

*THE HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

+ CRIMINAL REVISION CASE No.3208 of 2016

% 20-02-2017

Mr. Amit Khetawat

... Petitioner

Vs.

\$ State of Telangana

... Respondent

! Counsel for the petitioner : Sri B. Chandrasen Reddy

Counsel for Respondent : Sri V. Ravi Kiran Rao

< Gist:

> Head Note:

? Cases referred:

01. AIR 1961 SC 1808
02. 2007 CRI.L.J. 1530
03. 1973 SCC (Cri) 399 : 1973 Cri LJ 228
04. AIR 1980 SC 791
05. (2003) 6 SCC 195 : 2003 Cri.LJ 3117
06. 2003 CriLJ 5054
07. 2005 CriLJ 2868
08. (2013) 2 SCC 357 : AIR 2013 SC 1132
09. (2012) 11 SCC 321
10. (2015) 1 SCC 365
11. (2010) 8 SCC 633
12. (2014) 2 SCC 576
13. (1993) 3 SCC 418
14. (2003) 4 SCC 493
15. (2016) 8 SCC 307 (3JB)
16. 1994 SCC (CrI.) 1376
17. (1997) 7 SCC 110
18. (2006) 12 SCC 79
19. 1997 (1) ALT (CrI.) AP 719
20. (2010) 7 SCC 263



HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO**CRIMINAL REVISION CASE No.3208 of 2016****ORDER :**

The present Criminal Revision Case, under Sections 397 and 401 of Cr.P.C., is filed by the petitioner-AO.No.1 of Crime No.7/ACB-CIU-Hyd/2015, dated 02.12.2015, aggrieved by the order dated 05.12.2016 in Crl.M.P.No.50 of 2016 in Crime No.7/ACB-CIU-Hyd/2015 passed by the learned I Additional Special Judge for SPE and ACB Cases-cum-V Additional Chief Judge, City Civil Court, Hyderabad, allowing the petition/Memo filed by the Prosecution under Sections 9 and 10 of Prevention of Corruption Act, 1988 and Sections 468, 471 and 120(B) r/w. Section 34 of IPC, seeking permission to record the voice samples of A.1, in directing to submit voice samples of A.1 so as to enable the Investigating Agency to send the same to the Forensic Science Laboratory, Hyderabad, for comparison to determine the voice of A.1.

2. The contentions in the grounds of revision *vis-a-vis* the oral submissions in the course of hearing by the learned counsel for revision petitioner-A.1 are that the impugned order of the Court below is contrary to law, with no requirement of such a test and that too for no enabling provision and also for no reason or just cause much less to intrude into the personal liberty and to compel petitioner-A.1 against his will by testimonial compulsion and thereby sought for setting aside the impugned order of the Court below.

3. Whereas, it is the contention of the learned Standing Counsel for SPE and ACB Cases representing the respondent- State in support of the impugned order of the Court below that the same does not amount to testimonial compulsion to stand as a witness against himself, but only comes within the broader meaning of furnishing of information other than within the exclusive knowledge of accused for same is only a voice sampling for comparison and opinion and comes within the meaning of **such other tests** mentioned in Explanation (a) of Section 53 of Cr.P.C., and thus, the same is well within its scope contemplated by law and also necessary for the effective adjudication of the criminal *lis* and once it is a procedure established by law and will not come within the purview of testimonial compulsion of 'to be a witness against himself', but for furnishing evidence in larger sense, there is nothing to interfere with the impugned order of the Court below. It is also submitted that it cannot be stated as intruding into the privacy or affecting the qualified Fundamental Right of Right to Life, that too the same when subject to due process of law to obey the orders of the Court below in submitting to the requirement of voice sample for analysis and hence to dismiss the revision.

4. Heard the submissions of both sides, at length, in the course of hearing referred above, which no way require repetition herein and also perused the material on record with reference to the provisions and propositions.

5. Now, in deciding the revision *lis* on the correctness of the impugned order of the Court below, the factual background necessary to mention, in nutshell, is that the petitioner-A.1 along

with A.2 was arrested and subsequently enlarged on bail. During the course of investigation, it is revealed that A.1 rang up from his phone to the defacto-complainant – Sri R.G. Bhaskar Reddy, District Inspector, Legal Metrology; and one Sri Uppala Nagarjuna, Commercial Tax Officer, O/o. C.T.O., Special Commodities Circle, Saroornagar Division, demanding money on the name of ACB and the said conversation was recorded by them in their respective phones and the same were handed over to the Investigating Officer for further action. Basing on the same, pending investigation of Crime No.7/ACB-CIU-Hyd/2015, the Prosecution has filed the aforesaid Memo/Petition in Crl.M.P.No.50 of 2016 seeking the aforesaid relief and the same was allowed by the Court below by order dated 05.12.2016. It is impugning the same with the contentions referred supra, the revision is maintained.

