

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.04.2015
DELIVERED ON : 03.06.2015

CORAM

THE HONOURABLE MR.JUSTICE P.N.PRAKASH

Cr1.O.P.No.7117 of 2015
and
M.P.Nos.1 and 2 of 2015

Babitha Surendran

... Petitioner

vs.

State rep by
Inspector of Police
S-11, Tambaram Police Station
Chennai 600 045.

... Respondent

Criminal Original Petition filed under Section 482 Cr.P.C. to call for the entire records in C.C.No.789 of 2010 on the file of learned Judicial Magistrate Tambaram, Chennai and quash the same as against the petitioner/3rd accused.

For Petitioner : Mr.V.Raghavachari
for Mr.I.Lakshmana Shankar
For Respondent : Mr.M.Mohamed Riyaz,
Government Advocate [crl.side]
For intervenor : Mr.P.L.Narayanan
(G.SujiDeepa)

ORDER

Heard the learned counsel appearing for the petitioner, learned counsel for the intervenor and the learned Government Advocate [crl.side] appearing for the State.

2. A seminal issue arises for adjudication in this quash proceedings.

[a] Babitha Surendran [3rd accused], who is the petitioner before this Court, is seeking to quash the prosecution in C.C.No.789 of 2010 for offences under Sections 417, 420, 467, 471, 506(i) r/w 34 IPC. Suji Deepa [de facto complainant] and Babitha are blood sisters, born to Rajendran, who died on 19.05.2009. The allegations in the Final Report is that, Babitha and three others had fabricated a Will sometime after 19.05.2009 in Chennai, as if

Rajendran had executed the same on 02.08.2008, bequeathing the properties under the Will equally to Deepa and Babitha. It is Deepa's case that her father had executed a Will dated 31.01.2004, by which the entire property was bequeathed to her exclusively leaving out Babitha.

[b] The Will dated 31.01.2004 was left in the custody of one Dr.Balachandran, a close relative and after the death of Rajendran on 19.05.2009, the Will was made public and Bapitha was visibly upset that she has been left out in the Will. In order to frustrate the lawful claims of Deepa, Babitha and others fabricated a Will, as if Rajendran had written it on 02.08.2008 revoking the earlier Will dated 31.01.2004. On a complaint lodged by Deepa, the police registered a case and after investigation, Final Report against four persons, including Babitha for the aforesaid offences has been filed, which Babitha is seeking to quash.

3. Mr.V.Raghavachari, learned counsel appearing for Babitha submitted that, the genuineness of the impugned Will dated 02.08.2008 should have to be tested only by a civil Court and not in the criminal prosecution. He further submitted that Babitha was not in India on 02.08.2008 when the alleged Will is said to have been executed by Rajendran and therefore, the criminal prosecution against her is a sheer abuse of process of law. The last contention of Mr.V.Raghavachari is that, during the course of investigation, the police had obtained specimen handwritings and signatures from Bapitha for comparison, which is illegal and the Handwriting Examiners report based on such signatures and writings is not admissible in law, in the light of the judgment of the Full Bench of the Delhi High Court in Sapan Haldar and another vs. State [2012 VIII AD (Delhi) 533].

4. This Court carefully perused the Final Report and the accompanying documents. Here, the allegation against Babitha and others is that, they had fabricated the Will dated 02.08.2008 after 19.05.2009 i.e., after the death of Rajendran, as if Rajendran had executed the Will on 02.08.2008. The impugned Will has been scribed on a Rs.20/- non judicial stamp paper, which prima facie shows that it was purchased on 15.07.2008, but Police investigation reveals that the said stamp paper itself was released by the Treasury only on 07.08.2008. Therefore, the impugned Will could never have been scribed on the said non-judicial stamp paper on 02.08.2008, since the very stamp paper was released by the Treasury only on 07.08.2008. Police investigation also shows that Babitha came to India after her father's death and she was shown the Will dated 31.01.2004. Much later she produced the impugned Will which aroused suspicion in Deepa's mind. Thus there are sufficient materials for the prosecution to proceed against Babitha and others for the said offences. When there are sufficient materials on record collected by the prosecution to show that the impugned Will has been prepared by Babitha and other accused after the death of Rajendran, the argument that the genuineness of the

Will should be tested only in probate proceedings, deserves to be rejected.

