

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

+ **Crl. Rev. P. 577/2009 & Crl. M.A. No. 12520/2009(Stay)**

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Reserved on: 19th April, 2012

Decided on: 5th July, 2012

VINOD KUMAR @ VINOD KUMAR HANDA Petitioner

Through: Mr. Ram Lal, Advocate

versus

STATE GOVT. OF N.C.T. OF DELHI Respondents

Through: Mr. Mukesh Gupta, APP for the State
with SI Sunil Kumar, PS Tulghlak
Road, Delhi.

Mr. Jaiveer Chaudhary, Advocate for
Respondent No. 2.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. As the relief was sought against the prosecutrix who had not been impleaded as a party initially, this Court vide order dated 30th September, 2011 directed the Petitioner to implead the prosecutrix as a party. Accordingly she was impleaded as Respondent No.2.

2. The Petitioner is facing trial for offence under Sections 313/493/495/306/376/494/120B IPC in case FIR No. 251/2001 registered at P.S. Tughlak Road. The allegations as set out by the prosecutrix who has been examined in the Court are that she got married to the Petitioner at Ambala whereafter he made relations with her. The Petitioner under the influence of liquor had sexual intercourse with the prosecutrix and he represented that he had divorced his earlier wife which fact was later found to be incorrect.

3. The defence of the Petitioner is that the prosecutrix of her free will was having a live-in-relationship with him. To prove his defence, the Petitioner during the cross-examination of the prosecutrix on 25th February, 2008 produced tape-recorded conversation of the prosecutrix wherein she had conceded her love affair with the Petitioner knowing fully well of his earlier marriage. The prosecutrix denied the voice recorded in the tape-recorded conversation to be her voice during cross-examination on 25th February, 2008. Thus, on 21st April, 2009 when the prosecution evidence was still going on, the Petitioner moved an application under Section 45 of the Evidence Act before the learned Trial Court seeking directions to record voice sample of the prosecutrix and to send the same to CFSL for identification of the voice. In the application, the Petitioner alleged that he was falsely implicated in this case and during the pendency of the trial, the prosecutrix used to make telephone calls and she also called the Petitioner to meet her at Gurudwara Bangla Sahib, Delhi on 31st July, 2004. During the conversation, she admitted having an affair with co-accused Vinod Kumar. He, thus, sought directions to record the voice sample of prosecutrix and to send the same for scientific identification. This application was kept pending and only on conclusion of the defence evidence on 1st October, 2009 it was noted that this application was pending. The learned Trial Court, after hearing the arguments, dismissed the application primarily on the ground that the prosecutrix has been cross-examined at length on different counts and no single question has been asked about the conversation. The learned Trial Court also observed that the application was filed only to delay the trial.

4. Aggrieved by the impugned order, the Petitioner filed the present petition seeking directions as prayed before the learned Trial Court. The contention of the Petitioner is that by denying the voice sample, fair trial as

enshrined by the Constitution is denied to him. The tape-recorded conversation is a primary evidence duly admissible in law. It is like any previous statement which can be used to contradict the evidence given before the Court as well as to test the veracity of the evidence and to impeach the credibility of the witness.

5. Reliance is placed on the decision of the Constitution Bench in *N. Sri Rama Reddy & Ors. Vs. The Attorney-General of India*, AIR 1971 SC 1162 relying upon *Yusufalli Esmail Nagree vs. State of Maharashtra*, AIR 1968 SC 147. It is contended that the conversation between the accused and the Complainant which is tape-recorded, is a contemporaneous evidence and is relevant under Section 8 Evidence Act. Further like a photograph of a relevant incident, a contemporaneous tape recording of a relevant conversation is a relevant fact under Section 7 of the Evidence Act. Relying on *Dial Singh Narain Singh vs. Rajpal*, AIR 1969 Punjab and Haryana 350 it is contended that for use of an earlier tape-recorded statement, the identification of the taped voice is crucial and indeed such proper identification of the voices is the sine qua non for the use of the said tape-recorded evidence. Where the voice is denied by the alleged maker thereof, a comparison of the same becomes inevitable and the proper identification of voices must be proved by a competent witness.

