



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

| Reserved on | Pronounced on |
|-------------|---------------|
| 29.01.2018  | 06.02.2018    |

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THE HONOURABLE MR.JUSTICE **P.N.PRAKASH****Crl.R.C. (MD)No.20 of 2018****and****CRL.MP (MD) .No.205 of 2018**Julia alias Uliya : Petitioner/3<sup>rd</sup> Party Witnesses

Vs.

1. State, rep by the Inspector of Police,  
CBI, SCB, Chennai.  
FIR No.RC1(S)/2016.
2. Mose Ministries,  
Rep by its Administrator Jeyam Abraham,  
20C/7, 20/8 Anna Nagar, Subramaniyapuram,  
Trichy.
3. Jeyam Abraham,  
S/o.Thangadurai,  
20C/7, 20/8 Anna Nagar, Subramaniyapuram,  
Trichy.
4. Paster Gideon Jacob,  
Director,  
M/s.Good Shepherd Evangelical Mission Private Limited,  
Anna Nagar, Subramaiyapuram,  
Trichy.

: Respondents/Respondents

PRAYER: Criminal Revision Case is filed under Section 397 r/w 401 of the Criminal Procedure Code praying to set aside order dated 06.12.2017 passed in Cr.M.P.No.2050 of 2017 in RC.1(s)/2016/CBI/SCB/CHENNAI, on the file of the learned Chief Judicial Magistrate, Trichirappalli, against the petitioner.

For Petitioner : Mr.N.Ananthapadmanaban  
for M/s.Suganthi

For Respondent No.1 : Mr.N.Ashok Kumar Gowtham  
Special Public Prosecutor

**O R D E R****\*\*\*\*\***

The factual matrix of the case is as under:-

Public Interest Litigations in W.P.(MD).Nos.16273 and 20895 of 2015 were filed before this Court, alleging that murky activities were going on in M/s.Mose Ministries, an orphanage, at Trichirappalli and a direction should be issued to take appropriate action against the said institution. After several rounds of arguments, a Division Bench of this Court smelt a rat and directed the Central Bureau of Investigation to investigate into the affairs of the said institution, as this Court felt that the children there are being subjected to sexual abuse.

**2.1.** Accordingly, the Central Bureau of Investigation registered a case in RC.1(s)/2016/CBI/SCB/CHENNAI, under Sections 120-B, 361, 368 and 201 IPC, Section 34 r/w 33 and 81 of the Juvenile Justice (Care and Protection of Children) Act, 2000 and Section 20 r/w 6 of the Tamil Nadu Hostels and Homes for Women and Children [Regulation] Act, 2014 against M/s.Mose Ministries. Investigation was taken up by the Deputy Superintendent of Police/CBI, Anti-human Trafficking Wing and during the course of investigation, the offences punishable under Sections 370 and 370-A IPC came to light and therefore, the Central Bureau of Investigation filed an alteration report for adding these two penal provisions in the First Information Report.

**2.2.** During the course of investigation, the CBI seized a Compact Disc Sony CD-R, containing some conversations relating to this case from one B.Manikandan, under a seizure memo dated 04.11.2017 and the same was also submitted to the Court of Chief Judicial Magistrate, Trichirappalli, where the First Information Report is pending. The investigation conducted on the said Compact Disc revealed that there is a conversation pertaining to abuse of an inmate [child] of M/s.Mose Ministries and the conversation was between one Pricilla Jabamalar, K.Jesumanickam @ David and Julia @ Uliya. The Central Bureau of Investigation questioned Pricilla Jabamalar and K.Jesumanickam @ David and they owned up their voice in the compact disk, but whereas, Julia @ Uliya denied her voice.

**2.3.** Under such circumstances, the Central Bureau of Investigation filed an application in Cr.M.P.No.2050 of 2017, before the Court of Chief Judicial Magistrate, Trichirappalli, to record the consent of Pricilla Jabamalar, K.Jesumanickam @ David and Julia @ Uliya for giving voice sample and after recording their consent, issue orders directing them to give voice samples for the purpose of investigation.

**2.4.** On notice, Julia @ Uliya entered appearance and filed her objections contending that she is not willing to provide her voice



sample. After hearing either side, the learned Chief Judicial Magistrate, Trichirappalli, by the impugned order dated 06.12.2017, has directed Julia @ Ulia and two others to give their voice samples, aggrieved by which, Julia @ Ulia is before this Court.

