents sought by the applicant / accused Dr. Shashi Tharoor never came to the possession of the Special Investigating Team (SIT), and therefore, it is not in a position to supply the same to the applicant. It was also submitted that the application under Section 91 Cr.P.C. as such is not maintainable at this stage. It is submitted

that the applicant / accused Dr. Shashi Tharoor had joined investigation several times but at no point of time he has ever produced or referred to these documents (i.e. Twitter Account of deceased Ms. Sunanda Pushkar).

6. When the application was listed for arguments, the applicant / accused Dr. Shashi Tharoor filed another application seeking permission to place on record additional submissions on his application under Section 91 Cr.P.C. In this application he has submitted that the prosecution, is taking a diametrically opposite position in reply to the application under Section 91 Cr.P.C. vis-a-vis the Chargesheet. It is stated that in the Chargesheet, the prosecution has relied on the tweets of the deceased on a number of occasions. It is stated that at Page no.131 of the Chargesheet, there is a reference to a tweet dated 15.01.2014. Then the applicant referred to the statements of Ms. Barkha Dutt, Sh. Ashish Dass, Sh. Samir Saran, Ms. Advaita Kala, Ms. Nalini Singh, Sh. Abhinav Kumar, Sh. Rakesh Kumar Sharma and Sh. Sandeep Sharma recorded under Section 161 of Cr.P.C. and stated that these statements shows that the prosecution has relied on the tweets by the deceased Ms. Sunanda Pushkar.

7. It was further stated that the prosecution is trying to selectively place reliance on a small part of the Twitter Account / Tweets of the deceased and withholding the remaining Tweets. It is

also stated that the Investigating Agency had also made request to the concerned authority in USA under Mutual Legal Assistance Treaty (MLAT) to obtain log details, contents of inbox, sent items, drafts and any other user created content from Internet Service Providers / Administrators of Twitter, Google, Yahoo, BBM and Facebook.

8. It is further stated that if the Investigating Agency wanted to access the Twitter Account, it could have simply downloaded the same as the account is available online even today and that the Investigating Agency had undertaken a half-baked attempt in procuring the Twitter Account. It is stated that the right of the applicant / accused Dr. Shashi Tharoor to fair trial is of the paramount consideration and in support of his submissions, reliance was placed on the following judgments :-

1. **Dinesh Puri v. State (Govt. of NCT of Delhi)**, 2016 SCC Online Del 5551;
2. **Anvar P.V. vs. P.K. Basheer**, (2014) 10 SCC 473;
3. **P. Gopalkrishnan v. State of Kerala**, 2019 SCC Online SC 1532;
4. **Jisal Rasak v. State of Kerala**, CrI. M.C. No.4148 of 2019; and
5. **Siddhartha Vashisth @ Manu Sharma v. State (NCT of Delhi)**, (2010) 6 SCC 1.

9. I have heard the arguments of Sh. Vikas Pahwa, learned Senior Advocate for the applicant / accused Dr. Shashi Tharoor and Sh. Atul Srivastava, learned Special Public Prosecutor for the State.

10. Before coming to the provision of Section 91 Cr.P.C. and considering the prayer made in the application for supply of documents to the applicant / accused, I consider, it appropriate to refer, in short, to the facts of the case.

Brief Facts of the Case :- The present FIR has been registered on 01.01.2015 on the basis of the Rukka (Tehrir / Complainant) sent by Inspector V.K.P.S. Yadav PS Sarojini Nagar. It was stated that on 17.01.2014 at 9 pm, a telephonic call was received from Sh. Abhinav Kumar, PS to Dr. Shashi Tharoor (applicant / accused herein) pursuant to which Inspector Atul Sood had reached Suite No.344, hotel Leela Palace, where he found deceased Smt. Sunanda Pushkar dead inside the bedroom. The preliminary enquiry had revealed that she had checked into the hotel on 15.01.2014. She had married with the applicant / accused on 22.08.2010 and since the death was within seven years of marriage, the SDM, Vasant Vihar was informed to conduct Inquest Proceedings under Section 176 Cr.P.C. The usual investigation was done like scene of the crime was videographed by the Crime Team as well as CFSL Team, the exhibits were lifted from the scene of crime and scene of

