

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

Reserved on: 22nd December, 2014
Date of Decision: 11th February, 2015

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+ CRL. M.C. 3904/2014

SUDHIR CHAUDHRY

..... Petitioner

Through: Mr. Vijay Aggarwal with Mr. Mudit Jain and Ms. Katyayini, Advocates.

versus

STATE

.....Respondent

Through: Mr. Navin Sharma, APP for the State with Inspector Ram Avtar, STF Crime Branch.

Mr. Sudhir Nandrajog, Sr. Advocate with Mr. Rajeev Goyal and Mr. Mohit Mathur, Advocates for complainant.

+ CRL. M.C. 3912/2014

SAMIR AHLUWALIA

..... Petitioner

Through: Mr. Vijay Aggarwal with Mr. Mudit Jain and Ms. Katyayini, Advocates.

versus

STATE

.....Respondent

Through: Mr. Navin Sharma, APP for the State with Inspector Ram Avtar, STF Crime Branch.

Mr. Sudhir Nandrajog, Sr. Advocate with Mr. Rajeev Goyal and Mr. Mohit Mathur, Advocates for complainant.

CORAM:
HON'BLE MR. JUSTICE VED PRAKASH VAISH

JUDGMENT

1. By these two petitions filed under Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') the petitioners have impugned the order dated 07.07.2014 passed by learned Additional Sessions Judge-01, Patiala House Courts, New Delhi in Criminal Revision No.254/2013 in case FIR No.240/2012 under Sections 384/511/420/120B IPC registered at P.S. Crime Branch, New Delhi whereby the CFSL Experts at CBI were directed to prepare a 'text inter-mixed with sufficient sentences from the questioned text' so that the petitioners may give their voice samples.

2. Since both the petitions have arisen out of FIR No.240/2012 registered at P.S. Crime Branch and involve identical question of law, they are being disposed of by this common order.

3. The concise facts of the present case are that on 02.10.2012 FIR No.240/2012 was registered at P.S. Crime Branch, New Delhi on a complaint made by Mr. Rajiv Bhadauria, Director (HR) and authorized representative of M/s. Jindal Steel Co. Pvt. Ltd. against the petitioners for the offence under Sections 384/511/420/120B IPC. The petitioners were arrested on 27.11.2012. While the petitioners were in custody, an application was moved by the State praying for seeking consent of the petitioners for furnishing their voice samples. Reply was filed by the petitioners to the said application. In reply, the petitioners gave their consent for giving their voice sample. The said application was disposed of by learned Metropolitan Magistrate, Saket Courts, New

Delhi vide order dated 13.12.2012 wherein the investigating officer was empowered to move an appropriate application for the visit of the petitioners to the place/ office where he proposes to collect/ get samples. Pursuant to it, the petitioners were called for giving their voice samples by the investigating officer on 21.12.2012. When the petitioners reached the police station to give their voice samples, the investigating officer asked them to read out a paper. The petitioners objected and refused to provide their voice samples as the paper that they were asked to read contained inculpatory statements. Thereafter, the petitioners moved application under Section 156(3) of Cr.P.C. praying for the monitoring of the investigation, directions to the investigating officer for providing material for the purpose of voice samples which does not contain any inculpatory statement and also that the said sample be collected in the presence of a Judicial Magistrate. Vide order dated 04.02.2013, the said application was dismissed by learned Additional Chief Metropolitan Magistrate, Saket Courts, New Delhi with the directions that in case the petitioners want to give voice samples then the same is to be given as per the instructions of the investigating officer and the scientific officers.

4. Against the said order a revision was preferred by the petitioners bearing C.R. No.16/2013 (new No.254/13). The said revision petition was heard and disposed of vide impugned order dated 07.07.2014 passed by learned Additional Sessions Judge-01, Patiala House Courts, New Delhi.

5. Feeling aggrieved by the said order, the petitioners have filed the present petitions.

6. Learned counsel for the petitioners contended that the impugned order was based on the misreading of the judgment of this Court in '**Rakesh Bisht vs. CBI**', (2007) 1 JCC 482. In the said judgment it was stated that the Court may permit taking of voice sample only for the purpose of identification. The sample so collected would not be admissible if it contains inculpatory statements. This fact was not considered by the learned trial court.