6. Coming to the provisions relevant for the purpose, Sections 53, 53A, 54 and Section 2(h), (i) & (y) of the Code of Criminal Procedure, 1973, as amended from time to time, and Articles 20 and 21 of the Constitution of India read as under:-

(a). 53. Examination of accused by medical practitioner at the request of police officer. –

(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.”

{N.B: In the year 2005, a number of amendments were made in the Criminal Procedure Code by Act 25 of 2005. Those amendments included the addition of an explanation to Section 53 and insertion of Sections 53-A and 311-A.}

The explanation added to Section 53 reads as under:-

“[Explanation. – In this section and in sections 53A and 54, -

a) “examination” shall include the 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; (emphasis added)

b) “registered medical practitioner” means a medical practitioner who possess any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register.]”

(b). 53A. Examination of person accused of rape by medical practitioner.—

(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometres from the place where the offence has been committed by any other registered medical practitioner acting at the request of a police officer not below the rank of a Sub-Inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:--

- (i) the name and address of the accused and of the person by whom he was brought,
- (ii) the age of the accused,
- (iii) marks of injury, if any, on the person of the accused,
- (iv) the description of material taken from the person of the accused for DNA profiling, and
- (v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at shall also be noted in the report,

(4) The exact time of commencement and completion of the examination shall also be noted in the report,

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

(c). 54. Examination of arrested person by medical officer:--

(1) When a person is arrested, he shall be examined by a medical officer in the service of Central or State Governments and in case the medical officer is not available by a registered medical practitioner soon after the arrest is made:

Provided that where the arrested person is a female, the examination of the body shall be made only by or under the supervision of a female medical officer, and in case the female medical officer is not available, by a female registered medical practitioner.

(2) The medical officer or a registered medical practitioner so examining the arrested person shall prepare the record of such examination, mentioning therein any injuries or marks of violence

upon the person arrested, and the approximate time when such injuries or marks may have been inflicted.

(3) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the medical officer or registered medical practitioner, as the case may be, to the arrested person or the person nominated by such arrested person.

(d). Section 2(h), (i) and (y) of Cr.P.C.:

In this Code, unless the context otherwise requires,

(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 authorized by a Magistrate in this behalf;

(i) "judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath;

(y) words and expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860) have the meanings respectively assigned to them in that Code.

(e) Article 20: Protection in respect of conviction for offences:-- (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

(f) Article 21: Protection of life and personal liberty:-- No person shall be deprived of his life or personal liberty **except according to procedure established by law.**

7. Coming to the propositions, on the scope of Article 20 of the Constitution of India, the Eleven Judges Bench of the Supreme Court in the majority expression in **STATE OF BOMBAY v. KATHI KALU OGHAD**¹ clearly held that "to be a witness" may be equivalent to "furnishing evidence" in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen

¹ AIR 1961 SC 1808

writing or **exposing a part of the body by an accused person for purpose of identification.**

It is further observed that "the giving of fingers impression or of specified signature or of handwriting etc., strictly speaking, is not "to be a witness". **The expression "to be a witness" was held to mean imparting knowledge in respect of the relevant facts, by means of oral statements or statements in writing by a person who has personal knowledge of the facts to be communicated to a Court or to a person holding an enquiry or investigation.**

It is further observed that "person is said 'to be a witness' to a certain state of facts, which has to be determined by a Court or authority authorised to come to a decision, by testifying to what he has seen, or something he has heard which is capable of being heard and is not hit by the Rule excluding hearsay, or giving his opinion, as an expert, in respect of matters in controversy".

The Supreme Court further observed that "clause 3 of Article 20 of the Constitution is directed against self-incrimination by an accused person. Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in Court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge".

