

* THE HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

CRIMINAL PETITION No.15368 of 2016

%27.11.2018

Between:

Golla Vara Prasad and others

.. Petitioners

And

The State of Andhra Pradesh
Sub. Inspector of Police
Mandavalli Police Station
Mandavalli, Krishna District
Rep. by Public Prosecutor

.. Respondent

Counsel for the Petitioner : Smt. C.Sndhu Kumari

Counsel for respondent No.1 : Public Prosecutor (A.P.)

Counsel for respondent No.2 : Sri P.Ratnam

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? CITATIONS:

1. AIR 1961 SC 1808
2. AIR 1980 SC 791
3. 2013 (2) SCC 357
4. (2010) 7 SCC 263
5. (2016) 8 SCC 307 (3JB)

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO**Criminal Petition No.15368 of 2016****ORDER:**

The petitioners are A1 to A3 in Crime No.94 of 2010 dated 29.10.2013 of Mandavalli Police Station, Krishna District, Andhra Pradesh, registered for the offences punishable under Sections 420, 417, 471 r/w 34 IPC. The crime is registered on the report of respondent No.2 by the police supra.

2. It is during investigation the Sub-Inspector of Police-respondent No.1 representing by the State filed Crl.M.P.No.2470 of 2013 before the learned Judicial First Class Magistrate, Kaikaluru seeking a direction to the accused to appear before the Court and give specimen signatures and thumb impressions along with photographs of A2 & A3 for the purpose of investigation and to send the same to the Handwriting Expert in the interest of justice. A1 to A3 opposed the same and contested. The learned Judicial First Class Magistrate, Kaikaluru passed the order on 29.10.2013 allowing the petition by directing them to appear before the Court on 05.11.2013 and to give their specimen signatures and thumb impressions. A2 & A3 further directed to produce their photographs before the Court for the purpose of sending the same to the Handwriting Expert. The order was passed referring to Section 311-A Cr.P.C. Though it is contended of their signatures at the time of execution of the bail bonds available with Court if at all to send it is observed not a ground to refuse there from

for no prejudice being caused to them and thereby, it is a fit case so to direct A1 to A3 to give specimen signatures and thumb impressions and the photographs of A2 & A3 for further investigation. The impugment in the present petition is on the grounds that the said order is basically untenable and contrary to law and liable to be set aside.

3. In fact, from the very wording of Section 311-A Cr.P.C. that if a Magistrate is satisfied that, for the purpose of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting. The proviso to it further speaks importantly that no order shall be made unless the person has at some time been arrested in connection with such investigation or proceeding. Paragraph No.10 of the order speaks about the contention of the petitioners-respondents before the lower Court as A1 to A3 that their signatures were obtained at the time of taking bonds and they are complying with the conditions in the bail bonds by attending the police station and those are available in the police station. Once such is the case, whether it amounts to arrest in connection with such investigation or proceeding is the issue?

4. Learned counsel for the petitioners placed reliance on the judgment of this Court in Crl.R.C. No.3208 of 2016 dated 20.02.2017 in **Mr. Amit Khetawat v. State of Telangana** where the issue was whether the voice sample of the accused can be compelled to be given for the purpose of further investigation in Crime No.7/ACB-CIU-Hyd/2015 dated 02.12.2015 under the Prevention of Corruption Act, 1988 and IPC offences, so as to enable the Investigating Officer to send the same to the Forensic Science Laboratory, Hyderabad for comparison to determine the voice of A1. The Court referred Sections 53, 53A & 54 r/w Section 2(h), (i) and (y) Cr.P.C. amended from time-to-time and Articles 20 & 21 of the Constitution of India, of which Section 53 deals with examination of arrested accused by medical practitioner at request of the police officer and Section 53A deals with examination of arrested accused of rape case by medical practitioner and Section 54 deals with examination of arrested person by medical officer where there are reasonable grounds to believe that it will afford evidence by examination of his person or reasonably necessary for that purpose and expeditiously or even by private medical practitioner registered if Government Medical Officer not available and particularly in case of female under the supervision of female medical officer or registered private female medical practitioner. It referred the Constitution Bench expression in **State of Bombay v. Kathi Kalu Oghad**¹ in interpreting Article 20 of the Constitution of India which gives protection in respect of conviction

¹ AIR 1961 SC 1808

for offences as to particularly from clause 3 testimonial compulsion to be a witness and also under Article 21 of the Constitution of India on protection of life and personal liberty for the same cannot be deprived except according to the procedure established by law, in interpreting from Article 20(3) what to mention by “to be a witness” in saying same is equivalent to “furnishing evidence”. It is further observed giving of finger impression or specimen signatures or handwriting strictly speaking is not to be a witness for it to mean imparting knowledge in respect of the relevant facts by means or oral or written statements 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 and to be a witness to mean to testify what he has seen or some thing 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. Self incrimination whereby 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. Undisputedly, prior to Section 311-A Cr.P.C. introduced by Cr.P.C. amendment, there was no similar provision either under Cr.P.C. or under the Indian Evidence Act as held by the Apex Court in **State of Uttar Pradesh v. Ram Babu Misra**² that unless there is a proceeding before the Court while taking evidence to direct for Court not entitled to direct the accused to

