

Delhi High Court

Dharambir vs Central Bureau Of Investigation [Along ... on 11 March, 2008

Equivalent citations: 148(2008)DLT289

Author: [S. Muralidhar](#)

Bench: [S. Muralidhar](#)

JUDGMENT

S. Muralidhar, J.

Introduction 1.1 Questions of law concerning supply of copies of documents, gathered by the prosecution during investigation, to an accused person at the pre-charge stage arise for consideration in these petitions. It involves the interpretation of [Sections 173\(5\)](#) and [207](#) of the Code of Criminal Procedure 1973 (CrPC), [Sections 3](#) and [65B](#) of the Indian Evidence Act 1872 ('EA') and [Sections 2\(o\)](#) read with [Section 2\(t\)](#) of the Information Technology Act, 2000 ([IT Act](#)).

1.2 In order to appreciate the issues that arise a brief background is being set out. The petitioners here are persons accused of offences under [Section 120B](#) IPC and under [Sections 7](#) to [12](#), [13\(2\)](#) read with [13\(1\)\(d\)](#) of the [Prevention of Corruption Act, 1988](#) ('PC Act') in four different cases. In the charge sheets filed in the four cases, the prosecution has stated that as part of the investigation, intercepted telephonic conversations between the accused persons were recorded on four hard discs (HDs) in the computer systems kept at the office of the Special Unit (SU) of the Central Bureau of Investigation (CBI) in New Delhi. The charge sheets further state that these conversations took place on fifteen mobile phones and land lines (hereafter 'tapped phones'), belonging to one of the accused, which were placed under electronic surveillance between December 2002 and March 2003 pursuant to statutory permissions obtained from time to time from the competent authority. After listening to and analyzing the intercepted conversations recorded on the HDs, the CBI transferred to separate Compact Discs (CDs) such of those conversations which CBI considered to be relevant for each of the four cases.

1.3 The four computer systems containing the HDs and the CDs were then sent to the Andhra Pradesh Forensic Sciences Laboratory (APFSL) for certification for two purposes. First, that the HDs were in working condition as required by [Section 65B\(2\)\(c\)](#) EA and secondly, that the conversations transferred to the CDs were true copies of their original recording on the HDs. The CDs certified by the APFSL were thereafter forwarded to the learned Special Judge, New Delhi along with the charge sheets. The four HDs have been retained at the APFSL, Hyderabad.

1.4 The Special Judge took cognizance of the offences and issued process to the accused. Copies of the respective charge sheet and its annexures, along with a transcript of the intercepted telephone conversations relevant to the case were furnished to each of the

accused. Later, the CDs containing the said relevant telephone conversations were also supplied to the accused.

1.5 During the course of arguments on charge, some of the accused in the four cases filed applications before the Special Judge asking for a direction to the CBI to supply to each of them mirror-image copies of the HDs. This was declined by the Special Judge by separate orders. Aggrieved, the accused have approached this Court with the present petitions, one of which is under [Article 226](#) of the Constitution and the others under [Section 482](#) CrPC.

1.6 On 16th May 2007 this Court directed that arguments on charge could be proceeded with before the Special Judge but 'formal order be kept in reserve.' This order was challenged before the Supreme Court and the Special Leave Petition was disposed of on 29th February 2008 requesting this Court to take up the case on 4th March 2008 and 'dispose of the matter latest by 11.03.2008.' 1.7 In compliance of an order dated 29th February 2008 passed by the Supreme Court, these petitions were heard on March 4th, 6th, 8th and 9th 2008 and judgment is delivered today, 11th March 2008. Despite the last three dates being holidays, counsel for the parties addressed arguments on each of them. The Court expresses its appreciation of the cooperation extended by counsel.

The four cases 2.1 There are four cases in each of which a charge sheet has been filed and where some or all of the Petitioners here have been arrayed as accused. The FIR in the earliest of the four cases, bearing No. RC 0025(A)/2003-DLI was registered on 3rd April 2003 under [Sections 7, 13\(2\)](#) read with 13(1)(d) [PC Act](#). This concerns the unauthorised construction of a lift at the property at Mahavira Towers, IIIrd Floor, Paschim Vihar. In this case (hereinafter the 'Lift Case') Shri Subhash Sharma ('Sharma'), the former Vice-Chairman of the Delhi Development Authority (DDA) is accused No. 1, Shri Dharambir Khattar ('Khattar') who allegedly worked as a middleman between public servants and private individuals is accused No. 2, Shri Ved Prakash Kaushik an individual and coconspirator who helped in liaising with the DDA is accused No. 3, Shri Pradeep Kapoor husband of Smt. Kavita Kapoor, a partner of a firm M/s APY Hoteliers and Developers is Accused No. 4 and Shri Anil Wadhwa and Shri Yashpal Manocha, the other two partners of the said firm are accused Nos. 5 and 6 respectively. The charge sheet in the Lift Case was filed on 15th July 2004 The prosecution concluded its arguments on charge almost two years ago on 2nd June 2006. Arguments on behalf of accused No. 1 Sharma have been completed. The arguments on behalf of accused No. 2 Khattar are in progress and arguments are yet to be addressed on behalf of the four other accused.

2.2 The second case is RC-1(A)/2003-ACU-1 which was registered on 26th March 2003 for the offences under [Section 120B](#) IPC read with [Section 13\(2\), 13\(1\)\(d\)](#) PC Act. It concerns the Modern Public School Education Society, Shalimar Bagh, Delhi ('Society'). The chargesheet was filed in this case [hereafter 'the School case'] on 30th July 2004 It states that the Society was allotted 3.977 acres of land by the DDA on 11th July 1985 for the construction of a higher secondary school and playground. Despite approval of the building plan on 2nd August 1991, the Society did not construct the school building within a stipulated time of two years. A show cause notice was therefore issued to it by the DDA on 18th November 2002 for cancellation of the lease. The case of the prosecution is that the Accused No. 1 Sharma, accused No. 2 Shri Jagdish Chandra, the then Director (Lands) DDA, Accused No. 4 Shri Ashok Kapoor, the then Private Secretary to Sharma, and Accused No. 5, Shri Amrit Lal Kapoor, Director of the Society, in conspiracy with Accused No. 3 Khattar ensured that the lease was not cancelled and the composition fee not imposed leading to a pecuniary loss of Rs. 62,06,594 to the Government. Arguments on charge have been completed by the prosecution on 7th November 2005. The

arguments of only accused Nos. 4 and 5 remain to be addressed and are expected to be completed on 19th March 2008.

2.3 The third case is RC.2(A)/2003-ACU.III registered on 26th March 2003 under [Sections 120B IPC](#) read with [Sections 7, 8, 13\(2\)](#) read with 13(1)(d) [PC Act](#). Accused No. 1 is Sharma, the former Vice-Chairman DDA, Accused No. 2 is Shri Anand Mohan Sharan ('Sharan'), the former Commissioner (Land Disposal) DDA, Accused No. 3 is Shri Vijay Risbud, Commissioner (Planning) DDA, Accused No. 4 is Shri Jagdish Chandra Director (Lands) DDA, Accused No. 5 is Khattar, Accused No. 6 is Shri Ajay Khanna of DLF Universal Ltd. Shri Ravinder Taneja, Shri G.R. Gogia and Shri Mukesh Saini, accused Nos.7,8 and 9 respectively, have been named as co-conspirators. The charge sheet in this case (hereinafter known as 'DLF case') was filed on 31st March 2005. The case of the prosecution is that the accused entered into a criminal conspiracy with private parties in order to show undue benefit to DLF in the matter of allowing Floor Area Ratio of 300 in place of 139 and by charging rates much below the prevailing market rates in lieu of obtaining illegal gratification from DLF. The bribe amount agreed was Rs. 1.1 Crores of which Sharma then Vice Chairman of DDA was to get Rs. 50 lakhs and the rest of the amount was to be shared amongst Sharan, Chandra and Khattar. Risbud was to be gratified separately by DLF. It is stated that Taneja and Gogia were involved in the delivery of amount of the bribe. In this case the prosecution is expected to complete its arguments on 13th March 2008 after which arguments would be addressed on behalf of each of the other accused.

2.4. The fourth case is RC.3(A)/2003-ACU.X in which the FIR was registered on 29th April, 2003 under Sections 120B read with 7, 8, 9, 12, 13(2) read with 13(1)(d) [PC Act](#). Accused No. 1 is Shri Shameet Mukherjee ('Mukherjee') a former Judge of this Court, Accused No. 2 is Sharma, the former Vice-Chairman DDA, Accused No. 3 is Shri Vinod Khatri ('Khatri') and Accused No. 4 is Shri Ashok Kapoor ('Kapoor'), a former Private Secretary to Sharma. In this case (hereafter the 'Shameet Mukherjee Case'), the charge sheet was filed on 5th April 2005. The prosecution's case is that Khattar enjoyed a close relationship with Sharma and Mukherjee. Even after he became a Judge of this Court, Mukherjee used to visit premises of Khattar at 431, Mathura Road, Jangpura Extension, New Delhi and 2 K. G. Road and frequently enjoy the hospitality of Khattar. It is stated that Khattar acted as a conduit between Mukherjee and various private parties who wanted their pending cases to be decided favorably. The allegation is that the official files and records of cases in the Court of Mukherjee used to be taken to the premises of Khattar at Mathura Road in which Mukherjee used a room for his work. It is stated that CBI recovered files of cases pending in the Court of Mukherjee while they were being taken out from the aforementioned premises belonging to Khattar by Ashok Kapoor in his Maruti Van on 26th March, 2003. This included a six-page draft, unsigned order of the Court in a Suit titled Azad Singh v. DDA. It is alleged that the conspiracy was entered into between the accused aforementioned to cause undue benefit to Khatri who was interested in two suits pending in the Court of Mukherjee which pertained to two properties. Khatri, a dismissed Constable of the Delhi Police, had illegally occupied Gram Sabha land vested with the DDA for running the Sahara Restaurant. He was interested in the continuation of the interim order passed in Azad Singh v. DDA which effectively prevented the widening of the Aruna Asaf Ali Road. If the stay was lifted, it would cause Khatri a huge loss because he would have had to lose possession of two plots adjacent to the plot which was being claimed by Azad Singh. Also the commercial interests of the Sahara Restaurant which was about 1900 feet away from the Azad Singh plot would be affected by the road widening. The charge sheet details the manner in which the conspiracy between the accused ensured a interim order being passed to protect the interests of Khatri. The arguments on charge on behalf of the CBI and Mukherjee have concluded. The

arguments on behalf of Sharma are in progress. The arguments on behalf of other three accused are yet to take place.