8. No doubt, in ***RAKESH BISHT ETC. v. CENTRAL BUREAU OF INVESTIGATION***², a learned single Judge ***of Delhi High Court*** vide order dated 03.01.2007 in Criminal Revision Petition Nos.461 and 462 of 2006, observed that by virtue of Section 73 of the Indian Evidence Act, at the stage of investigation, the accused cannot be compelled to give his voice sample and there is no such provision in the Evidence Act to deal with taking of voice sample, however, if investigation is completed and charges framed, the Court may allow voice sample to be taken, provided it is only for the purpose of identification and does not contain any inculpatory statement. The learned single Judge further referred the expression in ***KATHI KALU*** (supra) and the judgment of the Apex Court in ***R.M. MALKANI v. STATE OF MAHARASHTRA***³ for the proposition that tape recorded conversation is admissible in evidence, if it is relevant to the matters in issue, and the other expression of the Apex Court in ***STATE OF UTTAR PRADESH v. RAM BABU MISRA***⁴ on the scope of Section 73 of the Indian Evidence Act of Court has no power during investigation, but for during trial, to direct the accused to subscribe the specimen handwriting or signature or thumb impression etc., and the other judgment of the Apex Court in ***UNION OF INDIA v. PRAKASH P. HINDUJA***⁵, particularly para-20, “that the legal position is absolutely clear and also settled by Judicial authorities that the Court would not interfere with the investigation or during course of investigation, which would mean from the time of lodging of the FIR till submission of final report by the Officer incharge of Police Station in Court, under Section 173(2)

² 2007 CRI.L.J. 1530

³ 1973 SCC (Cri) 399 : 1973 Cri LJ 228

⁴ AIR 1980 SC 791

⁵ (2003) 6 SCC 195 : 2003 Cri.LJ 3117

Cr.P.C., this field being exclusively reserved for the Investigating Agency”, and the other expression of the Apex Court in **STATE OF HARYANA v. JAGBIR SINGH AND ANOTHER**⁶, which relied upon **RAM BABU MISRA** (supra) on the scope of Section 73 of the Evidence Act and also referred Section 311-A of Cr.P.C. and observed that by virtue of Section 311-A of Cr.P.C., amended provision came into force with effect from 23.06.2006 and not prior to that when the impugned order passed by the trial Magistrate, apart from the same only refers to the handwriting and no reference to voice samples or voice recording as a bar, **it cannot be urged that the specimen signatures or handwriting should also include voice samples**, because the Legislature when it introduced this provision was well aware of the technology of tape recording and taking of voice samples, no doubt, the said amendment is pursuant to the recommendations of the Apex Court in **RAM BABU MISRA** (supra) and thereby permitting of voice sample during investigation held unsustainable and set aside.

9. Though, the learned counsel for petitioner-A.1 relied on the observation of, at a post-cognizance stage Court can take, it is not by referring any provision and it is not a clear finding, but for a contextual reference on the scope of Section 73 of Evidence Act, from the law and what more observed is, the **Bombay High Court** in **CENTRAL BUREAU OF INVESTIGATION v. ABDUL KARIM LADSAB TELGI AND OTEHRS**⁷, at paras-11 and 12 directed for taking of voice samples referring to some English expressions. Even the Bombay High Court did not refer to any of the enabling

⁶ 2003 CriLJ 5054

⁷ 2005 CriLJ 2868

provisions either in the Evidence Act or under Cr.P.C. A learned single Judge of **Gujarat High Court** in the very latest expression in **NATVARLAL AMARSHIBHAI DEVANI v. STATE OF GUJARAT** in Special Criminal Application (Direction) No.5226 of 2015, dated 18.01.2017, observed that there is no provision in the Cr.P.C. to authorise any Investigating Agency to record voice sample of any person accused of an offence, though spectrographic analysis is the available technique of voice identification or elimination by means of voice prints and the voice print may be defined as a pictorial representation of the acoustical energy output of a speaker, as a function of time, frequency and amplitude and spectrographic voice identification requires nothing of the support beyond the furnishing of a voice sample, either in the presence of a tape recorder or depending on the circumstances, over telephone line to which a recording device has been connected. The suspect is required to repeat the sentence by sentence, perhaps, several times the words that have been transcribed from the recording of the known voice with which his or her voice is to be compared. It is also observed that spectrographic test will not fall within the ambit of psychiatric treatment and the principles explained in **SELVI's** case (supra) would not apply to the spectrographic test. However, there is no provision in the Code or any other law, which empowers the police or a Criminal Court, to subject the accused to the test, either from the provisions of the Act of 1920 or Section 53 Cr.P.C. or Sections 73 and 165 of the Evidence Act to compel the accused to give his voice sample for the purpose of spectrographs test. For that conclusion, it referred the expression in **RITESH SINHA VS. STATE OF U.P.**⁸ In