occurrence was preserved. The Postmortem Report dated 18.01.2014 suggested "Alprazolam Poisoning". The Report mentioned fifteen injuries on the person of the deceased. On the basis of this report, the SDM sent his report on 20.01.2014 to the SHO PS Sarojini Nagar directing him to further investigate the matter and take action as per law. He also directed the CFSL for giving early report of viscera examination. The said Viscera Analysis Report was received on 10.03.2014 and was sent to Autopsy Board, AIIMS. The Board gave its subsequent Report on 27.09.2014 and opined cause of death in the case as 'poisoning'. The Board Members also visited the scene of crime along with CFSL Expert Team on 05.11.2014. The further report from Autopsy Board was received on 29.12.2014. The Board gave the opinion that the death due to natural cause is ruled out and the cause of death in the case is 'poisoning' and 'poisoning' is through oral route, however, injectable route also cannot be ruled out. On the basis of this report and the material thus collected by the Investigating Agency, the case was registered under Section 302 of IPC bearing FIR No. 04/2015 at PS Sarojini Nagar. In the investigation thereafter, statements of witnesses were recorded, the Psychological Autopsy was got conducted and after investigation, Chargesheet was filed for the offence under Section 306 IPC and 498A IPC.

11. After filing of the Chargesheet before the Ld. Additional Chief Metropolitan Magistrate, all the documents, statements filed with the Chargesheet and relied upon by the prosecution were supplied to the applicant / accused in compliance of Section 207 Cr.P.C. Thereafter, the matter was committed for trial to this court.

12. The arguments on Charge were heard from learned Special PP for the State. The applicant / accused before addressing arguments on charge moved this application under Section 91 of Cr.P.C. for supply of the documents i.e. Tweets in the Twitter Account of the deceased. It is the case of the applicant / accused that the Tweets in Twitter Account of the deceased were available in the mobile phones of deceased which were seized during the investigation and the prosecution is relying upon the Twitter Account of the deceased as is evident from the Chargesheet and the statements of witnesses. It was submitted by the applicant / accused that the Twitter Account is material and relevant to decide even the question of prima facie case. The Tweets by deceased are 'document' as per the law and need to be supplied to the applicant / accused for making submissions on the point of framing of charge.

13. It was submitted by the learned Senior Counsel for applicant that the prosecution does not have a cause of death of the deceased and is relying upon the multiple Postmortem Reports and Psychological Autopsy conducted in January, 2017. It was argued

that the tweeter account would show the state of mind of the deceased and that she was in a positive state of mind qua her relationship with the accused / applicant. It was argued that the Twitter Account is one of the tool for psychological autopsy, and therefore, it is material to consider these twitter accounts even at the stage of charge. It was argued by the learned Senior Counsel for the applicant / accused that the Twitter Account is still available and it can be obtained by prosecution even now and can be supplied to the applicant / accused. It was further argued that the Twitter Accounts are relied upon documents by the prosecution, therefore, the applicant / accused has a right to have these documents. Learned Senior Counsel further argued that the investigating agency had also written to U. S. Authorities for supplying all the Twitter Accounts of the deceased. Therefore, now the prosecution cannot say that they are not relying upon the Twitter Accounts. Learned Senior Counsel has further argued that doctrine of fair disclosure entitle the applicant / accused to the documents which are not even relied upon by the prosecution but which were obtained by the Investigating Officer during the investigation.

14. Learned Senior Counsel for the applicant / accused has relied upon the following judgments apart from those mentioned in the application :-

1. **Manjeet Singh Khera v. State of Maharashtra**, (2013) 9

SCC 276;

2. **V.K. Sasikala v. State**, (2012) 9 SCC 771;
3. **M. L. Meena v. CBI**, (2014) SCC Online Del 6931;
4. **Brojendra Nath Koyla v. State**, (1993) SCC Online Cal 57;
5. **Shashi Bhalla v. State of Govt. of NCT of Delhi**; and
6. **Shakuntala vs. State of Delhi**, ILR (2007) 1 Delhi 1005.