The interception of calls and their recording 3.1 What is common to all the chargesheets is that apart from the statements of witnesses, and certain documents details of which have been set out in the Annexures to the chargesheets, the prosecution seeks to rely on intercepted conversations involving the accused made on 15 mobile and landline telephones belonging to Khattar, his family members and other accused which were placed under electronic surveillance between December 2002 and March 2003 pursuant to permissions being obtained from the competent authority from time to time under the [Indian Telegraph Act](#) 1885 and the Rules there under.

3.2 After listening to the various conversations between the accused, the CBI prepared call information records of identified calls of conversations between accused persons relevant to each of these cases. In the Shameet Mukherjee case, according to the charge sheet, the relevant calls between the accused persons were copied on to 19 CDs and taken on record for investigation. These 19 CDs contained conversations pertaining to 768 calls. From these 19 CDs, 100 short-listed telephone conversations relevant to Shameet Mukherjee case were prepared and transferred to 4 CDs. According to the chargesheets filed in the other three cases, the position regarding the relevant calls according to the CBI are as under:

(i) The Lift Case: 25 calls, transferred to 3 CDs.

(ii) The School case: 14 calls transferred to 2 CDs.

(iii) The DLF case: 62 calls transferred to 3 CDs.

3.3 As noticed earlier, the four hard discs and the CDs containing the relevant conversations were sent to the Andhra Pradesh Forensic Science Laboratory ('APFSL') for comparison with the originals and certification that the conversations recorded in the CDs were true copies of the original recording in the hard discs and further for certifying that the HDs were in a working condition. The APFSL was asked to certify that the time, date and duration of the calls in the CDs tallied with the data files in the four hard discs. The APFSL sent to the CBI the results of the examination in a report dated 22nd July 2003 which confirmed that the recorded conversations were true copies of the originals and that the HDs were in a working condition.

3.4 It is not disputed that the CDs containing the copies of all the aforementioned relevant conversations were forwarded to the court of the Special Judge by the CBI along with the charge sheets. Initially along with the copies of the respective charge sheets, each of the accused was given a transcript of the relevant intercepted telephone conversations recorded in the CDs. Thereafter, pursuant to the orders passed by the Special Judge, the copies of the CDs containing the relevant intercepted telephone conversations themselves were furnished to each of the accused.

Proceedings before the Special judge

4. After the charge sheets were filed the learned Special judge took cognizance of the offences and issued process. Over a period of two years thereafter, the accused filed applications before the learned Special Judge under Section 207 seeking copies of documents and in particular the mirror image copies of the hard discs. The learned Special Judge by separate orders dated 17th September 2005 and 8th March 2006 in the School case, 24th March 2006 in the Lift case, 5th September 2006 in the Shameet Mukherjee case, 19th September 2007 in the DLF case,

rejected each of the applications. The significant findings in the order dated 19th September 2007 passed by the Special Judge in the DLF case, were as under:

a. The certificate dated 22nd July, 2003 issued by the APFSL on examination of the 3 hard discs, i.e. A, D and E and 3 CDs containing the 62 calls in the DLF case, was to the effect that the data in 62 telephone calls tallied with the respective files in the hard discs. The certificate was therefore in compliance with Section 65B(4) EA and had to be treated as evidence within the meaning of [Section 3](#) EA. Therefore the 3 CDs fell within the definition 'computer output' being an electronic record within the meaning of Section 65B(1) EA and had to be treated as an original document.

b. There was force in the contention of the learned Counsel for the CBI that the four hard discs recorded telephone calls between persons not connected with the present cases and handing over a copy of these hard discs to the accused persons would prejudice the case of the other co-accused and persons unconnected with these cases. In any event, since the CDs of the relevant telephone conversations which were computer output within the meaning of Section 65B EA had been handed over to the accused, the mandate of Section 207(v) read with 173(5) [CrPC](#) had been complied with.

c. Since the prosecution was not relying upon telephone calls other than those copied on the CDs and therefore did not include the other calls in the list of documents appended with the charge sheet with 3 CDs, nothing more needed to be handed over to the accused. The request for supply of mirror image copies of the hard disc was rejected.

d. As regards non-compliance with the requirement of Rule 419 of the Indian Telegraph Rules, those were matters of evidence which could not be gone into at the stage of framing of charge.

d. The question whether the prosecution was, in the garb of indicating what evidence they proposed to rely upon, indulging in arbitrary picking and choosing of telephone calls, did not arise since the prosecution was not relying upon the four hard discs, copies of which were sought by the accused. There would be ample opportunity for the defense to cross-examine the expert witnesses of the APFSL on their analysis of the call duration, time date and so on.

The present petitions

5.1 Aggrieved by the aforementioned orders, some of the accused have filed these petitions under [Section 482](#) CrPC. As regards AM Sharan, he has filed Writ Petition (Crl) 1393 of 2007, in which the prayer is for a direction that the 'entire recorded and intercepted messages be destroyed' on the ground that they have been illegally obtained in contravention of [Section 5\(2\)](#) of Indian Telegraph Act, 1885 and Rule 419A of the Indian Telegraph Rules, 1951. He has further prayed for quashing the order dated 19th September 2007 passed by learned Special Judge, declining the request for the mirror images of the hard disc in the DLF case. Jagdish Chandra, an accused in the DLF case has filed Crl. Misc. (C) No. 203 of 2007 for a direction to the trial court to hear arguments on charge on a day-to-day basis.

5.2 Initially, when these petitions were filed notices were directed to issue but no interim order was passed. On 16th May 2007, since the position of the board did not permit a hearing of the cases, it was directed that they should be listed on 28th May, 2007 and that 'in the meanwhile, the trial court may continue with hearing on charge but formal order be kept in reserve.' Thereafter the interim orders were kept continued from time to time.

5.3 Aggrieved by the order dated 16th May, 2007 the CBI filed SLP (Crl) No. [Crl. MP No. 3060] of 2008 in which the following order was passed by the Supreme Court on 29th February 2008:

Delay condoned.

Since the parties are present, we request the High Court to take up the matter on 04.03.2008. Without further notice, the parties shall appear before the learned Chief Justice of the High Court with a copy of our order so that an appropriate Bench can be fixed for hearing of the petition, i.e. Criminal Misc. Application No. 2845 of 2007 in Criminal M.C. No. 203 of 2007. The High Court is requested to dispose of the matter latest by 11.03.2008. The special leave petition is disposed of accordingly.

5.4 This order was communicated to this Court on 4th March, 2008 during the lunch recess. Since the decision in Crl.M.A. No. 2845 of 2007 in Crl.M.C. 203 of 2007 would affect all the connected cases, counsel for the parties in all the cases insisted that they should all be heard as well. On 4th March 2008 the hearing commenced and orders were reserved on 9th March, 2008.

Submissions of counsel 6.1 Arguments have been heard at length of Shri R.N. Mittal, Dr. A.M. Singhvi and Shri Siddharth Luthra, learned Senior counsel, appearing for the Petitioners. Shri Dayan Krishnan, learned Counsel addressed arguments on behalf of the CBI.

6.2 The submissions on behalf of the petitioners were:

(i) In each of the charge sheets, the CBI has detailed the process of arriving at the list of calls 'relevant' to each of the cases. This process shows that telephone conversations on the tapped phones were recorded into a hard disc and from the hard disc the so-called relevant calls were culled out and transferred into CDs which have been handed over to the accused. Since there is a reference to the hard discs in the charge sheet, the conversations recorded in those hard discs were certainly 'documents' within the meaning of [Section 3 EA](#) read with [Section 173\(5\)\(a\)](#) and [207\(v\)](#) CrPC. Such documents as had been relied upon had necessarily to be supplied to the accused.

(ii) Section 65(B)(1) EA states that copies of an electronic record transferred to another medium would be deemed to be a document admissible in evidence subject to the conditions in Section 65(2) EA being complied with. This would render the HDs as relied upon documents and this would therefore also require the accused to be given copies of the HDs.

(iii) The CDs furnished to each of the accused is only partial information and the prosecution is bound to furnish to each of them at the pre-charge stage the entire material gathered by it during the course of investigation. The CBI Manual specifically mandates the procedure to be followed by the CBI while investigating the case when it involves electronic records. A clone of the hard disc is expected to be prepared and sent for analysis since the removal of a hard disc from a Computer Processing Unit ('CPU') can itself alter the structure of the content of the hard disc. Unless each of the accused was given a mirror image copy of the hard disc it would not be possible to ascertain whether even in relation to these so-called relevant calls whether they have been altered in any manner by writing over, removal and reinsertion and so on. It is stated that this is absolutely essential since the test report of the APFSL when compared with the information provided by the telephone companies shows that there is a discrepancy in call duration and time and this cannot be verified except by obtaining a copy of the hard disc.

(iv) Admittedly, the number of intercepted telephone conversations that took place between the accused and recorded in the HDs was in excess of 50,000. It is entirely the whim of the CBI as to how it has chosen certain telephone calls which are considered to be 'relevant'. It is sought to be demonstrated from the printout of the details of the telephone calls as furnished by the service provider that between the same two persons all the conversations on a particular date have not been picked up as being relevant. Even between 4 or 5 calls made in succession, alternate calls have been picked up and rest left out. Unless the entire set of calls recorded on the hard disc is provided to the accused persons, they would not be able to demonstrate if any material contained in the left out calls, is of advantage to the accused, or exculpates the accused.

(v) Each of the accused has a fundamental right to a fair trial under Articles 20,21, and 22 of the Constitution of India, which fundamental right has been given effect to in the various provisions of the [CrPC](#). Denial of any material gathered during investigation by the prosecution, and referred to or produced with a charge sheet, would be a violation of that right.