⁸ (2013) 2 SCC 357 : AIR 2013 SC 1132

RITESH SINHA (supra), the different opinions expressed by the Hon'ble 2-Judges Bench of the Apex Court and the matter is pending on reference for majority opinion before Larger Bench of the Apex Court. However, there is no legal bar therefrom in deciding the matter from the view expressed by the Apex Court in **ASHOK SADARANGANI AND ANOTHER v. UNION OF INDIA AND OTHERS**⁹ of pendency of a reference to a Larger Bench does not mean all other proceedings involving the same issue remains stayed till a decision is rendered in the reference, by referring to earlier expressions of the Apex Court, in this regard.

10. **In RITESH SINHA'** case (supra), the Apex Court by referring to **KATHI KALU** (supra) among other expressions, observed that:

“21. While departing from the view taken in **M.P. Sharma** that “to be witness is nothing more than to furnish evidence” and such evidence can be furnished through lips or by production of a thing or of a document or in other modes, **in Kathi Kalu Oghad this Court was alive to the fact that the investigating agencies cannot be denied their legitimate power to investigate a case properly and on a proper analysis of relevant legal provisions it gave a restricted meaning to the term “to be witness”.** The relevant observations may be quoted: (**KATHI KALU OGHAD's case – AIR – p-1814 – para-10**)

“To be a witness' may be equivalent to 'furnishing evidence' in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body. 'Furnishing evidence' in the latter sense could not have been within the contemplation of the Constitution-makers for the simple reason that – thought they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject – they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions or parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as

⁹ (2012) 11 SCC 321

much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice.”

.....

24. Four of the conclusions drawn by this court, which are relevant for our purpose, could be quoted:

“(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.”

.....

26. In SELVI’s case, 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.

11. In ***DIPANWITA ROY v. RONOBROTO ROY***¹⁰ referring to the earlier expressions in ***BHABANI PRASAD JENA ETC. v. CONVENER, SEC. ORISSA S.COMN.***¹¹, and ***NANDLAL WASUDEO BADWAIK VS. LATA NANDLAL BADWAIK AND ANOTHER***¹², while holding that there is no conflict in the two decisions of this Court, namely, ***GOUTAM KUNDU VS. STATE OF WEST BENGAL***¹³ and ***SHARDA VS. DHARMPAL***¹⁴, it was held that:

“It is borne from the decisions rendered by this Court in BHABANI PRASAD JENA (supra), and NANDLAL WASUDEO BADWAIK (supra), that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination, to determine the veracity of the allegation(s), which constitute one of the grounds, on which the concerned party would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The reason, as already recorded in various judgments by this Court, is that the legitimacy of a child should not be put to peril.”

12. In fact, even from these expressions, even against the will, the DNA test can be ordered to provide sperm, blood or other samples to be extracted from the body of the person for such examination and what is observed to avoid where it can be avoided is, in the

¹⁰ ((2015) 1 SCC 365)

¹¹ (2010) 8 SCC 633

¹² (2014) 2 SCC 576

¹³ (1993) 3 SCC 418

¹⁴ (2003) 4 SCC 493

interest of the child cannot be put to peril and not in considering any direction tantamount to testimonial compulsion of the same.

13. In the latest 3-Judges Bench expression of the Apex Court in ***SUDHIR CHAUDHARY VS. STATE (NCT of Delhi)***¹⁵, it was observed, no doubt from the consent of accused to the voice sampling, that:

“In the submissions which have been urged in these proceedings, learned counsel has specifically stated that the Appellants would abide by the consent which they had furnished to their voice samples being drawn. That being the position, **the only surviving issue for this Court is to ensure that the underlying process for drawing the voice samples is fair and reasonable, having due regard to the mandate of Article 21. On the one hand, it is not open to the accused to dictate the course of investigation.**”

14. From the above, it is clear that the process of collecting samples for conducting tests should be fair and reasonable, having regard to the mandate of Article 21 of the Constitution of India. But, it is not open to the accused to dictate the course of investigation. The conclusion therein is practically from the consent to give voice sample and not against the consent, it's ordering and the expression in ***RITESH SINHA's*** case (supra) not referred therein. However, it is observed that giving of voice sample is not evidence, since it's purpose is only to compare it with the questioned test, since consented to furnish.