7. It was further contended that although the accused persons have consented to give their respective voice samples as per law, however, they have not consented to be witness against themselves. If the petitioners (accused persons) are asked to read incriminating sentences, it shall be in violation of Article 20(3) of the Constitution of India. Even as per Section 161(2) of Cr.P.C., no person can be compelled to give self-incriminating statements. The case against the petitioners is based on circumstantial evidence and the prosecution heavily relies on voice samples hence, anything stated therein is clearly incriminating in nature. Even under Section 161(2) of Cr.P.C. an accused cannot be compelled to give statements which would have a tendency to expose him to a criminal charge or to a penalty or to forfeiture. The impugned order also contravenes the law laid down by the Hon'ble Supreme Court of India in '**Amit Singh vs. State of Punjab**', 2006 (3) JCC 2138 wherein it was held that in course of investigation, an accused cannot be compelled to provide hair sample. The same logic would equally apply to furnishing a voice sample and the petitioners cannot be compelled to give their voice samples by reading the statements containing incriminating material. Section 311A of Cr.P.C. applies

only to the handwriting specimen and not to voice samples. Similar view was taken by the Hon'ble Supreme Court in '**State of UP vs. Ram Babu Mishra**', (1980) 2 SCC 343.

8. It was lastly contended by learned counsel for the petitioners that non supply of advance copy of the text prepared by the CFSL Experts at CBI will seriously jeopardize the interests and rights of the petitioners. The petitioners have a right to examine beforehand the material supposed to be read by them and delete any portion of the text which may go against them.

9. *Per contra*, learned APP for the State urged that learned Additional Sessions Judge has given certain guidelines in the impugned order to maintain a balance between the fundamental rights as guaranteed under Article 20(3) of the Constitution of India and the requirement of investigating agency. It was only after due consideration of the objections taken by the petitioners, the trial court ordered that the text which would be given to the accused persons/ petitioners would be prepared by CFSL Experts at CBI by inter-mixing text with sufficient sentences from the questioned text. Restrictions imposed in '**Rakesh Bisht's case**' (*supra*) are applicable in those circumstances where the accused is asked to read a self-inculpatory statement. However, in the said judgment it was nowhere stated that an accused cannot be asked to read incriminating material. Clearly, an inculpatory statement is different from incriminating statement. An accused is not prejudiced merely because he reads some incriminating statement. The prohibition contained in Article 20(3) of the Constitution of India is applicable only to self-inculpatory statement.

10. It was also urged by learned APP for the State that accused is only asked to give a voice sample which cannot be equated with giving a hair sample. Placing reliance upon the judgment in '**State vs. Navjot Sandhu**', *AIR 2005 SC 3820*, it was further contended that asking an accused to give his voice sample is not violative of Article 20(3) of Constitution of India. It was lastly contended by learned APP for the State that the petitioners agreed to give their voice samples voluntarily, however, they cannot govern what statement is to be read by them for such a sample. The requirement and sufficiency of a voice sample is to be decided by the CFSL Experts who have to carry out its scientific analysis.

11. I have bestowed my thoughtful consideration to the submissions made by learned counsel for the petitioners and learned APP for the State. I have also perused the material on record.

12. The only question for consideration before this court is that whether an accused while reading a text containing certain incriminating statements is "compelled to be a witness against himself" as barred under Article 20 (3) of the Constitution of India, especially so when he himself consents to give his voice sample.

13. The right against self-incrimination is an essential safeguard, both under the Constitution of India and Cr.P.C. The underline rationale behind it corresponds with two objectives – firstly that of ensuring that the statements made by the accused are reliable and secondly ensuring that such statements are voluntarily made. In several instances, a person suspected or accused of a crime may be

