



* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment reserved on: 29th November, 2023*
Judgment delivered on: 7th December, 2023

+ **CRL.M.C. 1534/2018**

SANJIV KUMAR

..... Petitioner

Through: Mr. Vaibhav Sharma and Ms. Urvashi
Sharma, Advocates.

versus

THE STATE GOVT OF NCT OF DELHI

..... Respondent

Through: Mr. Ritesh Kumar Bahri, APP for
State.
SI Vikrant, PS ARSC, Crime Branch.

CORAM:

HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT

AMIT BANSAL, J.

1. The present petition has been filed under Section 482 of the Code of Criminal Procedure, 1973 (CrPC) impugning (i) the order dated 1st May, 2015 passed by the learned Magistrate, whereby the application filed on behalf of the prosecution for taking voice samples of the petitioner has been allowed and (ii) the order dated 5th May, 2017 passed by learned ASJ, whereby the appeal/revision filed by the petitioner against the aforesaid order of the learned Magistrate has been dismissed.
2. Notice in the present matter was issued *vide* order dated 23rd March, 2018 passed by the predecessor Bench. While issuing notice, the operation

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of the order dated 1st May, 2015, passed by the learned Magistrate was stayed and the aforesaid stay has continued till date.

3. Brief facts leading to the filing of the present petition are set out below:-

3.1. The present FIR No. 59/2015 under Section 120B of the Indian Penal Code, 1860 (IPC) and Sections 25/54/59 of the Arms Act, 1959 was registered against the petitioner on the basis of a 'technical surveillance', whereby the phone of the petitioner was intercepted. On the basis of the aforesaid FIR, the petitioner was arrested, along with the other co-accused persons. Subsequently, bail was granted to the petitioner.

3.2. During the proceedings before the Trial Court, the prosecution moved an application for taking voice samples of the petitioner which was allowed by the learned Magistrate *vide* the impugned order dated 1st May, 2015.

3.3. The appeal filed on behalf of the petitioner against the said order was dismissed by the learned ASJ *vide* order dated 5th May, 2017.

4. The aforesaid orders have been challenged by the petitioner in the present petition.

5. In the Status Report filed on behalf of the State, it is stated that through a 'technical surveillance' it came to light that the petitioner hatched a criminal conspiracy to murder one person named Tikka. In this regard, the petitioner contacted one Shaukat Pasha, who was a gangster lodged in the Central Tihar Jail at that point of time. The petitioner and Shaukat Pasha hired some contract killers including Asad, Aftab and Tofeek towards executing the aforesaid conspiracy.

6. Four accused persons being the petitioner, Shaukat Pasha, Mannan, and Tofeek were arrested. Subsequently they were granted bail. On 26th

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November, 2016, accused Shaukat Pasha was killed in an encounter with the Uttar Pradesh Police.

7. The voice samples of the accused persons, Shaukat Pasha and Tofeek, were obtained by the respondent. However, the voice samples of the petitioner could not be obtained due to the stay order passed in the present petition.

8. Counsel appearing on behalf of the petitioner has made the following submissions:-

- I. In the present case, the 'technical surveillance' carried out by the respondent was not in accordance with relevant provisions of The Indian Telegraph Act, 1885 (Telegraph Act). In this regard, he places reliance on the judgment of the Supreme Court in *People's Union for Civil Liberties (PUCL) v. Union of India*, (1997) 1 SCC 301, as well as the judgment of a Coordinate Bench of this Court in CRL.M.C. 3118/2012 titled *Jitender Pal Singh v. Central Bureau of Investigation*.
 - II. Counsel for the petitioner further submits that the judgment of the Supreme Court in *Ritesh Sinha v. State of Uttar Pradesh and Anr.*, (2019) 8 SCC 1, relied by the respondent should be disregarded by this Court as the direction passed in the said judgment are in the nature of legislating. Further, the judgment of the Supreme Court in *PUCL* (supra) has not been considered in the aforesaid judgment.
9. *Per contra*, the learned APP appearing on behalf of the State has made the following submissions: -
- I. The prosecution has the power to obtain voice samples of the petitioner for the purposes of investigation. Reliance is placed on the

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judgment of the Supreme Court in **Ritesh Sinha** (supra) and the judgment of the Madras High Court in CRL.R.C.(MD) No.20/2018 titled **Julia alias Uliya v. State & Anr.**.

- II. It is further submitted that the phone of the petitioner was intercepted in compliance with the provisions of the Telegraph Act. In this regard, the learned APP has shown to the Court a communication dated 22nd April, 2015 from the Office of the Additional Commissioner of Police, Crime, Delhi regarding interception of telephones. Learned APP submits that the aforesaid communication cannot be shared with the petitioner as it mentions the telephone numbers of other persons and hence would violate the privacy of the said persons.
- III. In view of the fact that the interception has been done in accordance with provisions of the Telegraph Act, the judgment of the Supreme Court in **PUCL** (supra) as well as the judgment of the Coordinate Bench in **Jitender Pal Singh** (supra) are not applicable.
- IV. It is submitted that no prejudice will be caused to the petitioner if he is asked to give the voice samples as it would be open for the petitioner to take all objections with regard to legality of the telephone interception at the stage of trial.
10. After hearing the submissions of the parties, the judgment was reserved on 29th November, 2023 and the learned APP was directed to file the documents showing compliance with Section 5(2) of the Telegraph Act with regard to interception of the phone of the petitioner in a sealed cover.
11. I have heard the rival submissions and perused the material on record.
12. At the outset, reference may be made to the observations of the Supreme Court in **Ritesh Sinha** (supra):-

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“10. We may now proceed to answer the second question, namely, whether in the absence of any specific provision in CrPC would a court be competent to authorise the investigating agency to record the voice sample of a person accused of an offence. We are told that no authoritative pronouncement of this Court has been rendered by this Court.