5. The last argument advanced by Mr.V.Raghavachari relying upon the Full Bench judgment of the Delhi High Court requires to be dealt with exhaustively. It may be relevant to state here that the said judgment of the Delhi High Court is now under appeal before the Supreme Court and is pending adjudication. According to the Full Bench of Delhi High Court, the Police Officer does not have the power to obtain specimen signatures and writings from an accused de hors 311 A Cr.P.C. To support this argument, the Full Bench has cited various judgments beginning from Kathi Kalu Oghad [AIR 1961 SC 1808] and the Bench has also analysed the provisions of the Identification of Prisoners Act, before coming to the said conclusion.

6. What was the situation that was obtaining prior to the coming into force of Section 311- A Cr.P.C. i.e. before 23.06.2006?

The offence of forgery, Sections 463 and 464, has been in the statute book from 01.01.1862, the date on which IPC came into force. Police in this Country have been investigating this offence and prosecuting the offenders since then. Initially we had the Code of Criminal Procedure 1861, followed by 1872, 1882, 1898 and now we have the 1973 Code.

7. Before advertng to precedents, I am inclined to address this issue on first principles with an illustration.

"X", an high ranking official, receives a handwritten letter in the letter head of "Y", containing serious insinuations and also handing out death threat to him. "X" hands over the letter with a complaint to the police, based on which an FIR is registered against "Y" and investigation is taken up. During the course of investigation, police summon "Y", who accepts that the letter-head belongs to him, but denies the authorship of the contents. So, the next step for the police should be, to ask "Y" to give his specimen signatures and handwritings. When asked by the Police, "Y" voluntarily gives his specimen signatures and handwritings. Police do not arrest "Y" and they allow him to leave. During investigation, Police suspect one "Z" and they examine him and in the course of examination they ask "Z" to give his specimen handwritings and signatures, which he gives. Specimen handwritings and signatures that were obtained from "Y" and "Z" are sent to the Handwriting Expert along with the subject letter received by "X", for opinion. The Handwriting Expert opines that, the subject letter has been written by "Z" and not by "Y". Police consciously take a decision not to arrest "Z", but after completing the investigation, they file a Final Report before the Court against "Z" for the offence of criminal intimidation etc.

8. Can we say that the police have committed an illegality by obtaining the specimen handwritings and signatures of "Y" and "Z"

and therefore, the prosecution should fail? The answer is an emphatic "No". The power of the police to obtain handwriting and signatures during the course of investigation from witnesses, suspects and accused has never been questioned, because it was considered as concomitant power of investigation that inheres in the police.

9. The word "investigation as defined in the 1898 Code and 1973 Code is as follows:

"Section 4(l) of 1898 Code:

4(l) "investigation" includes all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf."

Section 2(h) of 1973 Code:

2(h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf."

10. From the aforesaid texts itself it is abundantly clear that it is an inclusive definition and not an exhaustive definition. As long as there is no constitutional or statutory prohibition inhibiting the Police from obtaining specimen handwritings and signatures from an accused, it cannot be stated that the police is denuded of this power. The mere obtaining of specimen signatures or handwritings from the accused cannot by itself fasten any criminal liability on him, because the same has to be compared by an Expert with the disputed one for fastening criminal liability, unlike a statement to a Police Officer which proprio vigore may mulct the suspect with criminal liability if it is in the nature of a confession. The handwriting or signatures obtained from an accused cannot by itself fasten any criminal liability, unless it is sent to an expert to be compared with the disputed one and opinion obtained.

11. In Kathi Kalu Oghad case [cited supra] neither the eminent counsels who argued, nor the erudite Judges who decided, ever questioned the power of the police to obtain signatures and handwriting from the accused. Of the 4 appeals that were referred to the Constitution Bench, the facts in one of the appeals is worth quoting.