15. I have gone through the judgments on which reliance has been placed.

16. Learned Additional Public Prosecutor, on the other hand has argued that all the documents which were collected during the investigation and which are relied upon by the prosecution, have been supplied to the applicant / accused before the committal of the case. Learned Addl. PP submitted that it has been a long exercise and only after the applicant / accused was satisfied that he has been supplied all the material i.e. the documents, statements etc, filed with the chargesheet only then the case was committed to the Sessions Court. It was argued by him that the Hon'ble Supreme Court in the case of **State of Orissa v. Debendra Nath Padhi**, AIR 2005 Supreme Court 359, has categorically held that the applicant / accused is not entitled to seek production of documents at the stage of charge to enable him to prove his defence by resort to Section 91

Cr.P.C. He argued that the judgments which learned Senior Counsel for the applicant has relied upon are Division Bench judgments while judgment in **State of Orissa v. Debendra Nath Padhi**, is three bench judgment, therefore it has precedent value. It was also argued by him that the Laptop and mobile phones of the deceased were seized during the investigation and were sent to CFSL. One Laptop and one mobile phone make Blackberry was also sent to Directorate of Forensic Science, Gandhi Nagar and whatever material could be retrieved from these gazettes have been supplied to the applicant / accused. He argued that nothing has been withheld from the applicant / accused.

17. The Investigating Officer who was also present during the course of arguments submitted that Blackberry mobile phones of the deceased were seized apart from one laptop make Apple Mac Book. The CFSL could not extract anything from the Laptop and one Blackberry mobile phone, therefore, the said Blackberry phone along with Laptop was sent to Directorate of Forensic Science, Gandhi Nagar and a report was received. He informed the court that whatever material was retrieved from mobile phone by the CFSL and DFS, Gandhi Nagar, was duly supplied to the applicant / accused. He submitted that the reference to the Tweet dated 15.01.2014 in the Chargesheet is on the basis of statements of the

witnesses. He submitted that the witnesses mentioned in the application have referred to the tweets of the deceased and the Investigating Agency could not lay its hand on those Twitter Accounts of the deceased. He informed that a request was also made to the US Authorities to provide the contents of the social media account including Twitter Account of the deceased. However, nothing could be received from those agencies. Perusal of the record would show that efforts were made by the Investigating Agency and sent a Mutual Legal Assistance Request (MLAR) to the Director, US Department of Justice, Criminal Division, Office of International Affairs, Washington DC 20530. However, the detail of the electronic communication of Facebook, Google, Blackberry and Twitter could not be obtained as is evident from the correspondence on record. Therefore, it cannot be said that the prosecution has custody of Twitter Account of Ms. Sunanda Pushkar.

18. Therefore, as per the case of the prosecution, no such documents as claimed by the applicant / accused were seized by the Investigating Agency during the investigation and nothing has been withheld from the applicant / accused. It was also argued by the learned Additional PP for the State that the Twitter Account which is still stated to be available online as per the submissions of the learned Senior Counsel for the applicant / accused, could have been

produced by the accused / applicant during the investigation when he was called for investigation on number of occasions.

19. The principle of fair trial is enshrined in the Criminal Procedure Code as per which the accused has to be made aware of every evidence which is to be used against him and therefore, the provisions have been incorporated in the Code of Criminal Procedure to ensure that accused is apprised of all the evidence against him on which prosecution rely and that all the documents etc. are supplied to him.

20. Section 173 of Cr.P.C provides that after completion of the investigation, the report is to be forwarded to the Magistrate having jurisdiction to take cognizance. Section 173 (5) of Cr.P.C. provides that all the documents on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation and the statement recorded under Section 161 Cr.P.C. of the witnesses shall be forwarded to the Magistrate along with the report.

21. After the Chargesheet is filed, accompanying documents as well as statements of witnesses, are to be supplied to the accused in terms of Section 207 Cr.P.C. It is an obligation on the Magistrate to ensure that all the documents which were necessary for the accused for proper conduct of his defence are furnished to him.

22. Section 91 Cr.P.C., inter-alia, provides that the court may

summon the production of any document at any stage of investigation enquiry, trial or other proceeding under the Code if such document is necessary or desirable. The only fetter on the exercise of power under Section 91 Cr.P.C. is that document must be “necessary” or “desirable” for the purposes of investigation, exercise or trial, etc.