(vi) It is submitted that for the purposes of [Section 173\(5\)\(a\)](#) CrPC what can be said to be 'relevant' by the prosecution cannot be left to be decided by the prosecution itself. In any event the Court is not powerless, if it feels that the document or a portion of the document that has been referred to by the prosecution is necessary to be given to the accused, it can direct that the prosecution should furnish such a copy to ensure that the accused is not denied the fair right of defense at the trial.

(vii) It makes no difference if the prosecution were to say that the hard discs are either not relied upon or are being referred to only for the purposes of compliance with Section 65(B) of the EA. By conveniently not producing the hard discs at this stage before the Court, which in any event the prosecution was bound to do in terms of [Section 165](#) CrPC and by conveniently stating that they were not relying upon the hard discs, the prosecution has denied accused the material that is vital to the accused for a proper defense.

(viii) It is submitted that the learned Special Judge was in error in holding that the CDs supplied to the accused had to be treated as the original documents themselves. This was belied by what the CBI has explained in the charge sheet to the effect that these CDs have been copied from the hard disc. Even if these copies have been certified by the APFSL, that was of rebuttable authenticity and the accused could not be expected to rebut it without access to the original recordings of those conversations as contained in the hard discs.

(ix) It is submitted that mere playing all the relevant calls relied upon by the CBI from the hard disc would not suffice as the accused would still not have access to the other conversations involving them contained in the hard disc.

(x) Illegally collected evidence, in the form of telephonic conversations intercepted without following the mandatory requirement of the [Indian Telegraph Act](#) and the Rules made there under ought not to be permitted to be relied upon by the prosecution

(xi) Finally, it was urged that even where the prosecution withholds a certain document from the accused at the pre-charge stage on the ground that it does not propose to rely upon such document, the trial court or even this Court in exercise of its inherent powers can direct the prosecution to provide to the accused a copy thereof in recognition of the right of the accused to a proper and effective opportunity of being heard even at the stage of charge.

6.3 The submissions on behalf of the CBI were as follows:

(a) There is a distinction between a device and an electronic record. The had is only an electronic device for storing information and is not a document and hence it is shown in the list of articles and not in the list of documents accompanying the chargesheet.

(b) The provision of Section 65(B) EA has been followed by the CBI in letter and spirit in this case. Therefore, once the conditions in Section 65B(2) have been satisfied then the CDs containing the relevant telephone conversations, duly certified by the APFSL, would be deemed to be a document under Section 65B(1) EA. It is admissible evidence without requirement of proof of production of the original computer output.

(c) It is not open, to the accused to ask for the production of the original computer output or the hard disc at the stage of the trial, and therefore, even less can they do so at the pre-charge stage of furnishing copies of documents.

(d) The reference to hard discs in the chargesheet was only to explain the process of making copies of the relevant calls and it was shown in the list of materials only for the purposes of proving to the court during the trial that the conditions contemplated under Section 65B(1) EA were duly complied with.

(e) The prosecution is therefore not obliged, in terms of [Section 207\(v\)](#) CrPC read with Section 173(5)(a) thereof, to supply the mirror image of the HDs as demanded by the accused. In any event a mirror image of the hard disc which contains calls pertaining to other cases as well is not only not contemplated under [Section 207\(v\)](#) CrPC but would also prejudice the right to privacy of other persons not connected with the cases.

(f) The accused would have the right to cross-examine the witnesses of the APFSL regarding the discrepancies concerning the relevant calls including call duration and time and therefore would not be prejudiced if the hard disc is not produced at this stage.

(g) The prosecution can validly determine what is relevant for the case amidst the large number of documents gathered during investigation and choose to rely upon only such documents for proving its case. In fact, the prosecution risks not relying upon any other documents for bringing home the charge. It is not as if the telephone calls are the only piece of evidence relied upon by the prosecution. The court will have to go only by what the prosecution says it relies upon at the stage of framing charges. This Court cannot itself determine what the prosecution ought to rely upon. [Referring to State of Orissa v. Debendra Nath Padhi](#) it is submitted that the accused has no right to obtain copies of documents not relied upon by the prosecution.

(h) Even if the prosecution was to bring on record any other document which it proposes to rely upon at a subsequent stage, it can only be done in accordance with the procedure contemplated in the [CrPC](#). At that stage the accused will have full opportunity of knowing in advance what is proposed to be relied upon and can ask for access to those documents as well.

(i) Relying upon the DPP v. Mckewon [1997] All.E.R. 737 and State v. Navjot Sandhu it is submitted that the stage for explaining the discrepancies concerning the call information as provided by the telephone companies and that certified by the APFSL is at the trial and not at the pre-charge stage. The question of legality and illegality of the evidence gathered can be examined also only at the trial and the stage of framing of charges is not appropriate for that purpose.

(j) The scope of the power of the High Court under [Section 482](#) CrPC does not cover the examination of the admissibility of the evidence relied upon by the prosecution at the pre-charge stage.

Questions for determination

7. In the above background, and in light of submissions of counsel for the parties, the questions that arise for determination in these petitions are:

(i) Are the HDs on which the intercepted telephone conversations have been recorded, 'documents' within the meaning of Section 173(5)(a) read with [Section 207\(v\)](#) CrPC

(ii) Can the prosecution decide which of the documents gathered by it during investigation are 'relevant' and therefore choose to 'rely upon' and furnish to the accused only copies of such documents under [Section 207\(v\)](#) CrPC or is the prosecution obliged to furnish copies of all documents gathered by it during investigation'

(iii) Even where the prosecution states that it is relying upon only some of the documents gathered by it during investigation, can the trial Court or this Court direct that a copy of (or inspection of) a certain document should nevertheless be given to an accused in recognition of the right of the accused to a proper and effective opportunity of being heard even at the stage of charge'

(iv) Does the denial to the accused at the pre-charge stage of copies of all documents gathered by the prosecution during investigation tantamount to a violation of the fundamental right to a fair trial under [Article 21](#) of the Constitution'

(v) Is it sufficient compliance with [Section 207\(v\)](#) CrPC for the prosecution in the instant case to furnish copies of the CDs containing the relevant conversations or must it give to the accused copies of or at least an inspection of the original of those conversations as recorded in the HDs' In other words, if the answer to question (i) is in the affirmative, relevant to the cases on hand, to what extent can the accused demand to be furnished with copies of or inspection of the HDs and in what form Issue (i): Are the Hard Discs documents

8.1 In order to appreciate why the question whether, in the instant cases, four hard discs are documents and of which copies can be demanded by the accused it is necessary to recapitulate the statutory provisions that mandate supply to the accused by the prosecution of the copies of those documents forwarded to the court along with the charge sheet which it proposes to rely upon as well as of those documents already sent to the court during investigation. The relevant provisions are Section 173(5)(a) and [Section 207](#) CrPC, which read thus:

173. Report of police officer on completion of investigation.

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-

(a) The names of the parties;

(b) The nature of the information;

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

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

(e) Whether the accused has been arrested;

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

(g) Whether he has been forwarded in custody under Section 170.

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

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

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

(5) When such report is in respect of a case to which Section 170 applies, the police officer shall forward to the Magistrate along with the report-

(a) All documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) The statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in Sub-section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under Sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed and the provisions of' Sub-section (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under Sub-section (2)

207. Supply to the accused of copy of police report and other documents. In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following.

(i) the police report;

(ii) the first information report recorded under Section 154:

(iii) the statements recorded under Sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding there from any part in regard to which a request for such exclusion has been made by the police officer under Sub-section (6) of Section 173.

(iv) The confessions and statements, if any, recorded under Section 164;

(v) Any other document or relevant extract thereof forwarded to the Magistrate with the police report under Sub-section (5) of Section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in Clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in Clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

8.2 The scheme of the above two Sections indicates that the Legislature has intended to differentiate between documents forwarded to a court by the police along with the charge sheet or sent to it earlier during the course of investigation on the one hand and the statements of prospective witnesses recorded by the police during investigation under [Section 161](#) CrPC, copies of which are also forwarded to the Court along with the charge sheet, on the other. This is plain from the language of Section 173(5)(a) when compared with that of Section 173(5)(b) read with Section 173(6) and the first and second provisos to [Section 207\(v\)](#) CrPC. For instance, the reference in Section 173(6) to 'any such statement' is to the statement of witnesses referred to in [Section 173\(5\)\(b\)](#) CrPC, i.e statements recorded of prospective witnesses under [Section 161](#) CrPC. In relation to these statements the police officer has a discretion under [Section 173\(6\)](#) CrPC to withhold a part thereof if he forms an opinion that it is inexpedient in public interest to do so and inform the Magistrate accordingly. Further, the first proviso to Section 207(v) gives a discretion to the Magistrate to provide to the accused even those statements which 'the Magistrate thinks appropriate' shall be furnished.

8.3 This is in contrast to the position regarding documents. [Section 173\(5\)\(a\)](#) CrPC refers to documents 'on which the prosecution proposes to rely' other than 'those already sent to the Magistrate during the investigation'. These documents are to be forwarded to the Magistrate along with report. Therefore at the stage when the supply of documents has to be made in terms of [Section 207\(v\)](#) CrPC what the Magistrate has with him are those documents which have already been sent to the Magistrate during the course of investigation and those documents that are forwarded by the police officer along with the charge sheet. Under Section 207(v), the Magistrate has no discretion in the matter of not supplying such documents. The only limited discretion that the Magistrate has in terms of the second proviso to [Section 207\(v\)](#) CrPC is if the documents are so voluminous he can direct that the accused will be permitted only an inspection of the documents.

8.4. Since considerable importance is attached, on a reading of the aforementioned two provisions of the [CrPC](#), to the supply to the accused of all the 'documents' proposed to be relied upon by the prosecution, the question that arises is whether the HDs are documents of which

copies can be asked for by the accused. If the HDs are not documents at all and only storage devices as contended by the CBI, then the further question whether they are being relied upon by the CBI and whether copies thereof therefore need to be supplied to the accused will not arise.

8.5 The meaning of the word 'document' used in Section 173(5)(a) as well as Section 207(v) has to be appreciated in the present case in the context of the nature of document the copy of which is being sought. Here we are concerned with digital copies, in the form of voice executable. WAV (sound format) files, of the intercepted telephone conversations which were directly recorded on to an electronic device viz., the hard disc.