compelled through methods of coercion, threats or inducement to testify on his/ her behalf. In such a case, there is a higher likelihood of such a testimony being false. A false testimony is undesirable because it impedes the integrity of a trial and subsequent verdict of the case. Involuntary or compelled testimony is more likely to mislead a Judge and a prosecutor thereby resulting in miscarriage of justice. Even during an investigation, false statement is likely to cause delay and obstruction in an investigation effort. If involuntary statements were readily given weightage during trial, investigator would have a strong incentive to compel such statements through methods involving coercion, threats, inducement or deception. It is for this reason the right guaranteed under Article 20(3) of the Constitution of India is considered as a 'Fundamental Right'. It serves as a check on police behavior during the course of investigation. Exclusion of compelled testimony is important otherwise investigators will be more inclined to extract information through compulsion as a matter of course. However, what is prohibited under Article 20(3) of Constitution of India is furnishing of information based on personal knowledge likely to lead to incrimination by itself or furnishing a link in the chain of evidence. The rule against self-incrimination does not, however, prohibit (i) collection of material evidence such as bodily substances and other physical objects; and (ii) statement used for comparison with the facts already known to the investigator.

14. In '**State of Bombay vs. Kathi Kalu Oghad**', *AIR 1961 SC 1808*, the Hon'ble Supreme Court held: -

“16. In view of these considerations, we have come to the following conclusions:

(1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

(2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not “compulsion”.

(3) “To be a witness” is not equivalent to “furnishing evidence” in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.

(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression “to be a witness”.

(5) “To be a witness” means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise.

(6) “To be a witness” in its ordinary grammatical sense means giving oral testimony in court. Case law has gone beyond this strict literal interpretation of the expression

which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence, orally or in writing.

(7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made.”

15. In ‘**Selvi and Ors. vs. State of Karnataka**’, (2010) 7 SCC 263, the Apex Court held: -

“145. The next issue is whether the results gathered from the impugned tests amount to “testimonial compulsion” thereby attracting the prohibition of Article 20(3). For this purpose, it is necessary to survey the precedents which deal with what constitutes “testimonial compulsion” and how testimonial acts are distinguished from the collection of physical evidence. Apart from the apparent distinction between evidence of a testimonial and physical nature, some forms of testimonial acts lie outside the scope of Article 20(3). For instance, even though acts such as compulsorily obtaining specimen signatures and handwriting samples are testimonial in nature, they are not incriminating by themselves if they are used for the purpose of identification or corroboration with facts or materials that the investigators are already acquainted with. The relevant consideration for extending the protection of Article 20(3) is whether the materials are likely to lead to incrimination by themselves or “furnish a link in the chain of evidence” which could lead to the same result. Hence, reliance on the contents of compelled testimony comes within the prohibition of Article 20(3) but its use for the purpose of identification or corroboration with facts already known to the investigators is not barred.

153. Since the majority decision in *Kathi Kalu Oghad* [AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10] is the controlling precedent, it will be useful to restate the two main premises for understanding the scope of “testimonial compulsion”. The first is that ordinarily it is the oral or written statements which convey the personal knowledge of a person in respect of relevant facts that amount to “personal testimony” thereby coming within the prohibition contemplated by Article 20(3). In most cases, such “personal testimony” can be readily distinguished from material evidence such as bodily substances and other physical objects. The second premise is that in some cases, oral or written statements can be relied upon but only for the purpose of identification or comparison with facts and materials that are already in the possession of the investigators. The bar of Article 20(3) can be invoked when the statements are likely to lead to incrimination by themselves or “furnish a link in the chain of evidence” needed to do so. We must emphasise that a situation where a testimonial response is used for comparison with facts already known to the investigators is inherently different from a situation where a testimonial response helps the investigators to subsequently discover fresh facts or materials that could be relevant to the ongoing investigation.”

16. A voice sample is like a finger print impression, signature or specimen handwriting. Like giving of fingerprint impression or specimen handwriting by an accused for the purpose of investigation, giving of voice sample for the purpose of investigation cannot be included in the expression “to be a witness”. By giving a voice sample, the accused does not convey any information based upon his personal knowledge which can incriminate him. A voice sample by itself is fully innocuous. It is only used for the purpose of comparing it

with the recorded conversation but it ‘by itself’ is not a testimony at all. By giving a voice sample an accused, merely gives an ‘identification data’. When an accused is asked to furnish a voice sample he is neither asked nor expected to furnish any statement based on his personal knowledge as would be barred under Article 20(3) of the Constitution of India. The only thing that is required of him while giving a sample is to read from a given text which gets recorded for comparative purpose. It is as, I have already observed, an identification data record which when compared with the previous recorded conversation with the help of mechanical process, may throw some light on the point in controversy.