23. The question now is about the right of the applicant / accused to summon the document under Section 91 of Cr.P.C. The judgment in the case of State of Orissa vs. Debendra Nath Padhi (Supra) is very clear in defining the right of the accused under Section 91 of Cr.P.C. It is settled law that at the stage of charge, only the record produced before the court in terms of Section 173 of the Code is relevant at this stage, the defence of the accused is not to be taken into account. The Hon'ble Supreme Court was of the view that Section 91 of Cr.P.C. does not confer a right on the accused to produce the document in his possession to prove his defence. It was held that the “necessity” or “desirability” will have to be seen with reference to the stage when the prayer is made for production of documents. The Hon'ble Supreme Court has made the observation in para No.25 as under :-

“25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is 'necessary or desirable for the purpose of investigation, inquiry, trial or other

proceedings under the Code'. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. In so far as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it whether police or accused. If under Section 227 what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at the stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by Court and under a written order an officer in charge of police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof. ”

24. The learned Senior Counsel for the applicant / accused has argued that even at the stage of charge, the court can consider the document in favour of the accused which are of sterling quality. He argued that the Investigating Agency / prosecution cannot be allowed to withhold documents from the court which are in favour of the accused. He argued that even at this stage, the court can ask for production of document. It was his argument that the document asked for are in possession of the prosecution. He refers to the judgment in **Nitya Dharmananada @ K. Lenin and Anr. vs. Gopal Sheelum Reddy** (supra) to support his arguments. In this judgment, the Hon'ble Supreme Court was of the view that the material of sterling quality which has been withheld by the investigator / prosecutor can be summoned by the court even if such document is not part of the Chargesheet. However, in the present case, the prosecution is very categorical in saying that no such document has been withheld and whatever material could be retrieved from the mobile phone and the Laptop of the deceased have been supplied to the accused in soft copy in CD form. In the case of Nitya Dharmananda (supra), the Court although had declined the request of the accused for summoning of documents under Section 91 Cr.P.C. but had made observations that if the Court is satisfied that there is a material of sterling quality which

has been withheld by the Investigator / Prosecutor, then the Court is not barred from summoning of the said document even if such document is not a part of the chargesheet. It was further held that the defence has no right to invoke Section 91 Cr.P.C. de hors the satisfaction of the court, at the stage of charge.

25. A document of sterling quality, however, has not been defined in the judgment. Some guidance however can be taken from the observation of the Hon'ble Supreme Court in the case of **Rukmani Narvekar v. Vijay Sataredkar & Ors.**, (2008) 14 SCC 1 where the Court was considering whether document of accused can be considered at the stage of charge and it had observed that in rare cases document of the accused can be seen, which could convincingly demonstrate that the whole prosecution case is totally absurd, preposterous and totally concocted. So I am of the view that a document of sterling quality referred to in the judgment of Nitya Dharmananda has to be of the same quality. Learned Senior counsel for the applicant had submitted that analysis of Twitter Account was necessary for Psychological Autopsy and the Tweets made by the deceased would reflect a different state of mind of the deceased as opposed to the Psychological Autopsy. In my considered view, it is a matter of evaluation of the evidence which cannot be gone into so meticulously at the stage of charge. The validity, correctness of the proposition that Twitter Account is an

importance tool in conducting Psychological Autopsy can be considered when the Experts who have given the Psychological Autopsy Report, are confronted with this proposition.

26. Learned Senior Counsel for the accused argued that the doctrine of fair disclosure as propounded in the case of **Siddhartha Vashisth @ Manu Sharma v. State (NCT of Delhi)** (supra) enjoins upon the prosecution to supply the documents which the prosecution has collected during the investigation.

27. I have considered these submissions of the learned Senior Counsel for the accused and has no dispute with the proposition that the right of the applicant / accused to receive the documents etc. filed before the court is absolute and it is for the court to ensure the compliance. However, in the **Siddhartha Vashisth @ Manu Sharma's** case also, the court was referring for supply of those documents which were obtained by the Investigating Agency and considered by the prosecutor to be relevant. In the present case, however, it is the case of the prosecution that the Twitter Accounts were never received by the Investigation Agency and the reference to tweets by deceased has come only in the statement of witnesses.