15. From the above, covering the scope of admissibility and relevancy of an expert opinion on voice sampling and the same can be obtained from the accused against his will, either during investigation or at post-cognizance stage by the Court or to direct

¹⁵ (2016) 8 SCC 307 (3JB)

the police to so obtain/take either at request of police or other investigating agency or at request of the defacto-complainant or victim of a criminal proceeding, this Court in Crl.P.No.2119 of 2015, dated 23.06.2015, at paras-3 to 5, held as follows:

“3. Though the Eleven Judges Constitutional Bench expression of the Apex Court in **KATHIKALU** (supra) 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 **RAM BABU MISHRA** (supra) relied upon later in **SUKHVINDER SINGH & ORS. v. STATE OF PUNJAB**¹⁶, **AJITH SAVANTH MAJAGAVI v. STATE OF KARNATAKA**¹⁷, **AMRITH SINGH v. STATE OF PUNJAB**¹⁸, **B.MALLESAM v. STATE OF A.P.**¹⁹ No doubt, Section 311-A Cr.P.C is introduced by amended Act 25 of 2005 with effect from 23.06.2006, where under 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** (supra) (and the later expressions relied on it) on the scope of Section

¹⁶ 1994 SCC (Crl.) 1376

¹⁷ (1997) 7 SCC 110

¹⁸ (2006) 12 SCC 79

¹⁹ 1997 (1) ALT (Crl.) AP 719

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** (supra), 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 upon."

16. From the above, coming back to the decision of the 3-Judge Bench of the Apex Court in **SELVI AND OTHERS v. STATE OF KARNATAKA**²⁰, it is clearly observed that --

-- The rule under Article 20(3) of the Constitution of India against the testimonial compulsion, however, does not prohibit collection of material evidence, such as bodily substances and

²⁰ (2010) 7 SCC 263

other physical objects and the statement used for comparison with facts already known to investigators. To ascertain whether the statement is incriminatory, depends upon the use to which it is put. The distinction, whether the statement is inculpatory or exculpatory is to decide at the stage of trial, whereas the Right to remain Silence is available even at the stage of investigation in a criminal case.

In the conclusion para, it was observed:

“In our considered opinion, the compulsory administration of the impugned techniques violates the ‘right against self- incrimination’. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. 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 categorised as material evidence.

We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of ‘substantive due process’ which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases, i.e. the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not feasible in light of the rule of ‘ejusdem generis’ and the considerations which govern the interpretation of statutes in relation to scientific advancements. We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to ‘cruel, inhuman or degrading treatment’ with regard to the language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these

techniques comes into conflict with the 'right to fair trial'. Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the 'right against self-incrimination'.

In light of these conclusions, we hold that no individual should be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntarily administered test results can be admitted, in accordance with Section 27 of the Evidence Act, 1872. The National Human Rights Commission had published 'Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused' in 2000. These guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the 'Narcoanalysis technique' and the 'Brain Electrical Activation Profile' test. The text of these guidelines has been reproduced below:

- (i) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.
- (ii) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.
- (iii) The consent should be recorded before a Judicial Magistrate.
- (iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.
- (v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a 'confessional' statement to the Magistrate but will have the status of a statement made to the police.
- (vi) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.
- (vii) The actual recording of the Lie Detector Test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.
- (viii) A full medical and factual narration of the manner of the information received must be taken on record."

17. From the above, covering the scope of 'Expert Opinion', admissibility and relevancy, now coming to the opinion as to voice sampling can be obtained from the accused against his will, either during investigation or at post-cognizance stage by the Court or to direct police to so obtain/take either at request of police or other investigating agency or at request of defacto-complainant or victim of a criminal proceeding, this Court in Crl.P.No.2119 of 2015, dated 23.06.2015, at para-3, held as follows:

"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."

18. No doubt, in **DIPANWITA ROY** (supra), it was observed at para-18, upholding of the order of the High Court directing for DNA examination by giving liberty to the wife to comply with and if she declines, the allegation would be determined by the Court concerned by drawing a presumption of the nature contemplated by Section 114, particularly from illustration (h) (adverse inference) of the Evidence Act.