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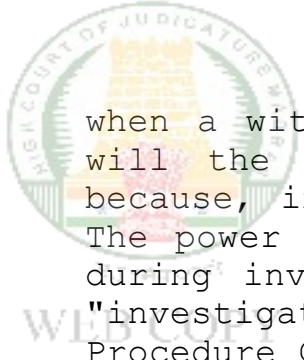
3. Heard Mr.N.Anandapadmanaban, learned counsel appearing for the petitioner and Mr.N.Ashok Kumar Gowtham, learned Special Public Prosecutor appearing for the first respondent.

4. At the outset, Mr.N.Anandapadmanaban, learned counsel, submitted that there is no provision in the Code of Criminal Procedure for compelling a person to give the voice sample and therefore, a person can refuse to give his/her voice sample by taking shelter under Article 20(3) of the Constitution of India. He contended that the Central Bureau of Investigation had not placed before the Trial Court any material to show the manner in which the Compact Disc was obtained. He also contended that it is open to the Central Bureau of Investigation to record the statement under Section 161 of the Code of Criminal Procedure and there is no necessity to obtain the voice sample of the petitioner. He further contended that the content in the Compact Disc is an electronic record and in the absence of any certificate under Section 65-B of the Indian Evidence Act, 1872, no reliance can be placed upon it. He further submitted that Section 311-A of the Code of Criminal Procedure will apply only to the accused, since the proviso to Section 311-A of the Code of Criminal Procedure clearly states that an order can be passed by the Court only in respect of a person, who has been arrested in the case. However, in this case, Julia @ Lulia has not even been shown as an accused and that she was never arrested. Hence, he submitted that the order passed by the Trial Court requires to be set aside.

5. Per contra, Mr.N.Ashok Kumar Gowtham, learned Special Public Prosecutor, placed strong reliance upon a very recent Judgment of this Court in **P.Kishore Vs. State, [2017 (3) MWN (Cr1) 515]** and contended that the order passed by the Trial Court requires to be sustained.

6. This Court gave its anxious consideration to the above submissions made by the learned counsel on either side.

7. The question of giving voice samples has been dealt with in **P.Kishore [supra]** and this Court is in full agreement with the law laid down therein. In **Kishore's** case [supra], this Court has clearly held that an accused cannot claim any right or privilege and refuse to give his voice sample. Thus, when an accused himself has no right or privilege for avoiding to give voice sample, no greater privilege can be conferred to the petitioner, who is after all a witness now. The petitioner cannot be heard to say that only



when a witness graduates to become an accused and gets arrested, will the police officer be permitted to obtain voice sample, because, in that event, every unwilling witness will be in peril. The power of the police officer to take voice sample of a person during investigation is traceable to the definition of the word "investigation" as defined in Section 2(h) of the Criminal Procedure Code, which reads as under:-

"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".

8. Collecting the voice samples cannot be equated to recording the conversation of the accused. The voice sample by itself will not incriminate a person. The voice sample has to be sent along with the recorded conversation to the voice expert for opinion and such an opinion is relevant under Section 45 of the Indian Evidence Act, 1872, as a corroborative piece of evidence. Section 161 of the Code of Criminal Procedure empowers a police officer to record a statement of any person and this has nothing to do with the power of the police officer to obtain blood sample, hair sample, nail sample, voice sample, thumb impression etc. If this power to obtain such material evidences is denied to the police, then, Section 2(h), cited supra, would be rendered otiose and impotent.

9. As regards the submission of Mr.N.Anandapadmanaban, learned counsel, that the police have not shown the place as to where from the Compact Disc was recovered, in the opinion of this Court, that may not be necessary at this stage, because, the Compact Disc is not being admitted as a piece of evidence now. The case is only in the stage of investigation. The question of a certificate under Section 65-B of the Indian Evidence Act, 1872, will come only during trial and will not cover investigatory processes. In fact, in our jurisprudence, illegally collected materials will not become irrelevant and inadmissible in a Court of law, [vide **Pooran Mal Vs. Director of Inspection**, [1974 AIR 348 : 1974 SCR (2) 704].

10. Mr.N.Anandapadmanaban, learned counsel, submitted that there is no power in the Code of Criminal Procedure for the Magistrate to issue a direction to the petitioner to give her voice sample. He further submitted that the prayer sought for by the Central Bureau of Investigation is for a direction to the petitioner to give her consent for giving voice sample appears queer. To appreciate the said submission made by Mr.N.Anandapadmanaban, learned counsel, it may be relevant to extract the following paragraphs from the Judgment of this Court in **Saranya Vs. State** [2016 (6) CTC 503], which are as under:-



"46. What is the source of power for a criminal Court to compel a witness to give his or her blood sample, hair or nail, etc?.

47. In Sharda v. Dharmpal (supra), the Supreme Court has traced the power to Sections 75(e), 151 and Order 26 C.P.C. for a civil Court. For a criminal Court, there is no such specific power.