28. The learned Senior Counsel for the applicant / accused has also argued that the mobile phone is in custody of the prosecution / court and the Twitter Accounts can be downloaded, and thereafter,

a copy can be supplied to the applicant / accused. He argued that the Twitter Accounts of the deceased is still available Online.

29. In my view, if these tweets accounts are in the public domain, the accused can produce them at the appropriate stage. I have no reason to doubt that the prosecution made best efforts to extract the contents of the Laptop and mobile phone of the deceased and whatever could be retrieved has been supplied to the applicant / accused under Section 207 Cr.P.C.

30. Learned Senior Counsel for the accused had argued that for the Psychological Autopsy, Twitter Account was a material tool. It was submitted by the IO that by deceased tweets were not furnished to the Board which conducted the Psychological Autopsy as they could not be extracted. The Investigating Agency got a Psychological Autopsy report from the Forensic Psychology Expert as per which 'suicidal ideation' was present in the deceased. The arguments of learned Senior Counsel for the applicant / accused is that the Twitter Accounts would be relevant in connection with the conclusion of Forensic Psychology Expert regarding the mental state of the deceased. This is the defence of the accused that the deceased did not have 'suicidal ideations' and she was in fit mental state and positive outlook. The applicant / accused wants to bring on record this defence by way of calling the Twitter Account of the deceased which are in public domain. The accused would be at

liberty to bring these documents on record at the appropriate stage in the trial. He cannot resort to Section 91 Cr.P.C. for a direction to the Investigating Officer to download the twitter account and then supply those documents to the applicant / accused. This is not the object and purpose of Section 91 of Cr.P.C.

31. The learned Senior Counsel for the applicant / accused had argued that electronic record falls into category of 'document'. He refers to judgment in Anwar PV (supra) and P. Gopalkrishnan v. State of Kerala (supra). This proposition is not in dispute. The issue here is with regard to supply of a document which was never in the possession of the Prosecution. The reliance on the judgment of Jisal Rasak v. State of Kerala (supra), V. K. Sasikala v. State (supra), Shakuntala v. State of Delhi (supra), is correct to the extent that an accused has a right of fair trial and investigation which would require that he should be supplied with all the documents on which reliance has been placed and he cannot be deprived of a document which has been collected during the investigation, though, it is not relied upon by the Prosecution. The factual position in the present case, however, is different. The Prosecution has categorically said that the Twitter Accounts of the deceased could not be accessed. An effort was made to obtain such record from the US Authorities but without success. The mobile phones and the Laptop of deceased were sent to CFSL and DFS, Gandhi Nagar. Whatever material

could be retrieved therefrom, has been supplied to the applicant / accused at the stage of compliance of Section 207 Cr.P.C. The applicant / accused never raised this issue earlier which means that he was satisfied with the documents supplied at that stage. In the application filed initially, the applicant / accused had stated that these documents are available with the Prosecution but they are not part of Chargesheet. However, in the additional submission with regard to the application under Section 91 Cr.P.C., the applicant / accused stated that the police had made a half baked attempt at procuring the Twitter Account of the deceased and it had no real intention to produce the same. This means that even the applicant / accused knows that the Tweets in the Twitter Account of the deceased are not available with the Investigating Agency. By resorting to Section 91 Cr.P.C., the applicant / accused cannot insist on a direction to the Prosecution to first obtain the document and then supply it to him. When the documents are in the public domain as per the submission of the learned Senior Counsel for the applicant / accused, the accused will have the liberty to produce them at an appropriate stage. The Court will not venture into this exercise of procuring document for the accused which may possibly contain his defence. It goes without saying that at the stage of charge such a roving inquiry by the Court is not expected and the Court has to look into the documents of the Prosecution to ascertain

whether a prima facie case is made out or not.

32. In view of the aforesaid, I am of the considered view that the application is liable to be dismissed and it is ordered accordingly.

33. Application stands disposed off.

Announced in the open court (AJAY KUMAR KUHAR)
on 30.01.2020 ASJ/Special Judge (PC Act) (CBI)-09,
(MP/MLA Cases), RADDC, New Delhi.^(a)