6. Learned APP for the State relying upon *Rakesh Bisht vs. CBI*, MANU/DE/0338/2007 contended that though there is no provision under the Indian Evidence Act, 1972 to deal with taking of voice sample, however, the investigating agency is permitted to take the same for the purpose of identification though an accused cannot be compelled to give the sample in case the conversation is incriminatory in nature. Thus, the learned Trial Court

has rightly rejected the application of the Petitioner. The petition has no merit and is liable to be dismissed.

7. Learned counsel for Respondent No. 2, the prosecutrix contends that the application submitted by the petitioner for taking the voice samples of the prosecutrix contained no such telephone numbers with which the petitioner and the prosecutrix had conversations. It is further stated that during her cross-examination also no question in regard as to what conversation was made or in what manner it was made has been put to the prosecutrix. Thus the present petition has no merit and is liable to be dismissed.

8. I have heard learned counsel for parties. The main issue raised by the learned counsel for Petitioner is that the learned Trial Court has denied a fair trial to him by dismissing the application for recording the voice samples of the Prosecutrix. The Trial Court while dismissing the application has observed that the Prosecutrix was cross-examined at length and nothing as regard to the tape-recorded conversation was put to her and the application was nothing more than a method to delay the proceeding. This observation of the learned Trial Court is contrary to the record.

9. Before proceeding further, it would be relevant to note the law laid down in regard to the admissibility of recorded conversation and allowing the application for taking voice samples of the parties. As early as 1956, in *Rup Chand vs. Mahabir Prasad AIR 1956 Punj. 173* it has been categorically held that a tape recorded version of a former statement of a witness is admissible in Evidence to shake the credit of the witness. Hon'ble Supreme Court in *S. Pratap Singh vs. State of Punjab, AIR 1964 SC 72* held that the tape recorded version of a conversation was admissible in evidence to corroborate the evidence of witness who had stated that such a conversation had taken place.

In *RM Malkani vs. State of Maharashtra*, AIR 1973 SC 157 their Lordships observed:

“23. Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape-record. A contemporaneous tape-record of a relevant conversation is a relevant fact and is admissible under Section 8 of the Evidence Act. It is *res gestae*.”

29. It was said that the admissibility of the tape recorded evidence offended Arts. 20(3) and 21 of the Constitution. The submission was that the manner of acquiring the tape recorded conversation was not procedure established by law and the appellant was incriminated. The appellant’s conversation was voluntary. There was no compulsion. The attaching of the tape recording instrument was unknown to the appellant. That fact does not render the evidence of conversation inadmissible. The appellant’s conversation was not extracted under duress or compulsion. If the conversation was recorded on the tape it was a mechanical contrivance to play the role of an eavesdropper. In *R.V. Leatham*, (1861) 8 Cox C.C. 198 it was said “It matters not how you get it if you steal it even, it would be admissible in evidence” as long as it is not tainted by an inadmissible confession of guilt: evidence even if it is illegally obtained is admissible.”

Thus, in view of the above discussion it is clear that if an accurate tape-recorded version of the statement is produced in evidence, the same is relevant and admissible in evidence in case the recording is not tampered with and the voice is properly identified.

10. As the tape-recorded conversation is admissible under the law of evidence, the question before this Court is whether the Court can compel a person to give his/her voice samples for identification. Reliance on *Rakesh*

Bisht (Supra) by the learned APP for State is misconceived, as in that case the application for taking voice samples for identification was allowed by the learned Trial Judge at the stage of investigation which is not the case in the present petition. The Petitioner's application was dismissed after recording of Prosecution evidence.

11. The Hon'ble Supreme Court in *Vikas Kumar Roorkewal vs. State of Uttarakhand*, 2011 (2) SCC 178 has held:

“22. The necessity of fair trial hardly needs emphasis. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases. The learned Judge has failed to take participatory role in the trial. He was not expected to act like a mere tape recorder to record whatever has been stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confers vast and wide powers on Court to elicit all necessary materials by playing an active role in the evidence collecting process. However, the record does not indicate that the learned Judge presiding the trial had exercised powers under Section 165 of the Evidence Act which is in a way complimentary to his other powers.”

12. Section 165 of the Evidence Act reads as under:

“165. Judge's power to put questions or order production.- The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, The Orient Tavern cross-examine any witness upon any answer given in reply to any such question.

