

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.11.2017

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Crl.R.C.No.1348 of 2017

and

Crl.M.P.No.13106 of 2017

Jayapaul Mohan

... Petitioner

Vs.

State Rep.by

The Inspector of Police,
Special Investigation Cell,
Vigilance and Anti Corruption,
Chennai - 600 028.

... Respondent

Prayer: Criminal Revision filed under Sections 397 and 401 Cr.P.C. to set aside the order dated 19.09.2017 in Crl.M.P.No.1300 of 2017 in Cr.No.7/AC/2015/HQ passed by the learned Special Court, for the cases under prevention of corruption Act, Chennai.

For Petitioner : Mr.M.Anandaraj

For Respondents : Mr.P.Govindarajan
Additional Public Prosecutor

O R D E R

This Criminal Revision Petition is directed against the order passed by the trial Court permitting the investigating officer to record voice sample of the petitioner herein, who is arrayed as an accused in Crime No.7/AC/2015/HQ, on the file of the Special Investigation Cell, Vigilance and Anti Corruption, Chennai.

2.The petitioner herein is the accused in Crime No.7/AC/2015/HQ, on the file of the Special Investigation Cell, Vigilance and Anti Corruption, Chennai, for alleged offence under section 7 of Prevention of corruption Act. The defacto complaint Rajagopal, Assistant Engineer in PWD under suspension has given the complaint against the petitioner that he demanded Rs. two lakhs for revoking his suspension.

3.The prosecution has filed a petition seeking permission to take standard voice sample of the petitioner/accused to compare the conversation between the defacto complainant and the petitioner regarding demand of bribe, recorded in the cell phone micro SD card. The petitioner has contested the petition on the ground that directing the accused to give voice sample is deprivation of Constitutional right. Without disclosing the person who was in custody of the micro SD card since 2015, petition to draw standard voice sample after the delay of two years is liable to be dismissed. Without citing the provision of law under which voice sample sought to be requested, the petition is not maintainable.

4.The trial court after hearing both sides and analysing the law governing the issue has allowed the petition filed by the prosecution directing the accused to appear before Tamil Nadu Forensic Scientific Laboratory to give voice sample. The above said order is under challenge in this petition filed by the accused.

5. The grounds raised by the petitioner is that the court cannot direct a person to give his voice sample when such power is not conferred to the court under the Code. The Hon'ble Supreme Court in Ritesh Sinha V. State of Uttar pradesh and another reported in [(2013) 2 SCC 357], has held that in the absence of any provision under the Statute compelling the person to give voice sample, the Court cannot authorise the Investigating Agency to record voice sample of the accused against his volition. While under section 53 and Section 311A of the Code, legislatures have permitted to take finger prints and hand writing of the accused during investigation and trial, obtaining standard voice sample from the accused person is not included. Compelling the accused to give voice sample amounts to invasion of his privacy.

6.Heard the learned counsel for the petitioner and the learned Additional Public Prosecutor for the respondent.

7. The points to be considered now are:

(i) Whether directing the accused to give his voice sample amounts to invasion of his privacy and violative of his constitution right?

(ii) Whether absence of specific provision in the code will disentitle the court from directing the accused to give his voice sample?

(iii) Whether the reference to the Larger Bench by the two Judges, in Ritesh Sinha V. State of Uttar pradesh and another reported in [(2013) 2

SCC 357], will stand in the way of the trial Court from permitting the Investigation Agency to take the voice sample of the accused person?

8. The question of testimonial compulsion in Independent India in the light of Article 20(3) of the Constitution of India came for scrutiny, before 11 Judges Bench of the Hon'ble Supreme Court in *State of Bombay v. Kathi Kalu Oghad* reported in AIR 1961 SC 1808. Thereafter, in view of modern technology which has developed in the recent past, the crime detective agencies which were earlier adopting certain conventional methodology such as identifying the person through eyes (test identification), collecting fingerprints or footprints of suspected person, drawing blood samples, compelling to give specimen signature or handwriting were equipped with other methodology such as Polygraph Test, Narcotic Test and Brain Mapping. When use of these technology on accused person was challenged on the ground of privacy and testimonial compulsion, in 2005 (11) SCC 600, wherein the Hon'ble Supreme Court held that drawing of blood samples, pubic hair, etc., in the offence of rape where the prosecution has to establish the guilt of the accused beyond reasonable doubt is not violative of Article 20 (3) of the Constitution of India.