"2. We shall, therefore, state only so much of the facts as have occasioned calling in aid of the provisions of cl. (3) of Art. 20 of the Constitution. In the first case, namely, Criminal Appeal 146 of 1958, the State of Bombay is the appellant. The respondent was charged, along with another person, under S.302, read with

S.34 of the I.P. C., as also under S.19(e) of the Indian Arms Act (XI of 1878). The Trial Court found him guilty of those charges and sentenced him to imprisonment for life under S.302, read with S.34 of the I.P.C. and to a term of two years rigorous imprisonment for the offence under the Arms Act. At the trial the identification of the respondent, as one of the two alleged culprits, was the most important question to be decided by the Court. Besides other evidence, the prosecution adduced in evidence a chit- Ex.5- alleged to be in his handwriting and said to have been given by him. In order to prove that Ex.5 was in the handwriting of the respondent, the police had obtained from him, during the investigation, three specimen handwritings of his on three separate sheets of paper which were marked as Exs. 27, 28 and 29. The disputed document, namely, Ex.5 was compared with the admitted handwritings on Exs. 27, 28 and 29 by the Handwriting Expert whose evidence was to the effect that they are all writings by the same person. At the trial and in the High Court, the question was raised as to the admissibility of the specimen writings contained in Exs. 27, 28 and 29, in view of the provisions of Art. 20(3) of the Constitution. It is an admitted fact that those specimen writings of the accused had been taken by the police while he was in police custody, but it was disputed whether the accused had been compelled to give those writings within the meaning of cl. (3) of Art. 20."

In the majority view expressed by B.P.Sinha, C.J., it is stated thus:

"11.....When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony.'"

Even in the minority judgment rendered by K.C.Das Gupta, J., it is stated thus:

"But the evidence of specimen handwriting or the impressions of the accused person's fingers, palm or foot, will incriminate him, only if on comparison of these with certain other handwritings or certain other impressions, identity between the two sets is established. By themselves, these impressions or the handwritings do not incriminate the

accused person, or even tend to do so. That is why it must be held that by giving these impressions or specimen handwriting, the accused person does not furnish evidence against himself."

12. In my view, Kathi Kalu Oghad case is a complete answer to this issue and it requires no further deliberation. The Supreme Court has very clearly held that giving of specimen signatures and handwritings to the police will not amount to testimonial compulsion prohibited by Article 20(3) of the Constitution of India. Thus, there is no Constitutional bar for the police to obtain specimen handwritings and signatures from an accused.

13. The next question is, is there any statutory prohibition? Is obtaining specimen handwritings and signatures would amount to giving a statement, so as to be hit by Section 162 Cr.P.C.? This issue has been settled by the Supreme Court in State of U.P. vs. Boota Singh [AIR 1978 SC 1770], wherein it is held:

"Merely taking a specimen handwriting does not amount to be giving a statement so as to be hit by S.162 Cr.P.C."

I am unable to lay my hands on any other provision in the Code or in any other law prohibiting the Police from obtaining specimen signatures and handwritings from an accused.

14. This issue can also be looked at from two other perspectives, namely (a) what is not prohibited is permitted and (b) when a power is given to an authority to do something, it includes such incident or implied powers, which would ensure proper doing of that thing. I am conscious of the fact that the aforesaid principles cannot be extended to protect all actions of the police, for, that may lead to disastrous consequences. The above principle can be applied on a case to case basis. In the present context, the aforesaid principles can be safely applied because, specimen signatures and handwritings by themselves cannot fasten criminal liability on an individual. The damage to the administration of criminal justice system will be more if the said power is not conceded to the police.

15. To say that Section 311-A is the only repository of the power to obtain signatures and handwriting from the accused during investigation, would amount to denuding a power which always existed with the police. Section 311-A was introduced in the Statute nearly 25 years, after the Supreme Court made a suggestion in State of Uttar Pradesh vs. Ram Babu Misra [(1980) 2 SCC 341].

16. In my considered opinion Section 311A Cr.P.C. is an enabling provision which comes to the aid of the Investigating Agency, when a suspect or accused refuses to give his specimen

signatures or handwriting. Section 311A Cr.P.C. reads as under:
"311A. Power of Magistrate to order person to give specimen signatures or handwriting.

If a Magistrate of the first class is satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting:

Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.]"