19. This decision, no doubt, shows that despite direction, if a party failed to obey the same, the Court is entitled to draw an adverse inference.

20. Thus, asking or directing an accused or suspect and even during investigation to give his/her/ their voice samples is not a testimonial compulsion "to be a witness" in the sense of making any oral or written statements against himself within the meaning of self-incrimination of conveying information based upon the personal knowledge of the person giving the information, but it is only in the larger sense of the expression to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or voice sample or exposing a part of the body by an accused or suspect for purpose of identification; particularly in case of voice samples, its purpose is only to compare them with the disputed ones, which are to be analysed through the available spectrographic technique of voice identification or elimination by means of voice prints by pictorial representation of the acoustical energy output of a speaker, as a function of time, frequency and amplitude, which may either in the presence of a tape recorder or depending on the circumstances, over telephone line to which a recording device has been connected in its submission of any similarity in repeating of sentences that are to be compared, by such mechanical process.

21. It is needless to say that spectrographic test will not fall within the ambit of psychiatric treatment and the principles explained in **SELVI's** case (supra) would not apply to the spectrographic test. It is no doubt to ensure that the underlying

process for drawing the voice samples must be fair and reasonable, having due regard to the mandate of Article 21, which does not mean, it is open to the accused to dictate the course of investigation or terms of the test of voice sample, but for any objection for same words.

22. However, the fact remains that there is no specific and enabling provision in the Code or any other law, which empowers the police or Court to subject the accused/suspect to such test, either from the provisions of the Act of 1920 or Sections 53, 53-A, 54, 311-A Cr.P.C. or Sections 73 and 165 of the Evidence Act, to compel the accused to give his voice sample for the purpose of spectrographic test within the meaning of procedure established by law, for the reason that specimen signatures or handwriting or finger prints or thumb impressions etc., should also include voice samples, nor it comes within such other tests contemplated by any of the provisions and, in particular, from the wording of Section 53 CrPC, apart from the fact that the Legislature, when it introduced Section 311-A Cr.P.C., was well aware of the said difference in the technology of tape recording and taking of voice samples.

23. In fact, in **RITESH SINHA** (supra), among the conflicting opinions of the two Hon'ble Judges, the views expressed by Hon'ble Justice Aftab Alam, which is a later one, after going through the views expressed by Hon'ble Justice R.P.Desai; by assigning reasons to the conclusion are as follows:

“For the reasons discussed above, I am unable to accept the views taken in the Bombay decision and to my mind the decision in Telgi is not the correct enunciation of law.

The Delhi High Court decision in the case of Bisht pertains to the period prior to June 23, 2006, when the amendments made in [the Code](#) of Criminal Procedure by Act 25 of 2005 came into effect. It,

therefore, did not advert to [Sections 53](#) or 311A and considered the issue of taking voice sample of the accused compulsorily, primarily in light of [Section 73](#) of the Indian Evidence Act, 1872. Though the decision does not refer to the provisions [of the Criminal Procedure Code](#) that came into force on June 23, 2006, in my view, it arrives at the correct conclusions.

At this stage, I may also refer to the decision of this Court in [State of Uttar Pradesh v. Ram Babu Misra](#)[34] where the Court considered the issue whether the Magistrate had the authority to direct the accused to give his specimen writing during the course of investigation. The first thing to note in regard to this decision is that it was rendered long before the introduction of [Section 311A](#) in [the Code](#) of Criminal Procedure which now expressly empowers the Magistrate to order a person to give specimen signature or handwriting for the purposes of any investigation or any proceeding under [the Code](#). In Ram Babu Misra the Court noted that signature and writing are excluded from the range of [Section 5](#) of the Identification of Prisoners Act, though finger impression was included therein. In that decision the Court made a suggestion to make a suitable law to provide for the investiture of Magistrates with the power to issue directions to any person, including an accused person, to give specimen signatures and writings. The suggestions made by the Court materialized 25 years later when [Section 311A](#) was introduced in [the Code](#) of Criminal Procedure.