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved.

Provided also that this Section shall not authorize an Judge to compel any witness to answer any question or produce any document which such witness would be entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases herein before excepted.”

13. This section is intended to arm the Judge with the most extensive power for the purpose of getting at the truth. The effect of this section is that in order to go to the root of the matter before it, the court has to look at and enquire into every fact before it. The exceptions to this wide power of judge are that the witness cannot be compelled to answer any question or produce any document contrary to Section 121 to 131 Evidence Act or any question contrary to Sections 148 or 149 Evidence Act and the Judge shall not dispense with primary evidence of any document except as provided before.

14. The Hon’ble Supreme Court in *Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others*, 2004 (4) SCC 158 observed:

“43. The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on Presiding Officers of Court to elicit all necessary materials by playing an active role in the evidence collecting process. They have to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, it can control the proceedings effectively so that ultimate objective i.e. truth is arrived at. This becomes more necessary the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or

pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

44. The power of the Court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code. The section consists of two parts i.e. (i) giving a discretion to the Court to examine the witness at any stage and (ii) the mandatory portion which compels the Courts to examine a witness if his evidence appears to be essential to the just decision of the Court. Though the discretion given to the Court is very wide, the very width requires a corresponding caution. In *Mohan Lal v. Union of India* this Court has observed, while considering the scope and ambit of Section 311, that the very usage of the word such as, "any Court" "at any stage", or "any enquiry or trial or other proceedings" "any person" and "any such person" clearly spells out that the Section has expressed in the widest possible terms and do not limit the discretion of the Court in any way. However, as noted above, the very width requires a corresponding caution that the discretionary powers should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case - 'essential', to an active and alert mind and not to one which is bent to abandon or abdicate. Object of the Section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and

public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

45. It is not that in every case where the witness who had given evidence before Court wants to change his mind and is prepared to speak differently, that the Court concerned should readily accede to such request by lending its assistance. If the witness who deposed one way earlier comes before the appellate Court with a prayer that he is prepared to give evidence which is materially different from what he has given earlier at the trial with the reasons for the earlier lapse, the Court can consider the genuineness of the prayer in the context as to whether the party concerned had a fair opportunity to speak the truth earlier and in an appropriate case accept it. It is not that the power is to be exercised in a routine manner, but being an exception to the ordinary rule of disposal of appeal on the basis of records received in exceptional cases or extraordinary situation the Court can neither feel powerless nor abdicate its duty to arrive at the truth and satisfy the ends of justice. The Court can certainly be guided by the metaphor, separate the grain from the chaff, and in a case which has telltale imprint of reasonableness and genuineness in the prayer, the same has to be accepted, at least to consider the worth, credibility and the acceptability of the same on merits of the material sought to be brought in.”

15. An accused has an indefeasible right to a fair trial and equal opportunity to prove his innocence. It is settled law that the right of accused to adduce defence evidence is not a mere formality but an essential part of a criminal trial where every opportunity must be given to the accused to adduce his defence.

16. Hon’ble Supreme Court in *Kalyani Baskar (Mrs.) v. M.S. Sampooranam (Mrs.)*, (2007) 2 SCC 258 has held as under:-

“12....The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. “Fair trial” includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a

valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and the courts should be jealous in seeing that there is no breach of them....”

17. In the case in hand the defence of the petitioner is that he has been falsely implicated in this case and the Prosecutrix has accepted having an affair with co-accused Vinod in the tape recorded conversation. He has placed the transcripts of the conversation which took place between him and the Prosecutrix along with the present petition. Prosecutrix when cross-examined on the point of conversation has denied the fact that the voice recorded in the tape recorder was her voice. A perusal of the transcripts shows that it has statements exculpatory to the Petitioner.

18. In my opinion it would be just and fair to grant an opportunity to the Petitioner to prove his innocence. In view of the discussion above the present petition is allowed. The Trial Court will direct the prosecutrix to give her voice samples, the same be sent for scientific analysis and appropriate action thereafter be taken in accordance with law.

19. Petition and application are disposed of.

(MUKTA GUPTA)
JUDGE

JULY 05, 2012
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