² AIR 1980 SC 791

subscribe any handwriting or thumb impression or signature for the purpose of further investigation and at the crime stage where no proceedings pending before the Court much less any enquiry or trial as per the wording of Section 73 of the Indian Evidence Act. It is to cure the defect in law Section 311-A Cr.P.C. is incorporated with effect from 23.06.2016. In **Ritesh Sinha v. State of U.P.**³ it is clarified of no provision either in Cr.P.C. or in any other law which empowers the police or criminal Court to subject the accused to the voice sample or frequency and amplitude and spectrographic voice identification in the presence of tape recorder or over telephone line to which a recording device has been connected or even from the provisions of the Identification of Prisoners Act, 1920, Section 53 Cr.P.C. or Sections 73 & 165 of the Evidence Act to compel the accused to give his voice for the said purpose. The two different Judges gave two different opinions of one permissible and the other not permissible. The matter referred to a larger Bench which is pending, but for to say the second opinion of the Judge for no specific wording under the provisions as not permissible is after referring to the conclusion of the other Judge as impliedly permissible. **Kathi Kalu Oghad**'s case (supra 1) was referred therein besides the other subsequent expression of **Selvi v. State of Karnataka**⁴ which deals with Narco-analysis, Polygraph- examination and Brain Electrical Activation Profile it is held as not permissible particularly in saying it

³ 2013 (2) SCC 357

⁴ (2010) 7 SCC 263

causes harm by bodily substance and other physical objects that too in compelling to convey personal knowledge though claimed from said administration of the substance as personal volition disclosure and the compulsory administration of the impugned techniques violates the right against self-incrimination aims to forcible conveyance of personal knowledge even relevant to the facts in issue for further investigation or enquiry. No doubt, the subsequent three Judge Bench expression of the Apex Court in **Sudhir Chaudhary v. State (NCT of Delhi)**⁵ observed regarding voice sampling that the underlying process for drawing the voice samples is fair and reasonable, having due regard to the mandate of Article 21 of the Constitution of India for otherwise not open to the accused to dictate the course of investigation. In fact, **Ritesh Sinha's** case (supra 3) was not even referred in **Sudhir Chaudhary's** case (supra 5). In **Sudhir Chaudhary's** case it was observed giving of voice sample is not evidence, the purpose is only to compare it with the questioned test since consented to furnish and **Kathi Kalu Oghad's** case (supra 1) followed therein.

5. The present issue is not brain mapping or voice sample or medical examination but only subscribing of handwriting and finger prints and photographs. The wording of Section 311-A Cr.P.C. introduced in 2006 by Cr.P.C. amendment from the decision of **Ram Babu Misra** (supra 2) and from the 87th Law Commission report of

⁵ (2016) 8 SCC 307 (3JB)

1980 for such amendment including Sections 3 to 5 of the Identification of Prisoners Act, 1920 to update investigation by including scientific advances and voice identification also to furnish voice of accused, however, in Section 311-A Cr.P.C. voice identification not incorporated, but for what provided is to the limited area of providing for the specimen writings or signatures of the arrested accused. It was the conclusion therefrom arrived by this Court in **Amit Khetavat's** case supra, but for what is provided by Section 311-A Cr.P.C. which not covered voice sampling unless voluntarily furnished as in **Sudhir Chaudhary's** case (supra 5) cannot be compelled.

6. From that needless to repeat Section 311-A Cr.P.C. which provides for judicial satisfaction of the Magistrate is there for the purpose of investigation or proceeding before the Court is expedient to direct any person (which includes accused or witness) to give specimen signature or handwriting. Sections 45 & 73 of the Evidence Act speak from combined reading the handwriting includes the thumb impression. Thus, the same can be extended in saying specimen signatures or handwriting or thumb impressions are covered by Section 311-A Cr.P.C. so to direct provided such direction to give the accused was at same time arrested in connection with such investigation or proceeding.

7. In the case on hand, from the order of the lower Court not in dispute including on the factum of A1 to A3 availed the concession of

bail and executed the bonds, it need not be go into whether it is an anticipatory pre-arrest bail or regular post arrest bail for the reason even the anticipatory bail conditions and the wording of Section 438 speaks release on execution of bond with sureties to be furnished as per the pre-arrest bail order only in the event of arrest. Once availed the bail concession with conditions, there was arrest practically within the meaning of the proviso to Section 311-A Cr.P.C. Once such is the case, the petitioners cannot contend that the case is not covered by the wording of Section 311-A Cr.P.C. and they cannot even contend that the Magistrate cannot direct to give his photographs or specimen handwriting or signatures or thumb impression. Needless to say as observed in **Kathi Kalu Oghad**'s case (supra 1) the Identification of Prisoners Act, 1920 includes taking of specific identifications with photographs and thumb impression in the event of arrest and remanded to judicial custody to prison. There is no material herein as to the accused availed pre-arrest bail to release on arrest without need of remanding to judicial custody to jail and once such is the case, the question of taking the thumb impression and signatures with photos under the Identification of Prisoners Act, 1920 by the jail authorities does not arise in a pre-arrest bail order from release on arrest. Once such is the case, merely because the accused as per the conditions of the bail order were attending the police station and subscribing their signatures or initial, that is not the be all to refuse to submit to the order of the Court to subscribe the thumb impressions and signatures and writing and to give photos. No doubt, giving of photos of the

accused is not specifically covered by any of the provisions of Cr.P.C. and the Evidence Act including from Section 311-A Cr.P.C. so also for voice sample as discussed supra. However, it is covered as concluded supra so far as the thumb impressions, signatures and writing are concerned.

8. Accordingly and in the result, this Criminal Petition is allowed in part by modifying the order in Crl. M.P.No.2470 of 2013 dated 29.10.2013 passed by the learned Judicial Magistrate of First Class, Kaikaluru, by setting aside the direction to give the photos of A2 & A3, but by confirming the direction to subscribe the signatures, writings and thumb impressions of A1 to A3.

Miscellaneous petitions pending, if any, shall stand closed.

27.11.2018
MVA

Note: L.R. Copy to be marked
(B/O)
MVA

Dr. B. SIVA SANKARA RAO, J