

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-39718 of 2022 (O&M)

DECIDED ON: 2nd September, 2022

Swaran Singh

.....PETITIONER

VERSUS

State of Punjab

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE AVNEESH JHINGAN.

Present: Mr. Atul Lakhanpal, Sr. Advocate with
Mr. R.S. Chahal, Advocate for petitioner.

Mr. Arun Luthra, DAG Punjab.

AVNEESH JHINGAN, J

Aggrieved of order dated 14.6.2022 passed by Judge, Special Court SAS Nagar, directing the petitioner to give voice sample, the present petition is filed.

The facts in brief are that the petitioner is facing trial in FIR No.7 dated 8.4.2019, under Section 7 of the Prevention of Corruption Act, 1988, (for short '1988 Act') registered at Police Station Vigilance Bureau, District SAS Nagar, Mohali. The petitioner was posted as SDO, Sub-Division Badali Ala Singh, P.S.P.C.L, District Fatehgarh Sahib. A complaint was filed by Inderjit Singh alleging that bribe of Rs.10,000/- was demanded by the petitioner for transfer of electricity connection of motor. The deal was struck for Rs.8000/-. On complaint, a trap was laid. The petitioner was apprehended red handed. As per the case set up, a voice recorder with memory card was handed over to the complainant for recording the conversation. The petitioner was arrested on 8.4.2019, he remained in remand of Vigilance Department for

challan, the charges were framed. An application was filed by prosecution seeking permission to get voice sample of the petitioner for comparison with audio recording. The application was allowed. Hence, the present petition.

Learned Senior counsel argues that the directions given in the impugned order compels the petitioner to be witness against himself. The argument is that direction for taking voice sample can be given only to Magistrate and not by Special Judge, under 1988 Act. The contention is that there is delay in filing application as no voice sample was taken when the petitioner was in custody. It is further argued that C.D. was prepared using a laptop and memory card of the voice recorder. There is nothing on record to show that the original source has been taken into custody and there is no certification under Section 65-B of The Evidence Act, 1872 (for short 'the Act').

Learned State counsel defends the impugned order.

The contention that direction given by the impugned order is a compulsion for the petitioner to be a witness against himself lacks merit.

As per Article 20(3) of the Constitution of India, “*No person can be compelled to be a witness against himself*”.

The issue raised by learned Senior counsel for the petitioner is no longer *res-integra*.

The Supreme Court in “***Ritesh Sinha vs. State of Uttar Pradesh; 2019 (8) SCC 1***”, held that the directions to take voice sample does not infringe Article 20(3) of the Constitution of India.

The Supreme Court while dealing with the question “*Whether Article 20(3) of the Constitution of India, which protects a person accused of an offence from being compelled to be a witness against himself, extends to*

protecting such an accused from being compelled to give his voice sample during the course of investigation into an offence” considering the earlier decision in **“State of Bombay vs. Kathi Kalu Oghad; AIR 1961 SC 1808,** held:-

“9. Despite unanimity amongst the learned Judges hearing the appeal on the first question on which the learned counsel for the appellant has also not laid much stress it would be appropriate to make the discussions complete to answer the question on the strength of the test laid down by this Court in **State of Bombay v. Kathi Kalu Oghad** (supra). Speaking on behalf of the majority the then learned Chief Justice B.P. Sinha was of the view that the prohibition contemplated by the constitutional provision contained in Article 20(3) would come in only in cases of testimony of an accused which are self-incriminatory or of a character which has the tendency of incriminating the accused himself. The issue in the case was with regard to specimen writings taken from the accused for comparison with other writings in order to determine the culpability of the accused and whether such a course of action was prohibited under Article 20(3) of the Constitution. The following observations of the then Chief Justice B.P. Sinha would be apt for recollection as the same conclusively determines the first question arising. The same, therefore, is extracted below:

"(11).....It is well-established that clause (3) of Article 20 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.....

(12) *In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so.* In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself. A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous, because they are unchangeable; except, in rare cases where the ridges of the fingers or the style of writing have been tampered with. *They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable.* They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside

the limit of 'testimony'.

The issue, Whether compelling to give voice samples infringes Right to Privacy was dealt with in **Ritesh Sinha's case (supra)** and the Supreme Court held:-

*“24. Would a judicial order compelling a person to give a sample of his voice violate the fundamental right to privacy under Article 20 (3) of the Constitution, is the next question. The issue is interesting and debatable but not having been argued before us it will suffice to note that in view of the opinion rendered by this Court in **Modern Dental College and Research Centre and others v. State of Madhya Pradesh and others, 2016(3) S.C.T. 35 : (2016) 7 SCC 353, Gobind v. State of Madhya Pradesh and another, (1975) 2 SCC 148** and the Nine Judge's Bench of this Court in **K.S. Puttaswamy and another v. Union of India and others, 2018(1) RCR (Civil) 398 : (2017) 10 SCC 1** the fundamental right to privacy cannot be construed as absolute and but must bow down to compelling public interest. We refrain from any further discussion and consider it appropriate not to record any further observation on an issue not specifically raised before us.”*

The nine Judges Bench of the Supreme Court in **“Justice K.S. Puttaswamy (Retd.), and Anr vs. Union of India and Ors; 2017 (10) SCC 1,** held that right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 of the Constitution of India. However, right is not an absolute right. The Court had not given exhaustive enumerations covered under right to privacy. Relevant paras are quoted below:

“324. This Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the Rule of Law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to

adapt its content bearing in mind its basic or essential features.

325. Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the threefold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.

326. Privacy has both positive and negative content. The negative content restrains the State from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the State to take all necessary measures to protect the privacy of the individual.”

Voice sample in a sense resemble finger prints and hand writing, each person has a distinctive voice with characteristic features dictated by vocal cavities and articulates. The samples are collected after having permission in accordance with law. The sample taken itself would not be an evidence, it is comparable for the evidence already collected.

The infringement of Fundamental Right to Privacy cannot be raised to create a bubble to scuttle the investigation, nullifying the evidence collected by merely denying that the voice in recording is not of the petitioner and there being no comparables.

With the advancement of technology, the modes of communication are changing. To keep pace with the change, new technology is required to be used for collecting and comparing evidence. One method being recording devices. But voice sample can be taken after compliance of the procedure laid down. It is in this context that taking of voice samples are

necessitated. The samples collected are not evidence in itself.

The contention that only Magistrate can issue direction to give voice sample does not enhance case of petitioner.

The Special Judge under the 1988, Act has dual powers, of a Session Judge and of a Magistrate.

The Supreme Court in ***Bangaru Laxman Versus Sate (through CBI) and another*** 2012(1) RCR (Criminal)108, as under:

"42. Thus, on a harmonious reading of [Section 5\(2\)](#) of the P.C. Act with the provisions of [Section 306](#), specially [Section 306\(2\)\(a\)](#) of the Code and [Section 26](#) of the P.C. Act, this Court is of the opinion that the Special Judge under the [P.C. Act](#), while trying offences, has the dual power of the Session Judge as well as that of a Magistrate. Such a Special Judge conducts the proceedings under the court both prior to the filing of charge sheet as well as after the filing of charge sheet, for holding the trial."

The argument of delay in filing application as no voice sample was taken of the petitioner when he was in custody, is noted to be rejected. Permission from the Court is required for taking voice sample. Non-filing of an application during investigation will not debar the prosecution to make such a prayer at a later stage. The prayer can be allowed by the Court if it is necessary for proper adjudication of the matter.

The contention that the audio recording cannot be relied upon as there is nothing on record to show that original source of recording was handed over to police and is without certification under Section 65-B of the Act, needs no adjudication at this stage.

The voice sample would be comparable for audio recording to show that it is reliable evidence. There is no specific stage provided for furnishing of certificate under Section 65-B of the Act, even if required. The

certificate can be produced at later stage when the audio recording is relied

upon by prosecution as an evidence.

Supreme Court in case of **Arjun Pandit Rao Khotkar Vs. Kailash Kushanrao Gorantyal and others (2020) 7 SCC 1** held that Section 65-B (4) of the Act does not mention the stage of furnishing the certificate. The decision in **State of Karnataka Vs. M.R.. Hiremath 2019 (7) SCC 515** was noted wherein it was held that failure to produce certificate under Section 65-B (4) of the Act at the stage of charge-sheet will not be fatal. The certificate is needed when recording is to be produced in trial as evidence. Relevant paras are quoted below:-

“50. We may hasten to add that Section 65B does not speak of the stage at which such certificate must be furnished to the Court. In Anvar P.V. (supra), this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the concerned person, the Judge conducting the trial must summon the person/persons referred to in Section 65B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the Cr.P.C.

51. In a recent judgment, a Division Bench of this Court in State of Karnataka v. M.R. Hiremath (2019) 7 SCC 515 : 2019(3) RCR (Criminal) 144, after referring to Anvar P.V.(supra) held:

"16. The same view has been reiterated by a two-Judge Bench of this Court in Union of India v. Ravindra V. Desai [(2018) 16 SCC 273 : 2018(2) S.C.T. 648]. The Court emphasised that non-production of a certificate under Section 65B on an earlier occasion is a curable defect. The Court relied upon the earlier decision in Sonu v. State of Haryana [(2017) 8 SCC 570], in which it was held:

"32. ... The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to

the present case, if an objection was taken to the CDRs being marked without a certificate, the court could have given the prosecution an opportunity to rectify the deficiency."

17. Having regard to the above principle of law, the High Court erred in coming to the conclusion that the failure to produce a certificate under Section 65B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise."