8.6 This can be better understood by referring to the meaning of the words 'document' and 'evidence' occurring in [Section 3](#) of the EA. The said definitions read as under:

3 - Interpretation clause. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:

"Document" - 'Document'` means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

"Evidence" - 'Evidence' 'means' and includes--(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

Such statements are called oral evidence;

(2) [all documents including electronic records produced for the inspection of the Court];

such documents are called documentary evidence.

[Section 3](#) EA states that the expression 'electronic record' has the same meaning as attributed to it in the [IT Act](#). [Section 2\(t\)](#) of the IT Act defines 'electronic record' to mean:

(t) ``electronic record'` means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

The word 'data' has been defined in [Section 2\(o\)](#) IT Act to mean:

(o) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer 8.7 A collective reading of the above definitions shows that an electronic record is not confined to data alone but it also means the record or data generated received or sent in an electronic form. The word 'data' includes 'a representation of information, knowledge and facts' which is either intended to be processed, is being processed 'or has been processed in a computer system or computer network' or stored initially in the memory of computer.' 8.8 The word 'data' therefore includes not only the active memory of the computer, in this case the hard disc, but even the subcutaneous memory. Indeed it was submitted by learned Counsel for CBI that there are six levels of memory in the hard discs and therefore an information which was written and then rewritten upon more than 5 times could still be retrieved from the subcutaneous memory of the hard disc. Even if there is a doubt whether that entire information can be reconstructed,

certainly the information to the effect that the memory in the hard disc has been written and rewritten upon for over six times would be available. It is possible to analyze a hard disc with the help of a software programme, to find out on what date the information was first written with the exact time of such change. It is possible to retrieve such information in respect of each of the occasions when such information is removed and reinserted or changed on the hard disc.

8.9 While there can be no doubt that a hard disc is an electronic device used for storing information, once a blank hard disc is written upon it is subject to a change and to that extent it becomes an electronic record. Even if the hard disc is restored to its original position of a blank hard disc by erasing what was recorded on it, it would still retain information which indicates that some text or file in any form was recorded on it at one time and subsequently removed. By use of software programmes it is possible to find out the precise time when such changes occurred in the hard disc. To that extent even a blank hard disc which has once been used in any manner, for any purpose will contain some information and will therefore be an electronic record. This is of course peculiar to electronic devices like hard discs.

8.10 Therefore, when Section 65B EA talks of an electronic record produced by a computer (referred to as the computer output) it would also include a hard disc in which information was stored or was earlier stored or continues to be stored. There are two levels of an electronic record. One is the hard disc which once used itself becomes an electronic record in relation to the information regarding the changes the hard disc has been subject to and which information is retrievable from the hard disc by using a software programme. The other level of electronic record is the active accessible information recorded in the hard disc in the form of a text file, or sound file or a video file etc. Such information that is accessible can be converted or copied as such to another magnetic or electronic device like a CD, pen drive etc. Even a blank hard disc which contains no information but was once used for recording information can also be copied by producing a cloned had or a mirror image.

8.11. The conclusions that can be drawn from the above discussion are:

- (a) As long as nothing at all is written on to a hard disc and it is subjected to no change, it will be a mere electronic storage device like any other hardware of the computer;
- (b) Once the hard disc is subject to any change, then even if it restored to the original position by reversing that change, the information concerning the two steps, viz., the change and its reversal will be stored in the subcutaneous memory of the hard disc and can be retrieved by using software designed for that purpose;
- (c) Therefore, a hard disc that is once written upon or subjected to any change is itself an electronic record even if does not at present contain any accessible information
- (d) In addition there could be active information available on the hard disc which is accessible and convertible into other forms of data and transferable to other electronic devices. The active information would also constitute an electronic record.
- (e) Given the wide definition of the words 'document' and 'evidence' in the amended [Section 3](#) the EA, read with [Sections 2\(o\)](#) and (t) [IT Act](#), there can be no doubt that an electronic record is a document.
- (f) The further conclusion is that the hard disc in the instant cases are themselves documents because admittedly they have been subject to changes with their having been used for recording telephonic conversations and then again subject to a change by certain of those files

being copied on to CDs. They are electronic records for both their latent and patent characteristics.

(g) In the instant cases, for the purposes of Section 173(5)(a) read with [Section 207\(v\)](#) CrPC, not only would the CDs containing the relevant intercepted telephone conversations as copied from the HDs be considered to be electronic record and therefore documents but the HDs themselves would be electronic records and therefore documents.

Question (i) is answered accordingly.

Questions (ii) and (iii): Discretion of the prosecution to decide what document it proposes to rely upon and powers of the Court 9.1 We are in present cases at a stage prior to the stage of framing of charges. At this pre-charge stage the accused are demanding to be supplied copies of documents in the form of four hard discs. According to them these are documents that have been gathered by the prosecution during investigation and sine they have been referred to extensively in the charge sheet they cannot be stated to be not relied upon by the prosecution for the purposes of [Section 207\(v\)](#) CrPC read with Section 173(5)(a) thereof.

9.2. The phrase 'proposes to rely upon' in [Section 173\(5\)\(a\)](#) CrPC indicates something that has to be done in the future i.e. at the stage of pressing the charges and thereafter. Therefore ideally in the charge sheet the prosecution would normally indicate the documents which it proposes to rely upon. The controversy in the present cases stems from the difference in the statements made or omitted to be made by the CBI in the charge sheets filed concerning the documents it proposes to rely upon.

9.3 In the charge sheet filed in the School case it is stated in para 44 as under:

List of witnesses and documents/ articles relied upon by the prosecution are enclosed herewith. Additional list of witnesses and documents will be furnished, if required in due course.

Annexure A to this charge sheet is the entire sequence of movement of the Model School file linking it to the relevant telephonic conversations. Annexure B is the transcript of the relevant telephonic conversations. Following this is the list of documents which lists out 59 documents with the note at the end which states 'further list of documents will be submitted, if required.' Following this is a list of witnesses which contains 70 names with a note at the end which states 'further list of witnesses will be submitted, if required.' 9.4 In the DLF case para 38 of the charge sheet reads as follows:

38. That the lists of witnesses, documents and material objects relied upon by the prosecution are enclosed herewith as per Annexures-I, II and III. Additional lists of witnesses, documents and material objects will be furnished, if required, in due course.

Enclosed with the charge sheet are the transcriptions of telephonic conversations as Annexure A, the sanctions for prosecution of the public servants, A1 to A3, the list of witnesses as per Annexure I, the list of documents in Annexure II which contains description of 126 documents and the list of material objects in Annexure III which lists 11 items. It is significant that these material objects do not include the HDs or the CDs whereas the list of documents includes the call information reports and call details of the relevant telephone numbers relevant to the case.

9.5 In the Lift Case the charge sheet encloses a list of witnesses which lists 91 witnesses, a list of documents which lists 104 documents, a list of articles which list so 5 articles. The charge

sheet does not specifically state that the CBI is relying upon is the list of documents appended but since this has been forwarded as such with the charge sheet, it must be presumed that it is proposed to be relied upon by the prosecution. In any event the charge sheet extensively refers to the conversations and the documents.

9.6 In each of the above three charge sheets, the CBI has not stated that it is proposing to rely upon the hard discs. However, it has also not said that it is not relying on them. The situation gets more complicated in the chargesheet filed in the Shamit Mukherjee case. There, unlike in the DLF case, there is no specific statement by the CBI as to what it is relying upon. Enclosed with the charge sheet is a list of witnesses containing names of 90 witnesses, with a note in the end stating 'additional list of witnesses if any will be submitted in due course of time.' Then we have a list of documents which lists out 105 documents with a similar note in the end stating 'additional list of documents, if any, will be submitted in due course of time. Then we have a list of articles which sets out 15 articles and contains a note in the end stating 'additional list of articles if any, will be submitted in due course of time. In this list of articles serial No. 1 to 7 detail the 19 CDs referred to earlier. Serial No. 8 to 11 mentions the 4 hard discs. Sl Nos. 12 to 15 refer to the phones used in the conversations. Following this is Annexure 1 which lists out details of 100 short-listed calls from various CDs.

9.7 Learned Counsel appearing for the accused in the Shameet Mukherjee case urged that the prosecution having itself appended to the charge sheet a list of materials including the 4 hard discs and not having stated in the charge sheet that it was not relying on those materials, cannot now be heard to say that it will not supply to the accused all that is mentioned in the charge sheet. On the contrary, it is submitted by learned Counsel for the CBI that it has annexed to the chargesheet a list of 100 relevant calls and obviously the CBI proposes to rely upon only those 100 relevant calls.

9.8 The question that arises is whether the prosecution can itself decide what it wants to rely upon among the documents it has gathered during investigation and leave out documents which may or may not help the accused in the defense of their case' 9.9 A reading of Sections 173(5)(a) and [Section 207\(v\)](#) CrPC indicates that there is very little discretion left with the court to substitute its opinion as to what the prosecution should be relying upon for proving its case. Where the prosecution categorically states in the charge sheet that it is relying on only certain documents and not others, it is not possible for the court to overlook that and insist that the prosecution should also rely upon some other document that it has gathered and therefore should provide the accused with a copy thereof. It does appear that in the matter of documents, the Court does not have the discretion of the type urged by the counsel for the petitioners.

9.10 There are also other good reasons why the trial courts should not be asked to undertake the task of requiring copies all documents gathered by the during investigation to be provided to the accused notwithstanding the fact that the prosecution says that it is relying only upon some of them for the purposes of the case. There are limited powers of the criminal courts circumscribed by the [CrPC](#). To expect a judge to sit in judgment over what the prosecution considers to be documents worth relying upon even at the pre-charge stage of is to require the trial court to perform a task it is plainly not expected to perform upon a reading of the various provisions of the [CrPC](#). The [CrPC](#) also envisages that at different stages of the progress of the criminal proceedings, the trial court is expected to get increasingly involved. For instance, the degree of scrutiny of materials at the stage of cognizance will of course not be as strict as at the stage of pre-charge and charge and would increase at the stage of framing of charge. There are provisions to take care of contingencies when in his defense the accused wants to summon

documents or witnesses. There is also [Section 91](#) CrPC. However, for the purposes of the present case, it is sufficient to observe that at the pre-charge stage the trial court is not expected to insist that copy of each and every document gathered by the prosecution must be furnished to the accused irrespective of what the prosecution proposes to rely upon.