If the opinion of the Full Bench of the Delhi High Court is to be accepted, then in every case, the police will have to necessarily arrest the accused before making an application under Section 311A Cr.P.C. as set out in the proviso to Section 311A Cr.P.C. It is trite law that arrest is not compulsory in every case as held in *Joginder Kumar vs. State of U.P.* [AIR 1994 SC 1349]. If a Police Officer, as pointed out by me in the illustration given above, consciously decides to follow the Supreme Court dictum in *Joginder Kumar's* case and does not effect arrest, then will he be precluded from obtaining specimen handwritings and signatures from the accused? If the Delhi Full Bench judgment is to be followed, then it would lead to anomalous results. The Police will have to willy nilly arrest a person if they have to obtain specimen handwritings and signatures under Section 311A. The effect of the proviso to Section 311A has not been discussed by the Delhi Full Bench.

17. Yet another argument that may be raised is that, if the power to obtain specimen signatures and handwritings is conceded to the police, there is likelihood of abuse. This argument militates against the presumption in Section 114(e) of the Evidence Act that, judicial and official acts have been regularly performed. It also goes against the following dictum of the Supreme Court in *Aher Raja Khima vs The State Of Saurashtra* [AIR 1956 SC 217], reiterated in *Jameel Ahmed vs. State of Rajasthan* [2003 AIR SCW 6078].

"The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not a judicial approach to distrust and suspect him without good grounds therefor. Such an attitude could do neither credit to the magistracy nor good to the public. It can only run down the prestige of the police administration."

18. One cannot start off with a presumption that the police would abuse the power and build the criminal justice system on such a premise, for, that would only ruin the system. In our system of investigation, we have accepted several practices, though they do not have statutory sanction. For example, conducting Test Identification parade at the request of the police by the Magistrate was hitherto never questioned, as it did not violate either the provisions of the Constitution of India or any other statutory provision. Only from 23.06.2006, we have Section 54A Cr.P.C., which provides for conduct of Test Identification.

19. In *Rabindra Kumar Pal @ Dara Singh vs. Republic of India* [(2011) 2 SCC 490], this question was specially raised before the Supreme Court and was dealt with in paragraph nos.75 and 76:

"75. Another question which we have to consider is whether the Police (CBI) had the power under the Cr.P.C. to take specimen signature and writing of A3 for examination by the expert. It was pointed out that during investigation, even the Magistrate cannot direct the accused to give his specimen signature on the asking of the police and only in the amendment of the Cr.P.C. in 2005, power has been given to the Magistrate to direct any person including the accused to give his specimen signature for the purpose of investigation. Hence, it was pointed out that taking of his signature/writings being per se illegal, the report of the expert cannot be used as evidence against him.

76. To meet the above claim, learned Addl. Solicitor General heavily relied on a 11-Judge Bench decision of this Court in *The State of Bombay vs. Kathi Kalu Oghad and Ors.*, (1962) 3 SCR 10 = AIR 1961 SC 1808. This larger Bench was constituted in order to re-examine some of the propositions of law laid down by this Court in the case of *M.P. Sharma and Ors. vs. Satish Chandra, District Magistrate, Delhi and Ors.*, (1954) SCR 1077."

20. The Supreme Court ultimately relied upon *Kathi Kalu Oghad's* case and held that the procedure is not illegal.

"78. In view of the above principles, the procedure adopted by the investigating agency, analyzed and approved by the trial Court and confirmed by the High Court, cannot be faulted with."

21. Finally in Vinay Tyagi vs. Irshad Ali [(2013) 5 SC 762], the Supreme Court has held that matters which are understood and implemented as legal practice, which are not opposed to the basic rule of law, would be good practice. When a Police Officer obtains the specimen signatures and handwritings from a witness, suspect or accused, he does not violate any statutory provision or provisions of the Constitution of India. For the aforesaid reasons, I am unable to persuade myself to agree with the dictum of the Full Bench of the Delhi High Court.

In the result, this petition is dismissed. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

gms

To

1. Inspector of Police
S-11, Tambaram Police Station
Chennai 600 045.
2. Judicial Magistrate,
Tambaram, Chennai.
3. The Public Prosecutor,
High Court, Madras.

+1cc to Mr.P.L.Narayanan, Advocate, S.R.No.26168
+2cc's to Mr.I.Lakshmana Shankar, Advocate, S.R.No.26321

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