17. The voice sample is not, in itself, a substantive piece of evidence. The use of such a sample is limited to the purpose for which it was collected. It cannot be considered in isolation and what is stated therein cannot be admitted as evidence before any Court on its own footing. The only use of such a sample is for comparison and no other.

18. In the instant case the petitioners are aggrieved by the order of learned Additional Sessions Judge whereby the trial court directed the CFSL Experts at CBI to prepare a “text intermixed with sufficient sentences from questioned text”. Observed in the light of the decisions of the Hon’ble Supreme Court in ‘**Selvi & Ors.**’ (*supra*) and ‘**Kathi Kalu Oghad**’ (*supra*), the contention of the petitioners that such a direction is violative of Article 20(3) of the Constitution of India does not find favour with this Court - Firstly, because the petitioners are not forced to give their voice sample. On the other hand they have volunteered to give such a sample. Secondly, as I have already

observed, that a voice sample is not ‘evidence’, which can be used in isolation from the main recording to which it is to be compared with. Its use is only comparative. What is contained in such a sample is not based on the ‘personal information’ of accused. It is merely a reading of material given to him.

19. Furthermore, an expert carrying out scientific analysis and the process of comparison is the best Judge to decide the sample which he needs for such an analysis. Where the CFSL experts at CBI have opined that best result would be obtained when sufficient common sentences to the questioned voice recording are present in the sample for spectrographic examination, it would be unfair to provide altogether a different text, devoid of such ‘common sentences’, and to expect accuracy in their result. However, not delving into the question of evidentiary value of opinions/ results of such experts, it would be sufficient to state at this stage, even at the cost of repetition, that merely because the text provided to the petitioners contain some inculpatory statements, it would not mean that the petitioners are forced to be witness in their own case.

20. The apprehension of the petitioners of a possible misuse of the voice recorded was also taken into consideration by learned Additional Sessions Judge. It is for this reason that the Revisional Court directed the CFSL experts at CBI to prepare a text containing parts from both questioned text and other text.

21. The petitioners have also relied upon the judgment of this Court in ‘**Sayeed Ahmad v. State**’ 2010 (2) JCC 1416. The observations in

‘Sayeed Ahmad case’ (Supra) were given in a context where the handwriting specimen was obtained by the officer when the accused therein were in custody without complying with the provisions of the Identification of Prisoners Act 1920. In this context it was observed by this Court after considering the judgments in **‘Sukhvinder Singh & Ors. v. State of Punjab’ 1994 (5) SCC 152**, **‘State of U.P. v. Rambabu Mishra’ AIR 1980 SC 791** and **‘State of Haryana v. Jagbir Singh & Ors.’ AIR 2003 SC 4377**, that anything personal to an accused obtained for the purpose of comparison with the suspected sample if obtained without the permission of the competent court and without accused being identified as required by the provisions of the Identification of Prisoners Act 1920 has to be ignored. The provisions of law stated in this judgment are not disputed.

22. It is relevant to reiterate herein that the petitioners before this Court were clearly not compelled to give voice samples. They themselves volunteered to do so. Once the accused persons have given their consent for furnishing their voice samples, they cannot be allowed to shift their stand again and again. Neither the investigation can be endlessly left at the mercy of the accused nor can the accused be left to lead the investigation. If they want to give voice samples they have to read the statements given to them as per the requirement of the scientific experts. The bar contained under Article 20(3) of the Constitution of India would not come to their rescue at this stage. Furthermore, their contention that the text so prepared should be provided to them beforehand too does not find favour with this Court.

Nothing material would be served in doing so as it has been already observed that what the petitioners read is not ‘substantive evidence’.

23. For the reasons aforesaid recorded, there is no infirmity or illegality in the impugned order dated 07.07.2014 passed by learned Additional Sessions Judge-01, Patiala House Courts, New Delhi. The petitions are without any merit, the same deserve to be dismissed and are hereby dismissed.

Crl.M.A. 13362/2014 in Crl.M.C.3904/2014
Crl.M.A. 13378/2014 in Crl.M.C.3912/2014

These applications are dismissed as infructuous.

(VED PRAKASH VAISH)
JUDGE

FEBRUARY 11th, 2015
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