9.11 Where of course the prosecution is silent in the chargesheet about what it is relying upon, then two courses are available to the court to follow. One is to proceed on the basis that whatever document is forwarded with the chargesheet is in fact proposed to be relied upon by the prosecution. For instance, in the Lift Case, a list of documents is attached; the court at the pre-charge stage has to proceed on the basis that those are the documents that are proposed to be relied upon by the prosecution. Where the accused insists that some other document apart from what is stated in the list of documents is being relied upon by the prosecution as is evident from a reading of the charge sheet, the court can examine such submission and if it is satisfied that the charge sheet does in fact indicate that some other document is also being relied upon, then it can require the prosecution to furnish the accused a copy of such document as well. As will be seen hereafter, in the Shameet Mukherjee case, in view of what is stated in the chargesheet, it appears to this Court that the prosecution is relying upon conversations other than the 100 relevant conversations it has mentioned in the list appended to it.

9.12 The position may be different when it comes to statement of witnesses as already noticed hereinbefore. There Section 173(5)(b) read with [Section 173\(6\)](#) CrPC and the first proviso to [Section 207\(v\)](#) CrPC indicates that the court has some element of discretion on what it wants the accused to be furnished even at the pre-charge stage. That is why the number of decisions relied upon by the petitioners do not have much relevance for the purposes of the present case.

9.13 In reply filed in one of these petitions i.e. CrL.M.C. 6476 of 2005 the stand taken by the CBI in relation to its reliance upon the hard discs is two- fold. In para 7 it is stated that 'the hard discs are relied upon document in the sense that they will be proved in terms of Section 65A and 65B of the EA and, therefore, what is tendered in the trial court would be documents in the nature of compact disc and other related media/printout which would be deemed as original in terms of those Sections'. It is stated that the original system have already been certified for the purity and there is no legal requirement for their production in the trial. It is then stated that in para 12 'the said hard discs would be produced by the relevant witnesses at the time of cross-examination for the limited purpose of satisfying the Court in respect of duration of relied upon phone calls in terms of the judgment of the Supreme Court in [State v. Navjot Sandhu](#) . This much is therefore clear. Even for a limited purpose the CBI says that it is relying on the HDs. The question is to what extent it is.

9.14 There are two issues that arise in this context. In the first place whether the CDs which have recorded the relevant telephone conversations in each case has to be considered to be the original documents and therefore does not require to be proved in terms of Section 65B(1) by producing the original recording made in the HDs as long as the CBI satisfies the Court that the requirement of Section 65B(2) have been complied with. The second is whether it is open to the CBI to contend that only certain calls of the total intercepted ones are 'relevant' are therefore being relied upon; and that since CDs containing those calls have been provided to the accused, there is no obligation to provide mirror copies of the entire hard disc or even provide an inspection thereof either to the accused or to the Court.

9.15 In order to test this submission of the CBI a reference has necessarily to be made to Section 65B EA which reads thus:

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

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

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

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

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

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

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in Clause (a) of Sub-section (2) was regularly performed by computers, whether'

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

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

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

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

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

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

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

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

(5) For the purposes of this section,-

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.-For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived there from by calculation, comparison or any other process.] 9.16 A perusal of the title to Section 65B EA which has been introduced by an Amendment made in 2000 simultaneous with the enactment of the [IT Act](#) with effect from 17th October, 2000 indicates that it concerns 'admissibility of the electronic records' at the stage of the trial when the question arises whether a certain electronic record is admissible in evidence or not. Section 65B(1) states that if any information contained in an electronic record produced from a computer (known as computer output) has been copied on to a optical or magnetic media, then such electronic record that has been copied 'shall be deemed to be also a document' subject to conditions set out in Section 65B(2) being satisfied. Both in relation to the information as well as the computer in question such document 'shall be admissible in any proceedings when further proof or production of the original as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.' 9.17 The conditions specified in Section 65(B)(2) are that the computer output containing the information should have been produced by the computer during the period over which the computer was used regularly to store or process information for the purpose of any activities regularly carried on over that period by the person having lawful control over the use of the computer. It must also be shown that during the said period the information of the kind contained in electronic record or of the kind from which the information contained is derived was 'regularly fed into the computer in the ordinary course of the said activity'. A third requirement is that during the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time that break did not affect either the record or the accuracy of its contents. The fourth requirement is that the information contained in the record should be a reproduction or derived from the information fed into the computer in the ordinary course of the said activity.

9.18 Under Section 65B(4) the certificate which identifies the electronic record containing the statement and describes the manner in which it was produced giving the particulars of the

device involved in the production of that record and deals with the conditions mentioned in Section 65(B)(2) and is signed by a person occupying a responsible official position in relation to the operation of the relevant device 'shall be evidence of any matter stated in the certificate.'

9.19 Turning to the case on hand, it will be useful to recall the modus operandi adopted by the CBI, which is common to the four cases as explained in the chargesheets themselves. For instance, it is stated in the chargesheet filed in the DLF case in para 5 that:

as per the procedure of electronic computerised recording of telephone calls, the orders of the competent authority were conveyed to the concerned telephone company/companies who in turn provided parallel connectivity or leased lines to the CBI. These leased lines did not have any numbers, but were identified by pairs and colours of wires. These leased lines were connected directly with the identified hard disc of a computer through a voice logger. Every incoming and outgoing call of the monitored telephone numbers were automatically recorded on a WAV (sound format) file in the hard discs of the computers giving complete details viz., call time, call duration, calling party's telephone number and called party telephone number through window operating system, voice logger drivers and voice executable WAV (sound format) files. The conversations recorded in these computer files were heard and two Call Information Reports containing 49 and 13 identified calls of conversations between accused persons relevant to this case were prepared and transferred into three compact discs and the same have been taken on record for investigation in this case. The compact discs so prepared are true replicas of recording done in the hard discs of the computer system through electro magnetic media. The purity of the process of recording has been certified by the Andhra Pradesh Forensic Science Laboratory (APFSL), Hyderabad after examining the hard discs and compact discs vide their expert opinion NO.COM/12/2003 dated 22.07.2003. Shri N.S. Virk, Superintendent of Police, Special Unit, CBI has given a certificate as required under [Section 65B](#) of the Indian Evidence Act, 1872 for use of electronically generated information as admissible evidence.

9.20 In other words, the intercepted telephone conversations on the tapped telephones which were under electronic surveillance were being directly recorded through parallel leased lines in four hard discs (HDs) kept at the conference room of the SU of CBI. Each call had a separate file and was identifiable as such since it was in a voice executable WAV (sound format) format file. For convenience, the four computer systems in which the HDs were placed marked A, B, D and E for identification. The certificate issued by Shri Navdeep Singh Virk, Superintendent of Police, SU, CBI dated 7th June 2003 sets out the description of the four computer systems in which the HDs were located and explains further how the calls were recorded, copies made and of the relevant calls on audio CDs and the HDs then being taken over by the investigation unit of the CBI. The relevant portion of the said certificate reads as under:

1. That the information contained in the hard disks of the above mentioned 4 computer systems was regularly recorded into them in the ordinary course of the activities of my unit.
2. That during the period in question the above mentioned 4 computer systems were operating properly and there have been no such operational problems so as to affect the accuracy of the electronic record.
3. That the computer hardware and software used in the above said computer systems have built in security mechanisms.

4. The call content and call related information of the various telephone numbers monitored by this unit was recorded on the hard disks of the said four systems. Contents of the recorded telephone calls, which were given to the Investigating Officers from time to time, in the form of audio compact discs, are an output of the said computer systems.

5. That these above said computer systems are in working condition, till today, i.e. 7th June, 2003 when they are taken over by Sh M K Bhatt, Additional SP ACU (IX), Investigating Officer of RC 3A 2003-ACU X, AC-III, CBI Delhi for the purpose of investigation.

9.21 In the Shameet Mukherjee case, the letter dated 8th June 2003 sent by the CBI at the time of forwarding the 4 HDs and the 19 CDs to the APFSL for certification, indicates that the opinion of the APFSL was sought on two aspects. The first was for an 'examination of the above hard discs of CPUs marked A,B,D and E in order to ascertain the continuity of recordings of the telephone numbers under surveillance in each of them, and to check for any kind of overwriting, interpolation or any other kind of editing/tampering and issuing of certification to this effect for each of the hard discs in the above CPUs.' The second was to opine whether the copies of the calls transferred on the CDs were true copies of their original recordings on the hard discs. It was stated in para 4 (A) of the letter that:

4. Your expert opinion is solicited on the following:

A) Hard Disc of CPU marked A purported to contain the original recording of the following numbers for the 9810258734 from 14.1.2003 to 20.3.2003 20050871 from 14.1.2003 to 05.02.2003 24311053 from 01.02.2003 to 25.02.2003 9.22 The letter then sought the opinion of the APFSL with reference to the particular intercepted conversations on identified telephone numbers, between specified dates, the original recording of which was purportedly contained in the hard disc.

9.23 The reply dated 22nd July 2003 of the APFSL indicates that the hardware had been physically examined and that there was 'examination of storage media using DIBS forensic work station, which is a computer forensic tool, comprises of both hardware and analyzer software an unauthorized tool for Scotland yard Police Federal Bureau of Investigation and other premier investigation agencies.' The opinion in regard to the 5 CPUs, one IDE hard disc and the 19 CDs was as under: 'Item nos. 1 to 7 are analyzed and found that all are in working condition. Item No. 1 to 4 are I.D.E. hard disks containing windows operating system, voice Item No. 1 and 2 have logger drivers, media player programme, voice logging executable files, WAV file conversation executable file which can be used for logging/recording the telephonic conversation.' 9.24 Thereafter opinion is given on the particular audio files of conversations were verified and a report given thereon. For instance, with regard to 'audio files recorded with extension VTM from 21.12.2002 to 24.05.2003 in different partitions', the opinion was as follows:

Each audio file is verified using forensic work station with respect to creation date/time, update/time corresponding to the details provided in the above reference letter in the form of the hard copy under recorded calls information report containing the date and time, duration of the calls from different telephones logged on to the computer through different voice logging cannels and found that the time and dates and duration the calls are tallying with the audio files contained in the hard disk.