9. In *CBI -vs- Abdul Karim Ladsab Telgi* reported in 2005 CrLJ 2868, the Hon'ble Bombay High Court, reversed the order of the trial Court allowing the Investigating Agency to record the voice sample of the accused. The Bombay High Court in the said judgment, held that lending voice sample to the Investigating Officer amounts to the testimonial compulsion and infringement of the accused right under Article 20(3) of the Constitution of India. Later, the Delhi High Court in *Rakesh Bisht etc v. Central Bureau of Investigation* (2007 CrLJ 1530) has held that, if after investigation, charges were framed and in the proceedings before the court. The court that voice sample ought to be given for the purposes of establishing identity, then such a direction may be given provided the voice sample is taken only for the purposes establishing the identity. Provided it does not contain any inculpatory statement so as to be hit by Article 20(3) of the Constitution.

10. In *Selvi -vs- State of Karnataka* (2010 (7) SCC 263) while deciding the question whether engaging modern and scientific techniques like DNA mapping, Narcotic Analysis Test, Polygraph Examination etc., should be liberally used by the prosecution, the Hon'ble Supreme Court, had clarified that Explanation to Section 53 Cr.P.C., "examination of the person" includes examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which

the registered medical practitioner thinks necessary in a particular case.

11. Following the three judges decision in Selvi case, Hon'ble Justice Ranjan Desai in Ritesh Sinha case has held the phrase, "such other test" appearing in Explanation for sub clause (a) to Section 53 of Cr.P.C., should include examination of voice sample, by applying the principle of Ejusdem Generis. Thus, in the light of the three Judges Bench in Selvi case which has distinguished the physical evidence and Testimonial Act, by liberal interpretation of the words "such other test" found in the Explanation to Section 53 Cr.P.C., by applying the doctrine of Ejusdem Generis directing the accused to give voice sample is legally permissible and Constitutionally valid. Since, the three Judges Bench have clearly distinguished the examination of physical evidence and Testimonial Act.

12. This Court after considering the plea raised by the petitioner and the Judgment rendered by the Hon'ble Supreme Court namely Ritesh Sinha, (supra) and Selvi V. State of Karnataka, (supra) and the observation made by the Constitution Bench in State of Bombay Vs Kathi Kalu Oghad (supra), is of the firm opinion that till the dissenting Judgment of one among the two judges rendered in Ritesh Vs. State of U.P. is considered by the Larger Bench, the view expressed by the three Judges Bench in Selvi case referring the 11 judges bench decision in Kathi Kalu Oghad will prevail.

13. After considering the law on this point including Article 20 Clause (3) of the Indian Constitution, Section 311 A of Code of Criminal Procedure as amended in the year 2005 and the Judgments rendered by the Constitutional Bench in Kathi and Selvi, one of the learned Judges in Ritesh case has held that there is no violation of fundamental rights and though there is no specific reference of providing voice sample under Code 311 A of Cr.P.C., there is no bar for the Court to order drawing of voice sample. Whereas the other learned Judge has deferred from that view. Therefore the matter has been referred to Larger Bench. The judgment in Ritesh case was rendered on 07.12.2012. Till date, Supreme Court has not taken a call on this.

14. Be that as it may. The law of precedent as propounded and settled by various judgments mandates, till the law held by a Bench is unsettled after reference to Larger Bench, the Courts Subordinate to the Supreme Court are bound to follow the dicta of the earlier judgment rendered by the Bench whichever is numerically higher.

15. Admittedly, in Selvi V. State of Karnataka, the three Judges Bench has not considered drawing of voice sample as violative of any law in force, including the Constitution. While so, this Court has no hesitation to hold that till the law is

declared otherwise by a Larger Bench, the law settled in Selvi, holds good.