The decision in Ram Babu Misra was rendered by this Court on February 19, 1980 and on August 27, the same year, the Law Commission of India submitted its 87th Report which was aimed at a complete revamp of the [Identification of Prisoners Act](#), 1920 and to update it by including the scientific advances in the aid of investigation. In Paragraph 3.16 of the Report it was observed as under:

“3.16 Often, it becomes desirable to have an accused person speak for the purposes of giving to the police an opportunity to hear his voice and try to identify it as that of the criminal offender ... However, if the accused refuses to furnish such voice, there is no legal sanction for compelling him to do so, and the use of force for that purpose would be illegal.” (emphasis added)

Further, in Paragraph 5.26 it was stated as under:

“5.26 The scope of [section 5](#) needs to be expanded in another respect. The general power of investigation given to the police under [the Criminal Procedure Code](#) may not imply the power to require the accused to furnish a specimen of his voice. Cases in which the voice of the accused was obtained for comparison with the voice of the criminal offender are known but the question whether the accused can be compelled to do so does not seem to have been debated so far in India.

There is no specific statutory provision in India which expressly gives power to a police officer or a court to require an accused person to furnish a specimen of his voice.” (emphasis added)

I am not suggesting for a moment that the above extracts are in any way binding upon the Court but they do indicate the response of a judicial mind while reading the provisions of the [Indian Prisoners Act](#) normally, without any urge to give the expression ‘measurements’ any stretched meaning.

The Report then discussed where a provision for taking voice sample can be appropriately included; whether in the [Identification of Prisoners Act](#) or in the [Evidence Act](#) or in [the Code](#) of Criminal Procedure. It concluded that it would be appropriate to incorporate the provision by amending [Section 5](#) of the Identification of Prisoners Act as follows:

“(1) If a Magistrate is satisfied that, for the purpose of any investigation or proceeding under [the Code](#) of Criminal Procedure, 1973, it is expedient to direct any person –

- a) to allow his measurements or photograph to be taken, or
- b) to furnish a specimen of his signature or writing, or
- c) to furnish a specimen of his voice by uttering the specified words or making the specified sounds.

the Magistrate may make an order to that effect, recording his reasons for such an order.

(2) The person to whom the order relates –

- a) shall be produced or shall attend at the time and place specified in the order, and
 - b) shall allow his measurements or photograph to be taken by a police officer, or furnish the specimen signature or writing or furnish a specimen of his voice, as the case may be in conformity with the orders of the Magistrate before a police officer.
- 3) No order directing any person to be photographed shall be made except by a metropolitan Magistrate or a Magistrate of the first class.
- 4) No order shall be made under [this section](#) unless the person has at some time been arrested in connection with such investigation or proceeding.
- 5) Where a court has taken cognizance of an offence a Magistrate shall not under this section, give to the person accused of the offence any direction which could, under [section 73](#) of the Indian Evidence Act 1872, be given by such Magistrate.”

The Report as noted was submitted in 1980. The [Code of Criminal Procedure](#) was amended in 2005 when the Explanation was added to [Section 53](#) and [Sections 53A](#) and [311A](#) were inserted into [the Code](#). Voice sample was not included either in the Explanation to [Section 53](#) or [Section 311A](#).

Should the Court still insist that voice sample is included in the definition of “measurements” under the [Identification of Prisoners Act](#) and in the Explanation to [Section 53](#) of the Code of Criminal Procedure? I would answer in the negative.

In light of the above discussion, I respectfully differ from the judgment proposed by my sister Desai J. I would allow the appeal and set aside the order passed by the Magistrate and affirmed by the High Court.

Let copies of this judgment be sent to the Union Law Minister and the Attorney General and their attention be drawn to the issue involved in the case.

In view of the difference of opinion between us, let this case be listed for hearing before a bench of three Judges after obtaining the necessary direction from the Honourable the Chief Justice of India.”

24. Having regard to the above and by reiterating the conclusion arrived at by this Court earlier in Crl.P.No.2119 of 2015, dated 23.06.2015, at paras-3 to 5 reproduced above, this Criminal Revision Case is allowed by setting aside the order dated 05.12.2016 in Crl.M.P.No.50 of 2016 in Crime No.7/ACB-CIU-Hyd/2015 passed by the learned I Additional Special Judge for SPE and ACB Cases-cum-V Additional Chief Judge, City Civil Court, Hyderabad, holding that the same is unsustainable and without jurisdiction conferred by law.

25. As a sequel, miscellaneous petitions pending, if any, in this revision shall stand closed.



Dr. JUSTICE B. SIVA SANKARA RAO

20.02.2017.

NOTE: L.R. Copy be marked.
(B/O)
Msr

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

CRIMINAL REVISION CASE No.3208 of 2016



20.02.2017
Msr