9.25 A perusal of the entire procedure outlined hereinabove indicates that the purpose of sending the hard discs to the APFSL was two fold. The prosecution has sent to the APFSL the hard discs not for the purposes of certifying all that was contained in the hard disc. The APFSL

was to certify on a physical examination that the hard discs were in a proper working condition in terms of Section 65B(2)(c) EA read with Section 65B(4) thereof. Secondly APFSL was to certify whether the relevant intercepted telephone calls copied on the CDs are in fact tallying with the original recordings of those calls in the hard disc. The scope of the examination by the APFSL was therefore to find out whether the hard disc was properly functioning and whether in respect of the calls copied on to the CDs the corresponding files in the HDs pertaining to those calls have been overwritten modified interpolated in any manner. Only to this extent can it be said that the HDs are being relied upon by the prosecution.

9.26 While the certification by the APFSL may enable the CBI to avoid producing the original recordings of the conversations in the HDs for the purposes of proof it cannot obviate the statutory requirement under Section 207(v) of providing to the accused access to the original recording of the relevant intercepted telephone conversation as a relied upon document. The stage of proof would be at the trial. At the present pre-charge stage, the accused has to be given access to the HDs as a relied upon document to the limited extent as explained hereinbefore.

9.27 It was then argued that in a statement recorded under [Section 161](#) CrPC, Inspector M.C. Kashyap adverts to the fact that he listened to all the conversations before deciding on the relevant calls. It is submitted that this statement has in turn referred to all the calls in the hard discs. This Court is unable to agree. One thing is to say is that the evidence was collected of a large number of calls but that does not mean that the prosecution would be relying upon all those calls. A mere reference to these calls which were listened to in the course of the investigation would not make them automatically relied upon. The prosecution has to therefore indicate to the court what it proposes to rely upon. It cannot be said that in determining what it proposes to rely upon the prosecution is indulging in pick and choose. The very scheme of the [Section 173\(5\)](#) requires the prosecution to tell the court that it has relied upon this or that document. It is not possible to imagine that the learned trial court has itself to perform the exercise of examining the entire document collected by the prosecution and then determine what the prosecution shall rely upon. It is inconceivable and impractical to proceed on the basis that all the material gathered during investigation is to be relied upon by the prosecution. It is not possible to accede to the contention of the petitioners that each and every document that the prosecution gathers should be deemed to be relied upon. That is contrary to the scheme of the [CrPC](#).

9.28 There is yet another aspect in the Shameet Mukherjee case concerning the relied upon calls that requires to be dealt with. The case of the prosecution is that it is relying upon only 100 relevant calls and therefore it is sufficient if the accused are furnished the CDs of those 100 calls at the stage of pre-charge. The explanation for the said 100 short-listed calls is contained in para 21 of the charge sheet which reads as under:

21. That as per the procedure followed by the Special Unit of CBI in computerized telephonic surveillance, the orders of the competent authority are conveyed to the concerned telephone company who in turn provide a parallel connectivity to CBI. Every incoming and outgoing call of each monitored telephone number is automatically recorded in the hard disc of the computer giving the complete details of the monitored number, the call time and duration.

The conversations so recorded were heard and the relevant calls between accused persons, were copied onto 19 Compact Discs and taken on record for investigation. The Compact Discs so prepared are a true copy of the recordings in the hard discs of the relevant computer system. The integrity of the process of recording has been certified by the Andhra Pradesh Forensic

Science Laboratory (APFSL), Hyderabad after examining the hard discs and the 19 Compact Discs vide their Expert Opinion No. COM/10/2003 dated 7.7.2003. The APFSL opined that each audio file in each hard disc was verified by their experts by using a standardized forensic work station with the parameters of creation date/time and the date/time corresponding to the details provided to them in the form the hard copy and found that the time, date and duration were tallying with the audio files contained in the four hard discs. The experts of APFSL have also opined that the 100 shortlisted telephonic conversations relevant to this case as listed vide Annexure-I and other calls, recorded electronically on computer, were on the relevant hard discs of the relevant computers of the Special Unit of CBI. Shri N.S. Virk, Superintendent of Police, Special Unit, CBI, New Delhi has given a Certificate under [Section 65B](#) of the Indian Evidence Act, 1892 for use of electronically generated records as admissible evidence.

9.29 It is clear from the reading of the above paragraph that the CBI itself contends that 768 calls contained in 19 CDs are 'relevant' for the case. The CBI states that these 768 calls were further screened to arrive at the further 100 relevant calls. On a reading of the above paragraph of the charge sheet it is not possible to conclude that the CBI was not proposing to rely upon the 768 calls contained in the 19 CDs. In fact it sent these 19 CDs for certification to the APFSL. This Court, therefore, comes to the conclusion that as far as the charge sheet in Shameet Mukherjee case is concerned, notwithstanding the fact that the CBI has not included the 768 calls in the 19 CDs in the list of documents appended to the charge sheet, the court must proceed on the basis that the CBI proposes to rely upon these 19 CDs containing 768 calls as well. The consequence is that in terms of Section 207(v) read with [Section 173\(5\)\(a\)](#) CrPC each of the accused in the Shameet Mukherjee case is entitled to be provided with copies of the 19 CDs containing the 768 calls.

9.30 To summarise the conclusions on questions (ii) and (iii):

(a) In terms of Sections 207(v) read with [Section 173\(5\)\(a\)](#) CrPC, the prosecution is obliged to furnish to the accused copies of only such documents that it proposes to rely upon as indicated in the charge sheet or of those already sent to the court during investigation;

(b) The trial court or this Court cannot, at the pre-charge stage, direct the prosecution to furnish copies of documents other than that which it proposes to rely upon or which have already been sent to the court during investigation;

(c) At the pre-charge stage the trial court is not expected to insist that copy of each and every document gathered by the prosecution must be furnished to the accused irrespective of what the prosecution proposes to rely upon.

(d) The prosecution is bound to indicate in the charge sheet submitted to the Court the documents it is proposing to rely upon for persuading the court to frame a charge against the accused. If it fails to do so, the court will proceed on the basis that whatever document is forwarded with the chargesheet is in fact proposed to be relied upon by the prosecution. Where the accused insists that some other document apart from what is stated in the list of documents should be taken as being relied upon by the prosecution, as is evident from a reading of the charge sheet, the court can examine such submission and if it is satisfied that the charge sheet does in fact indicate that some other document is also proposed to be relied upon by the prosecution, then it can require the prosecution to furnish the accused a copy of such document as well.

(e) In the instant case, the scope of the examination by the APFSL was to find out whether the hard discs were properly functioning and whether in the calls copied on to the CDs are true copies when compared with the corresponding files in the HDs pertaining to those calls. Only to this extent can it be said that the HDs are being relied upon by the prosecution.

(f) The certification in terms of Section 65B(4) EA Act does not obviate the statutory requirement under Section 207(v) of providing to the accused access to the original recording of the relevant intercepted telephone conversation as a relied upon document.

(g) As far as the Shameet Mukherjee case is concerned, in view of what is stated in para 21 of the charge sheet in that case, the court has to proceed on the basis that the CBI proposes to rely upon the 19 CDs containing 768 calls in addition to the document listed by it in the annexure to the charge sheet. Therefore each of the accused in the Shameet Mukherjee case is entitled to be provided with copies of the 19 CDs containing the 768 calls.

Question (iv): Is the right to a fair trial violated' 10.1 Extensive arguments were addressed on the basis of [Article 21](#) of the Constitution. It was contended that the denial of a copy of each and every document gathered by the prosecution during the investigation to the accused at the pre-charge stage would violate the fundamental right of the accused to a fair trial as enshrined in [Articles 20, 21](#) and [22](#) of the Constitution. It was also contended that short of a challenge to the constitutional validity of the provisions, the words 'all documents'on which the prosecution proposes to rely!' occurring in [Section 173\(5\)\(a\)](#) CrPC should be read down to mean 'all documents'which have been gathered by the prosecution during investigation!' It was urged that the principle of purposive construction must be adopted to advance the right to a fair trial which is the running thread through the entire [CrPC](#).

10.2 There is no challenge in these petitions to the constitutional validity of either Section 173(5)(a) or [Section 207\(v\)](#) CrPC which are exhaustive of what can be provided to an accused as documents at the pre-charge stage. As long as the said provisions of the [CrPC](#) are strictly complied with, and they should be insisted upon being strictly followed, there can be no quarrel that they encapsulate and operationalise the procedural due process requirements of the provisions of the Constitution. Therefore, if the prosecution is able to show that it has complied with the said provisions at the pre-charge stage then the accused cannot be heard to say that the denial of a document that falls outside the scope of those provisions would still constitute a violation of the fundamental right to a fair trial.

10.3 Reliance was placed on the judgment of the Supreme Court in [Hindustan Construction Company Ltd. v. Union of India](#) in support of the proposition that the copy of a document must be full and accurate reproduction of the original. This was in an arbitration case and really does not advance the case of the petitioners. Reliance was placed on the judgment in [Union of India v. Purnanda Biswas](#) where it was said that the document favoring the accused not annexed to the charge sheet would vitiate the trial. It requires to be noticed that [the said decision](#) was not dealing with the right of the accused at the pre-charge stage and therefore the question of scope of Section 207(v) Cr PC did not arise for consideration. For the same reason the decisions under the law of preventive detention, viz. [Khudi Ram v. State of West Bengal](#) and [M. Ahmed Kutty v. Union of India](#) can have no application in the instant case. The question involved in the decision in [Ashok Kumar Aggarwal v. CBI](#) 2007 (4) JCC 2429 concerns the statements of witnesses under Section 161 and whether that was relevant for the purposes of grant of sanction. Likewise the decision in [Ashok Kumar Aggarwal v. CBI](#) 2007 (4) JCC 2557 concerning

the relevance of a statement made under [Section 164](#) CrPC for the grant of pardon to the approver is also of no relevance here.

