

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

CRIMINAL PETITION No.2119 of 2015

ORDER :

This Criminal Petition is filed by the Petitioners/Accused under Section 482 Cr.P.C seeking to quash the proceedings and set aside the order dated 02.03.2015 in CrI.M.P.No.47 of 2015 on the file of II Additional Judicial Magistrate of the First Class, Tirupati in Crime No.177 of 2014 of East Police Station, Tirupati. The subject petition was filed by the 1st respondent herein seeking to issue summons for producing the petitioners herein before the Assistant Director, Forensic Science Laboratory, Hyderabad for conducting voice test for the comparison and submission of the report for further investigation. The said petition was allowed by the learned Magistrate and hence, the petitioners questioned the same.

2) Heard both parties at length before admission and perused the material on record. Admittedly the investigating officer requested the Court to obtain voice sample to be subscribed by the persons facing the accusation in the crime under investigation and the learned Magistrate ordered despite counter opposing the same on maintainability apart from the copy of the C.D. to be given to him for his verification, without even cause furnishing.

3) Though the Eleven Judges Constitutional Bench expression of the Apex Court in ***State of Bombay V.***

Kathikalu Oghad^[1] is clear that once accused is arrested in connection with investigation or other proceeding under Section 5 of the Identification of Prisoners Act, 1920, a Magistrate of the First Class, where satisfied that, for purpose of said investigation or proceeding under the Criminal Procedure Code, it is expedient to direct the person to allow his photographs or measurements (which include finger impressions or foot print impressions as per Section 2(i)(iii) of the Act, 1920 (that may extends to signatures even) for purpose of comparison with any disputed finger impressions or the like, that does not hit by Article 20(3) of the Constitution of India as not within the meaning of 'to be a witness' but for 'furnishing' evidence in the larger sense and what is protected an accused is from hazards of self incrimination, the bar under Article 20(3) of the Constitution of India can be invoked when the statements are likely to lead to incrimination by themselves or furnish a link in the claim of evidence.

4) The law is very clear by interpretation of scope of Section 73 of the Indian Evidence Act that the Court has no power to ask for writing or thumb impression of an accused of a crime before commencement of enquiry or trial. Such obtaining by the Magistrate is besides unwarranted and even so taken and used for comparison during investigation, it is inadmissible in evidence, but for the same obtained during enquiry or trial to admit in evidence, vide

expressions of the Apex Court in **Rambabu Mishra**^[2] relied upon later in **Sukhvinder Singh V. State**^[3] **Ajith Savanth**^[4], **Amrith V. State**^[5], **B.Mallesam V. State of A.P.**^[6]. No doubt, Section 311-A Cr.P.C is introduced by amended Act 25 of 2005 with effect from 23.06.2006, whereunder the investigating officer can ask during investigation for purpose of the investigation to provide for specimen signature or hand-writing of an arrested accused. Even this provision no way speaks giving of voice sampling but for confining at best to set at knot the impact of the expression of **Rambabu Mishra** (and the later expressions relied on it) on the scope of Section 73 of the Indian Evidence Act. It is needless to say even the law commission (pursuant to the observation in **Rambabu Mishra** supra) in its 87th report of August, 1980 suggested the amendments to Sections 3 to 5 of the Act, 1920 to update it by including the scientific advances in the aid of investigation, including at para 3.16 of the report, for voice identification to furnish voice of the accused, same not materialized for none of the provisions of the Act, 1920 amended. Section 311-A Cr.P.C inserted is only for the limited area of arrested accused specimen writings and even explanation to Section 53 of Cr.P.C besides Section 53-A inserted by inclusion of D.N.A profiling and such other tests which the registered medical practitioner thinks necessary in a particular case; thus when registered

medical practitioner cannot take a voice sample, Section 53 or 53-A or Section 311-A Cr.P.C or Section 73 of Indian Evidence Act or Sections 3 to 5 of the Act, 1920 have no application for taking voice sampling. Further when accused not arrested and brought before Court none of the provisions even enable to ask the accused or suspect to undergo any medical tests even muchless to subscribe handwriting or signature or thumb or palm impressions or foot prints.

5) The law is well settled no doubt that even a minority view of the Apex Court not in conflict to the majority view of the Apex Court, when that applicable to the lis is binding precedent under Article 141 of the Constitution of India. However, when there is difference of opinion between each of the two Judge bench of the Apex Court, High Court and subordinate Courts can follow which view among the two is sound to follow, but for to say if the view of first Judge is considered and differed by the second Judge, the High Court and Subordinate Courts cannot sit against the wisdom of the second Judge of the Apex Court. Hence, among the conflicting opinions of the two Judges expressed in ***Ritesh Sinha V. State***^[7], the view expressed by Hon'ble Justice Aftab Alam is not only a later one after going through the views expressed by Hon'ble Justice R.P.Desai; but also a reasoned one to follow and accordingly relied up.

6) Having regard to the above, the criminal petition is

allowed by setting aside the order dated 02.03.2015 in Crl.M.P.No.47 of 2015 in Crime no.177 of 2014 passed by the learned II Additional Judicial Magistrate of the First Class, Tirupati holding the same is unsustainable and without jurisdiction conferred by law. As a sequel, miscellaneous petitions pending, if any, in this criminal petition shall stand closed.

Dr. B. SIVA SANKARA RAO, J

23.06.2015
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[\[1\]](#) AIR 1961 SC 1808

[\[2\]](#) AIR 1980 SC 791

[\[3\]](#) 1994 SCC (Crl.) 1376

[\[4\]](#) AIR 1997 SCLJ 1364

[\[5\]](#) (1998)8 SCC 1613

[\[6\]](#) 1997(1) ALT (Crl.) AP 719

[\[7\]](#) AIR 2013 SC 1132