16. The learned counsel for the petitioner submitted that subsequent to this judgment in Ritesh Sinha, some of the High Courts conferred the view of Hon'ble Justice Aftab Alam have held that drawing voice sample is against Constitution and few High Courts have deffered from that view. In this regard the judgments rendered by Andra Pradesh High Court, Delhi High Court and Gujarat High Court were placed before this court by the petitioner counsel and the respondent. In all this case uniformly Hon'ble Judges have taken enough pain to analyse the law on this point and have recorded their respective views.

17. However, the law of precedents as enunciated does not permit to give a go by to the Constitution Bench finding and the three Judges view in Selvi case and also the purposive interpretation given by Hon'ble Justice Ranjana Desai to the explanation in section 53 of the code. Therefore, in order to maintain the judicial discipline, this Court is of the view that till contra decision is rendered by the Supreme Court, the view expressed in Selvi judgment holds the field. When there is no express bar to direct the accused persons to give standard voice sample, contrarily when the phrase "any other test" to be given a broad and purposive meaning, and in addition when there is no personal invasion in seeking voice sample, this court finds no error in the impugned order of the Magistrates who has applied his mind and thought fit that in the interest of fair trial drawing standard sample is required in this case.

18. The view expressed by one of the Judges in Ritesh Sinha case may be appropriate to conclude since this view is in consonance to the spirit of the legislation.

" In Selvi a three Judge Bench of this Court was considering whether involuntary administration of certain scientific techniques like narco- analysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) tests and the results thereof are of a 'testimonial character' attracting the bar of Article 20(3) of the Constitution. This Court considered the protective scope of right against self-incrimination, that is whether it extends to the investigation stage and came to the conclusion that even the investigation at the police level is embraced by Article 20(3). After quoting extensively from Kathi Kalu Oghad, it was observed that the scope of 'testimonial compulsion' is made clear by two premises. 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. It was held that all the three techniques involve testimonial responses. They impede the subject's right to remain silent. The subject is compelled to convey personal knowledge irrespective of his/her own volition. The results of these tests cannot be likened to physical evidence so as to exclude them from the protective scope of Article 20(3). This Court concluded that compulsory administration of the impugned techniques violates the right against self-incrimination. Article 20(3) aims to prevent the forcible conveyance of personal knowledge that is relevant to the facts in issue. The results obtained from each of the impugned tests bear a testimonial character and they cannot be categorized as material evidence such as bodily substances and other physical objects."

19. Applying the test laid down by this court in *Kathi Kalu Oghad* which is relied upon in *Selvi* case, I have no hesitation in coming to a conclusion that if an accused person is directed to give his voice sample during the course of investigation of an offence, there is no violation of his right under Article 20(3) of the Constitution. Voice sample is like finger print impression, signature or specimen handwriting of an accused. Like giving of a finger print impression or specimen writing by the accused for the purposes of investigation, giving of a voice sample for the purpose of investigation cannot be included in the expression "to be a witness". By giving voice sample the accused does not convey information based upon his personal knowledge which can incriminate him. A voice sample by itself is fully innocuous. By comparing it with tape recorded conversation, the investigator may draw his conclusion but, voice sample by itself is not a testimony at all. When an accused is asked

to give voice sample, he is not giving any testimony of the nature of a personal testimony. When compared with the recorded conversation with the help of mechanical process, it may throw light on the points in controversy. It cannot be said, by any stretch of imagination that by giving voice sample, the accused conveyed any information based upon his personal knowledge and became a witness against himself. The accused by giving the voice sample merely gives 'identification data' to the investigating agency, he is not subjected to any testimonial compulsion. Thus, taking voice sample of an accused by the police during investigation is not hit by Article 20(3) of the Constitution.

19. In the result, the Crl.R.C., stands dismissed. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

AT/gr
To

1.The Special Judge,
Special Court(Prevention of Corruption Act), Chennai.

2.The Inspector of Police,
Special Investigation Cell,
Vigilance and Anti Corruption,
Chennai - 600 028.

3.The Public Prosecutor,
High Court, Madras.

Copy to:

The Section Officer,
Crlminal Section(Records),
High Court, Madras.

+1cc to Mr.M.Anandaraj, Advocate in sr.no.81434

Crl.R.C.No.1348 of 2017
and
Crl.M.P.No.13106 of 2017

NR 08/12/2017