10.4 In [Superintendent and Remembrancer of Legal Affairs, West Bengal v. Satyen Bhowmick](#) AIR 1981 SCC 917 the Supreme Court was considering the scope of [Section 14](#) of the Official Secrets Act, 1923 and held that the said provision cannot take away the right of the accused to get copies of statement recorded of witnesses or documents obtained by the police during investigation. The question whether each and every document collected by the police during investigation should be furnished to the accused at the pre-charge stage or whether it was limited by Section 173(5)(a) read with [Section 207\(v\)](#) CrPC clearly did not arise for consideration there. Reference was then made to [State of Uttar Pradesh v. Lakshmi Brahman](#) (1983) 2 SCC 3872 where the Supreme Court observed that the language of [Section 207](#) CrPC was mandatory and the furnishing of copies by the Magistrate to the accused was not an administrative but a judicial function. In any event, [the said judgment](#) nowhere states that all documents collected by the prosecution at the stage of investigation should be provided to the accused at the pre-charge stage and that a denial thereof would constitute a violation of the fundamental right to a fair trial. The decision of the Gujarat High Court in [Pravin Kumar Lalchand v. State of Gujarat](#) 1982 Cri. L.J. 763 turned on its own facts. There since the enlarged photographs had been examined by the expert for giving the opinion, it was held that the said document cannot be denied to the accused. In the instant case the APFSL has not been asked to certify the entire contents of the 4 HDs but as pointed out earlier have compared the conversations recorded on the CDs with their original recordings in the HDs. Therefore, this case is of no assistance to the petitioners.

10.5 Reliance was also placed on the judgments in [Shakuntala v. State](#) , [Pravin Kumar Lalchand Shah v. State of Gujarat](#) (1982) Cri. L. J. 76, [S.J. Chowdhary v. State](#) 1984 Cri. L. J. 864, [State of Kerala v. Raghavan](#) 1974 Cri. L. J. 1373, and [Shiv Narayan Kachawa v. State of Rajasthan](#) (1985) Cri. L. J. 761 to contend that nothing can prevent the Court from forming an opinion that a certain document is essential for the defense of the accused and no such document can be denied even by the prosecution. After perusing each of these decisions, this Court finds that either the facts there did not deal with the question of supply of documents at the pre-charge stage or even if they did, it did not involve the interpretation of what was proposed to be relied upon by the prosecution as stated in the charge sheets filed in those cases.

10.6 None of the decisions cited by the petitioners support their contention that the denial to the accused at the pre-charge stage of a copy of each and every document gathered during investigation by the prosecution would constitute a violation of the fundamental right of the accused to a fair trial. Question (iv) is answered accordingly.

11.1 Some of the other contentions raised are now taken up for consideration. A reference was made to Sections 74 and 76 of the EA to contend that the hard discs are themselves public documents, access to which cannot be denied. The decision of this Court in [Ram Jethmalani v. Director, CBI](#) 1987 Cri. L.J. 570 was relied upon for this purpose. It is noticed that the said case was in the context of the statement recorded by the police under [Section 161](#) CrPC being considered to be a public document. The case was not about documents gathered during investigation, which as explained, stand on a different footing in the context of the two provisions that we are immediately concerned with. The argument that hard disc is a public document which the petitioner has a right to inspect, need not to be gone into in view of the finding of this Court that what is recorded in the hard discs is in fact an electronic record to

which the petitioner can insist upon an inspection but limited to the extent that it relates to the calls which the CBI has relied upon for the purposes of the case.

11.2 It was then submitted that under [Section 165](#) CrPC the prosecution was duty bound to submit the documents immediately to the Magistrate which was not done in the instant case for over two years after their seizure. It is also submitted that under Section 457 the seized documents are required to be deposited in the Court, which was not done. It is stated that even now hard discs have been kept in Hyderabad and not in the control of the Court. The contention of the CBI is that the learned Special Judge has been informed that the hard discs are in the custody of APFSL and this satisfies the statutory requirement. Whether in fact the documents evidencing seizures were not produced as part of the chargesheet, or the documents themselves were not produced before the court immediately after seizure, whether evidence was collected illegally and whether that has prejudiced the rights of the accused is a matter that can be examined at a subsequent stage. It would be open to the accused to show how it has been prejudiced by the non-compliance, if any, of these provisions.

11.3 An argument was made about the non-compliance with Rule 419 A and [Section 5\(2\)](#) of the Telegraph Act. Reliance was placed on the judgment in [Pooran Mal v. The Director of Inspection \(Investigation\), New Delhi](#) where it was held that if the evidence is illegally gathered it can still be relied upon by the agency. Counsel for the petitioner submitted that there is an observation in [the said decision](#) to the effect that this rule does not apply where the gathering of such evidence is expressly prohibited by law. The question whether the evidence has been gathered contrary to any express or implied provision as mentioned in Pooran Mal, cannot be determined without examination of evidence in that behalf. This necessarily means that this exercise cannot be performed at the pre-charge stage. It is open to the petitioner to raise this point at the appropriate stage.

11.4 An apprehension was expressed by the counsel for the accused that in the impugned order the learned Special Judge has foreclosed their arguments which can be advanced at the stage of trial. This Court would like to clarify that none of the defenses available to the accused during the trial would be foreclosed either by the order of the learned Special Judge or by this order. Of course, the accused will not be permitted to again file the application asking for the same relief which has been declined to them by the impugned order by the learned Special Judge as modified by this order.

11.5 Extensive arguments were made on the basis of the judgment of the Supreme Court in [State of Orissa v. Debendra Nath Padhi](#) . The first paragraph of the judgment indicates that the Court was considering a case where accused wanted to produce certain documents even at the stage of framing of charge. That was declined by the Supreme Court. In the present case the accused are not seeking to produce any document and they are seeking copies of the hard discs which have been referred to in the charge sheets by the prosecution. Therefore this Court does not consider it necessary to discuss the decision in Debendra Nath Padhi.

11.6 It was submitted that unless they are given mirror images of the HDs, it will not be possible for the accused to demonstrate that any of the calls relied upon by the prosecution vis-à-vis an accused has been altered or tampered with in any manner. The stage of questioning whether such documents have been tampered with is certainly not the pre-charge stage. That opportunity will be available to the accused at a subsequent stage.

11.7 An elaborate argument has been made about the scope of [Section 239](#) CrPC which is different from [Section 227](#) CrPC. It is submitted that even at the pre charge stage it is open to the accused to apply to the court to ask for being examined. It is submitted that Section 227 is silent and therefore the right of an accused even at the stage of pre-charge before the Magistrate under Section 239 is wider in terms of the principle of natural justice. It is submitted when a request is made by an accused to access a document such request must be granted by the Court. This Court is unable to accept this submission. There is no application by an accused here seeking to produce a document or asking to be examined at the pre-charge stage. The request by the accused here is for being supplied with copies of documents, which according to them, have been wrongly withheld by the prosecution. Such a request would have to be considered within the scope of Section 207(v) read with [Section 173\(5\)\(a\)](#) CrPC.

11.8 It was stated that the stage of framing of charge is as important as trial itself and therefore every information that has been gathered by the prosecution has to be provided at this stage itself. It is not possible for this Court to agree with this contention. The stage of framing of charge has been explained to be different from the stage of the trial in various decisions of the Supreme Court. The observations in [State of Bihar v. Ramesh Singh](#) , [Superintendent and Remembrancer v. Anil Kumar Bhunja](#) and [Soma Chakravarty v. State](#) (2007) 4 SCC 274 are relevant.

Question (v): How should the accused be provided access to the Hard Discs' 12.1 The question then arises whether, for the purposes of compliance with the requirement of [Section 207\(v\)](#) CrPC, the accused petitioners should be given copies of all the conversations stored in voice files in the hard disc or is it enough to give them an inspection thereof. As already noticed, the four hard discs contain information pertaining to calls between persons not connected with the present cases. The accused cannot possibly claim access to this information. Apart from the issue of privacy of such other persons, it is also not warranted under the interpretation placed by this Court on the relevant statutory provisions.

12.2 There are bound to be problems in requiring further certification for providing copies of the original recordings from hard disc itself. Such certification can also be doubted by the accused who might insist on access to the original recording themselves. In fact counsel for the petitioners submitted that the copies of the conversations in the form of sound files transferred to the CDs supplied to them does not contain many of the call parameters which are certified to be present in the hard discs.

12.3 The appropriate approach to be adopted in cases concerning computer database has been discussed in a judgment of the Chancery Division in England in *Darby and Co. Ltd. v. Weldon* 1991 (2) All.E.R. Ch D 901. There it was held that merely because information was not capable of being visually inspected, it cannot be said that the format in which it is recorded is not a document. It was pointed out that there are difficulties in giving access to inspect information stored in the database of a computer. It was observed that there may be irrelevant or privileged material which should not be provided access to; further it is possible for a party to frustrate the attempted inspection by reprogramming the entire computer in such a manner that information previously retrievable, cannot be retrieved without reprogramming; at the same time the access has to be arranged only after ensuring that the database itself does not get damaged as a result of such access and the interference with the everyday use of the computer is also minimised. It was pointed out that there was a discretion in the court to consider 'if necessary in the light of expert evidence, what information is or can be made available, or how far it is necessary for there to be inspection of copying of the original document (database) or whether the provision

of printouts or hard copies is sufficient, what safeguards should be incorporated to avoid damage to the database.' 12.4 On a careful consideration of the submissions of the learned Counsel for the petitioners, this Court concludes that it would be appropriate if, consistent with the requirement of [Section 207\(v\)](#) CrPC that the accused petitioners are permitted to listen to the original recordings of the relevant intercepted telephonic conversations relied upon by the prosecution in each of the four cases by having the said original recordings played directly from the hard discs in the presence of the accused or their representatives, their counsel and the learned Judge. At the pre-charge stage, there is no requirement for mirror images of the entire hard discs to be made available to the accused for this purpose. It is made clear however, that this will not foreclose the right of the accused, at the stage of the trial, for the purposes of cross-examining the witnesses of the APFSL to have access to the hard discs.