52. It is pertinent to recollect that the stage of admitting documentary evidence in a criminal trial is the filing of the charge-sheet. When a criminal court summons the accused to stand trial, copies of all documents which are entered in the charge-sheet/final report have to be given to the accused. section 207 of the CrPC, 1973 which reads as follows, is mandatory. Therefore, the electronic evidence, i.e. The computer output, has to be furnished at the latest before the trial begins. The reason is not far to seek; this gives the accused a fair chance to prepare and defend the charges levelled against him during the trial. The general principle in criminal proceedings therefore, is to supply to the accused all documents that the prosecution seeks to rely upon before the commencement of the trial. The requirement of such full disclosure is an extremely valuable right and an essential feature of the right to a fair trial as it enables the accused to prepare for the trial before its commencement."

53. In a criminal trial, it is assumed that the investigation is completed and the prosecution has, as such, concretised its case against an accused before commencement of the trial. It is further settled law that the prosecution ought not to be allowed to fill up any lacunae during a trial. As recognised by this Court in Central Bureau of Investigation v. R.S. Pai (2002) 5 SCC 82 : 2002(2) RCR (Criminal) 536, the only exception to this general rule is if the prosecution had 'mistakenly' not filed a document, the said document can be allowed to be placed on record. The Court held as follows:

"7. From the aforesaid sub-sections, it is apparent that normally, the investigating officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is

always open to the investigating officer to produce the same with the permission of the court."

54. *Therefore, in terms of general procedure, the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before commencement of the trial. Thus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in respect of the rights of parties has to be carried out by the court, in examining any application by the prosecution under sections 91 or 311 of the CrPC, 1973 or Section 165 of the Evidence Act. Depending on the facts of each case, and the Court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, the Court may in appropriate cases allow the prosecution to produce such certificate at a later point in time. If it is the accused who desires to produce the requisite certificate as part of his defence, this again will depend upon the justice of the case - discretion to be exercised by the Court in accordance with law.*

55. *The High Court of Rajasthan in Paras Jain v. State of Rajasthan 2015 SCC Online Raj 8331, decided a preliminary objection that was raised on the applicability of Section 65B to the facts of the case. The preliminary objection raised was framed as follows:*

"3. (i) Whether transcriptions of conversations and for that matter CDs of the same filed alongwith the chargesheet are not admissible in evidence even at this stage of the proceedings as certificate as required under Section 65-B of the Evidence Act was not obtained at the time of procurement of said CDs from the concerned service provider and it was not produced alongwith chargesheet in the prescribed form and such certificate cannot be filed subsequently."

After referring to Anvar P.V. (supra), the High Court held:

"15. Although, it has been observed by Hon'ble Supreme Court that the requisite certificate must accompany the electronic record pertaining to which a statement is sought to be given in evidence when the same is produced in evidence, but in my view it does not mean that it must be produced alongwith the charge-sheet and if it is not produced alongwith the charge-sheet, doors of the Court are completely shut and it cannot be produced subsequently in any circumstance. Section 65B of the Evidence Act deals with admissibility of secondary

evidence in the form of electronic record and the procedure to be followed and the requirements be fulfilled before such an evidence can be held to be admissible in evidence and not with the stage at which such a certificate is to be produced before the Court One of the principal issues arising for consideration in the above case before Hon'ble Court was the nature and manner of admission of electronic records.

Xxx xxxx xxxx xxxx

23. When legal position is that additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the Court production of it is essential for the proper disposal of the case, how it can be held that the certificate as required under Section 65B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured alongwith the electronic record and not produced in the Court with the charge-sheet. In my opinion it is only an irregularity not going to the root of the matter and is curable. It is also pertinent to note that certificate was produced alongwith the charge-sheet but it was not in a proper form but during the course of hearing these petitioners, it has been produced on the prescribed form.”

56. In Kundan Singh (supra), a Division Bench of the Delhi High Court held:

"50. Anwar P.V. (supra) partly overruled the earlier decision of the Supreme Court on the procedure to prove electronic record(s) in Navjot Sandhu (supra), holding that Section 65B is a specific provision relating to the admissibility of electronic record(s) and, therefore, production of a certificate under Section 65B(4) is mandatory. Anwar P.V. (supra) does not state or hold that the said certificate cannot be produced in exercise of powers of the trial court under Section 311 Cr.P.C., 1973 or, at the appellate stage under Section 391 Cr.P.C., 1973 Evidence Act is a procedural law and in view of the pronouncement in Anwar P.V. (supra) partly overruling Navjot Sandhu (supra), the prosecution may be entitled to invoke the aforementioned provisions, when justified and required. Of course, it is open to the court/presiding officer at that time to ascertain and verify whether the responsible officer could issue the said certificate and

meet the requirements of Section 65B."
57. Subject to the caveat laid down in paragraphs 50 and 54 above, the law laid down by these two High Courts has our concurrence. So long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the learned Judge at any stage, so that information contained in electronic record form can then be admitted, and relied upon in evidence."
(...empahsis)

The relevancy of the recording would be determined only after comparison of voice sample, the requirement of certification under Section 65-B of the Act would arise thereafter.

The petition is dismissed being devoid of merit.

Since the main case has been dismissed, the pending application, if any is rendered infructuous.

2nd September, 2022
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(AVNEESH JHINGAN)
JUDGE

Whether speaking/reasoned *Yes*
Whether reportable *yes*