48. Section 91 Cr.P.C. reads as follows:

"91. Summons to produce document or other thing.- (1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed (a) to affect Sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or (b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority."

49. Section 311 Cr.P.C. reads as follows:

"311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."



50. The following passage from U.T. of Dadra & Nagar Haveli and another v. Fatehsinh Mohansinh Chauhan [(2006) 7 SCC 529], would throw some light on the point of discussion.

"15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice." (emphasis supplied) This paragraph has been affirmed by the Supreme Court in Rajaram Prasad Yadav v. State of Bihar and another [(2013) 14 SCC 461].

51. Except the High Court, no criminal Court has inherent power unlike a civil Court under Section 151 C.P.C. However, a criminal Court, in order to arrive at the truth, is clothed with certain incidental powers/implied powers. This has been recognized by the Supreme Court in Savitri v. Govind Singh Rawat [(1985) 4 SCC 337]. The following passage from the said judgment is apposite.

"6. ....Every court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim "ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest" [Where anything is conceded, there is conceded also anything without which the thing itself cannot exist]. [Vide Earl Jowitt's Dictionary of English Law, 1959 Ed., p.1797] Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something else will be supplied by necessary intendment. Such a construction though it may



not always be admissible in the present case however would advance the object of the legislation under consideration." (emphasis supplied)

52. A similar view has been echoed in *Sakiri Vasu v. State of Uttar Pradesh and others* [(2008) 2 SCC 409] in the following paragraphs:

"17. In our opinion Section 156(3) Cr.P.C. is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an FIR and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156(3) Cr.P.C., though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.

18. It is well settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without social mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary for its execution.

19. The reason for the rule (doctrine of implied power) is quite apparent. Many matters of minor details are omitted from legislation. As Crawford observes in his *Statutory Construction* (3rd Edn., p.267):

".....If these details could not be inserted by implication, the drafting of legislation would be an interminable process and the legislative intent would likely be defeated by a most insignificant omission."

20. In ascertaining a necessary implication, the court simply determines the legislative will and makes it effective. What is necessarily implied is as much part of the statute as if it were specifically written therein."



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53. On a reading of Sections 91 and 311 Cr.P.C. on the touchstone of the principle laid down in Fatehsinh Mohansinh Chauhan's case, Savitri's case and Sakiri Vasu's case, the power of a criminal Court to send a witness for DNA profiling can be traced to Section 91 and the second limb of Section 311 Cr.P.C.

54. The word thing employed in Section 91, Cr.P.C., has a very wide meaning and would take within its fold, blood samples, hair, nail, etc. of a person. Though the literal and strict construction of Section 91 Cr.P.C. may not admit of such an interpretation, yet the Code is only a procedural law and procedure is only a hand maid of justice and not its master. It may be apt to quote the following lines from the Constitution Bench judgment of the Supreme Court in Willie (William) Slaney v. State of Madhya Pradesh [AIR 1956 SC 116]:

"The Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities."

55. From a conspectus of the aforesaid discussion, this Court is of the view that the source of power for a criminal Court to subject a witness and her child to DNA analysis flows from Section 91 read with the second limb of Section 311 Cr.P.C. and Section 45 of the Evidence Act".

11. Thus, in the above case, this Court traced the source of power for a Criminal Court to direct a **witness** to give blood sample, for DNA profiling to Section 91 r/w Section 311 of the Code of Criminal Procedure and Section 45 of the Indian Evidence Act, 1872. What applies to giving of blood sample would equally apply to voice sample too in relation to a witness?. Why should Julia @ Lulia fight shy to give her voice sample. After all the Central Bureau of Investigation is conducting investigation in a serious human trafficking case, pursuant to the direction issued by the Division Bench of this Court, supra. Unless she wants to protect the accused or fears that her involvement in the offence would come out, there is no reason for her to refuse the request of the Central Bureau of Investigation to give her voice sample.



12. In the result, this Criminal Revision Case is devoid of merits and it is, accordingly, dismissed. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS-II)

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Sub Assistant Registrar

To

1. The Chief Judicial Magistrate,  
Tiruchirappalli.
2. The Inspector of Police,  
CBI, SCB, Chennai.
3. The Special Public Prosecutor for CBI cases,  
Madurai Bench of Madras High Court, Madurai.

Copy to:

The Record Keeper,  
Criminal Section,  
Madurai Bench of Madras High Court,  
Madurai. (2 copies)

+ 1 cc TO M/s.Suganthi , Advocate in SR No. 46514

NB

AE/SV MMS/SAR4/14.02.2018/9P/7C

**ORDER MADE IN**  
**Cr1.R.C.(MD)No.20 of 2018**  
**Dated:-06.02.2018**