12.5 This Court directs that for the above purpose the four hard discs, which were sealed and sent to the APFSL, Hyderabad by the CBI for certification of the recorded relevant telephonic conversations, should immediately be brought back to Delhi. Learned Counsel for the CBI informs that as required by the CBI Manual cloned mirror images copies of the HDs have been made by the APFSL and these are also available in Hyderabad. It is, therefore, directed that the cloned copies of the four HDs can be retained at the APFSL, Hyderabad while the sealed hard discs sent to the APFSL should be brought back to Delhi within a period of six days from today and in any event not later than 17th March 2008.

12.6 The four HDs so brought back, will be kept in an aseptic environment in a temperature controlled room in either the Cyber Crime Section of the CBI or any other similar convenient place with prior intimation to the learned Special Judge. This place should be immediately identified by the CBI, in consultation with the learned Special Judge so that the four HDs when brought back are straightway taken and kept in the said place. It is made clear that hereafter the said four HDs would be in the control and subject to directions issued by the learned Special Judge. Nothing will be done in relation to those four HDs without orders of the Special Judge.

12.7 The learned Special Judge will fix three continuous dates between 18th March and 25th March, 2008 for the playing of the original recorded conversations of the relevant intercepted telephone calls relied upon by the CBI in each of the four cases directly from the HDs in the presence of the accused or their representatives, the counsel for the parties and in the presence of and subject to the directions of the learned Special Judge. The venue will be the very place where the four hard discs are to be kept immediately upon being brought back to New Delhi. Since the duration of these calls are not expected to be very long, the entire process should be ideally completed within a period of two to three days. This entire exercise should be completed on or before 25th March 2008. The parties will be permitted to listen to these conversations as they are played from the HDs and make notes. This will not be stage for advancing arguments on whether the original recording is different from copies furnished to the accused.

12.8 As regards the 19 CDs in the Shameet Mukherjee case, copies thereof of which have been directed to be provided to the accused in that case, it is made clear that the 768 calls on these 19 CDs need not be played from the hard discs at this stage. In other words, there will be no need to provide to the accused access to the entire 768 calls as recorded in the hard disc other than the 100 listed calls which the CBI is relying on. The reason for this is that the accused are will able to listen to the 768 calls from the CDs themselves. If any of those calls are exculpatory of the accused, then obviously the accused would not doubt the authenticity of the recording of such calls and will perhaps to seek rely upon, at an appropriate stage, on the certification of

their authenticity by the APFSL. Likewise the CBI will also not question the authenticity of the recording of these 768 calls which have been certified as such by the APFSL. In the unlikely event of the 768 calls (other than the 100 listed calls) containing material that is inculpatory of the accused in the Shameet Mukherjee case, then in any event at the pre-charge stage the CBI would not be permitted to rely on such material. The accused would therefore not be prejudiced by this procedure.

12.9 If the accused in the Shameet Mukherjee case want to refer to any of the 768 calls (other than the 100 listed calls) in the course of their arguments on charge before the learned Special Judge, they can play such calls straight from the CD itself before the learned Special Judge as they have been doing with reference to the calls relied upon by the CBI, copies of which have already been provided to them in CDs.

Conclusions

13. To summarise the conclusions on the various questions:

(i) As long as nothing at all is written on to a hard disc and it is subjected to no change, it will be a mere electronic storage device like any other hardware of the computer. However, once a hard disc is subject to any change, then even if it restored to the original position by reversing that change, the information concerning the two steps, viz., the change and its reversal will be stored in the subcutaneous memory of the hard disc and can be retrieved by using software designed for that purpose. Therefore, a hard disc that is once written upon or subjected to any change is itself an electronic record even if does not contain any accessible information at present. In addition there could be active information available on the hard disc which is accessible and convertible into other forms of data and transferable to other electronic devices. The active information would also constitute an electronic record.

(ii) Given the wide definition of the words 'document' and 'evidence' in the amended Section 3 the EA, read with Sections 2(o) and (t) IT Act, a Hard Disc which at any time has been subject to a change of any kind is an electronic record would therefore be a document within the meaning of Section 3 EA.

(iii) The further conclusion is that the hard disc in the instant cases are themselves documents because admittedly they have been subject to changes with their having been used for recording telephonic conversations and then again subject to a change by certain of those files being copied on to CDs. They are electronic records for both their latent and patent characteristics.

(iv) In the instant cases, for the purposes of Section 207(v) read with [Section 173\(5\)\(a\)](#) CrPC, not only would the CDs containing the relevant intercepted telephone conversations as copied from the HDs be considered to be electronic record and therefore documents but the HDs themselves would be electronic records and therefore documents.

(v) In terms of Sections 207(v) read with [Section 173\(5\)\(a\)](#) CrPC, the prosecution is obliged to furnish to the accused copies of only such documents that it proposes to rely upon as indicated in the charge sheet or of those already sent to the court during investigation.

(vi) The trial court or this Court cannot, at the pre-charge stage, direct the prosecution to furnish copies of documents other than that which it proposes to rely upon or which have already been sent to the court during investigation;

(vii) At the pre-charge stage the trial court cannot direct that a copy of each and every document gathered by the prosecution must be furnished to the accused irrespective of what the prosecution proposes to rely upon.

(viii) The prosecution is bound to indicate in the charge sheet submitted to the Court the documents it is proposing to rely upon for persuading the court to frame a charge against the accused. If it fails to do so, the court will proceed on the basis that whatever document is forwarded with the charge sheet is in fact proposed to be relied upon by the prosecution.

(ix) Where the accused insists that some other document apart from what is stated in the list of documents attached to a charge sheet should be taken as being proposed to be relied upon by the prosecution, and submits that this is evident from a reading of the charge sheet, the trial court will examine such submission and if it is satisfied that the charge sheet does in fact indicate that some other document is also proposed to be relied upon by the prosecution, then it can require the prosecution to furnish the accused a copy of such document as well.

(x) In the instant case, the scope of the examination by the APFSL was to find out whether the hard discs were properly functioning and whether the calls copied on to the CDs are true copies when compared with the corresponding files of original recording of those calls in the four HDs. Only to this extent can it be said that the HDs are being relied upon by the prosecution.

(xi) The certification in terms of Section 65B(4) EA Act does not obviate the statutory requirement under Section 207(v) of providing to the accused access to the original recording of the relevant intercepted telephone conversation as a relied upon document.

(xii) As far as the present cases are concerned, only those portions of the hard disc that relate to the files containing the original recording of the relevant intercepted telephone conversations would be 'documents' proposed to be relied upon by the prosecution in terms of Section 207(v) read with [Section 173\(5\)\(a\)](#) CrPC. Those files would be documents both as regards the file containing the actual conversation so recorded as well as constituting a record of any changes that such file may have been subject to thereafter.

(xiii) Therefore, only to the extent explained in (xii) above, the accused would have a right of inspection of the hard discs since making mirror image copies of the entire HDs is not called for in the circumstances explained in this judgment.

(xiv) As far as the Shameet Mukherjee case is concerned, in view of what is stated in para 21 of the charge sheet in that case, the court has to proceed on the basis that the CBI proposes to rely upon the 19 CDs containing 768 calls in addition to the documents listed by it in the annexure to the charge sheet. Therefore, each of the accused in the Shameet Mukherjee case is entitled to be provided with copies of the 19 CDs containing the 768 calls.

(xv) As long as the statutory requirements of Sections 207(v) read with 173(5)(a) [CrPC](#) are strictly complied with, and in the absence of any challenge to their constitutional validity, the failure to furnish to the accused by the prosecution at the pre-charge stage all documents gathered during investigation will not be a violation of the right to a fair trial under [Article 21](#) of the Constitution (xvi) The inspection as indicated in Sub-para (xiii) above will be allowed by playing directly from the HDs the original recording of the relevant intercepted telephonic conversations in the presence of the accused or their authorized representatives, the counsel for the parties, the counsel for CBI and the learned Special Judge on two or three continuous days so that the said exercise is completed on or before March 25th 2008.

Final directions

14. Accordingly, these petitions are disposed of with the following directions:

(i) In the Shameet Mukherjee case, the CBI will provide to each of the accused copies of the 19 CDs which has been mentioned in para 21 of the charge sheet containing the 768 calls within a period of one week from today and in any event not later than 18th March, 2008.

(ii) The four hard discs sent by the CBI after sealing and to the APFSL for the purposes of certification will be immediately brought back and in any event not later than 17th March 2008. The cloned copies of the four hard discs certified as such by the APFSL will be retained by the APFSL in Hyderabad.

(iii) The four HDs so brought back, will be kept in an aseptic environment in a temperature controlled room in either the Cyber Crime Section of the CBI or any other similar convenient place with prior intimation to the learned Special Judge. This place should be immediately identified by the CBI, in consultation with the learned Special Judge so that the four HDs when brought back are straightway taken and kept in the said place.

(iv) It is made clear that hereafter the said four HDs would be in the control and subject to directions issued by the learned Special Judge. Nothing will be done in relation to those four HDs without orders of the Special Judge.

(v) The learned Special Judge will fix three continuous dates between 18th March and 25th March, 2008 for the playing of the original recorded conversations of the relevant intercepted telephone calls relied upon by the CBI in each of the four cases directly from the HDs in the presence of the accused or their representatives, the counsel for the parties and in the presence of and subject to the directions of the learned Special Judge. The venue will be the very place where the four hard discs are to be kept immediately upon being brought back to New Delhi. Since the duration of these calls are not expected to be very long the entire exercise should be completed on or before 25th March 2008.

(v) As regards the 19 CDs containing 768 calls this need not to be played at the stage from the hard disc. There will be no need to provide to the accused access to the entire 768 calls as recorded in the hard disc other than the 100 listed calls which the CBI is relying on. If the accused in the Shameet Mukherjee case want to refer to any of the 768 calls in the course of their arguments on charge before the learned Special Judge, they can play such calls straight from the CD itself before the learned Special Judge.

(vi) The arguments on charge thereafter be positively concluded in all the four cases on or before 30th April, 2008 and orders on charge be passed on or before 31st May, 2008 Each of the learned Counsel will cooperate in this entire exercise.

15. The petitions and the applications stand disposed of.