11. Medical examination of an accused for the purposes of effective investigation of a criminal charge has received a wider meaning by the amendment to the Explanation to Section 53 CrPC made by Act 25 of 2005 with effect from 23-6-2006. Similarly, Section 53-A has been inserted by the same amending Act (25 of 2005) to provide for examination of a person accused of rape. Likewise, by insertion of Section 311-A by the same amending Act (25 of 2005) a Magistrate has been empowered to order any person, including an accused person, to give specimen signatures or handwriting for the purposes of any investigation or proceeding under CrPC.

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26. 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 & Research Centre v. State of M.P. [Modern Dental College & Research Centre v. State of M.P., (2016) 7 SCC 353 : 7 SCEC 1], Gobind v. State of M.P. [Gobind v. State of M.P., (1975) 2 SCC 148 : 1975 SCC (Cri) 468] and the nine-Judge Bench of this Court in K.S. Puttaswamy (Privacy-9J.) v. Union of India [K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1] the fundamental right to privacy cannot be construed as absolute 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.

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27. In the light of the above discussions, we unhesitatingly take the view that until explicit provisions are engrafted in the Code of Criminal Procedure by Parliament, a Judicial Magistrate must be conceded the power to order a person to give a sample of his voice for the purpose of investigation of a crime. Such power has to be conferred on a Magistrate by a process of judicial interpretation and in exercise of jurisdiction vested in this Court under Article 142 of the Constitution of India. We order accordingly and consequently dispose of the appeals in terms of the above.”

13. As noted above, the exact issue before the Supreme Court in ***Ritesh Sinha*** (supra) was whether a Court can authorize the investigating agency to record the voice samples of a person accused of an offence. The Supreme Court took note of the Explanation to Section 53 of the CrPC as amended with effect from 23rd June, 2006 and Section 53A and Section 311A of the CrPC brought into effect from the same date, which permit the examination of the persons arrested in certain cases/circumstances. The Supreme Court also observed that the fundamental right to privacy is subject to public interest, and therefore, not absolute. Accordingly, in exercise of its jurisdiction under Article 142 of the Constitution of India, the Supreme Court held that till exclusive provisions are made in the CrPC by the Parliament, the Magistrate would have the power to order a person to give his voice samples for the purposes of investigation of a crime.

14. Counsel for the petitioner submits that the aforesaid observations of the Supreme Court are in the nature of legislation and therefore, the same are not binding on this Court. He further submits that since the aforesaid judgment does not take note of the earlier judgment of the Supreme Court in ***PUCL*** (supra), the judgment in ***Ritesh Sinha*** (supra) is *per incuria*.

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15. The aforesaid submission made on behalf of the petitioner is liable to be rejected outrightly. It is a settled proposition of law that the Supreme Court has the power to lay down guidelines/directions where there is a legislative vacuum till the time the legislature enacts a law. Reliance is placed on the judgments of the Supreme Court in ***Dr. Ashwani Kumar v. Union of India***, (2020) 13 SCC 585, and ***Vishaka & Ors. v. State of Rajasthan & Ors.***, (1997) 6 SCC 241. This is exactly what has been done by the Supreme Court in ***Ritesh Sinha*** (supra). It needs no elaboration that the law declared by the Supreme Court under Article 141 of the Constitution of India is binding on all Courts in India, including this Court.

16. In fact, the aforesaid observations of the Supreme Court in ***Ritesh Sinha*** (supra) have been followed by the Supreme Court itself in the order dated 15th May, 2023, passed in SLP (CRL.) 4693/2023 titled ***Pravinsinh Nrupatisinh Chauhan v. State of Gujarat***. Relying upon the observations in ***Ritesh Sinha*** (supra), the Supreme Court upheld the orders of the Gujarat High Court as well as the Special Court ordering the accused therein to give his voice samples to facilitate investigation of the crime.

17. Learned APP has also correctly placed reliance on the judgment of the Madras High Court in ***Julia alias Uliya*** (supra), whereby the order of the Magistrate directing the accused persons to give their voice samples was upheld. The relevant observations of the Madras High Court are set out below: -

“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

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*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”.

18. Counsel for the petitioner has placed reliance on the judgment of the Coordinate Bench in **Jitender Pal Singh** (supra) where relying upon the judgment of the Supreme Court in **PUCL** (supra), the Coordinate Bench had quashed the order of the Trial Court framing charges against the petitioner therein *inter alia* on the ground that calls in that case were not intercepted in accordance with the provisions of the Telegraph Act and the Rules framed thereunder. The relevant observations of the Coordinate Bench are set out below: -

“58. This Court is of the view that as per Section 5 (2) of the Telegraph Act, an order for interception can be issued on either the occurrence of any public emergency or in the interest of the public safety as per the law laid down by the Hon’ble Supreme Court in the case of PUCL (Supra). After the perusal of the records, this Court is satisfied that in peculiar facts of the instant case, the mandatory requirements laid down by law for placing reliance on such audio conversations, have not been fulfilled. It is an admitted position that Rule 419(A)(17) which provides for destruction of intercepted

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message also adopt the said directions. The court below while passing the impugned orders has also ignored the settled legal positions and directions of the Hon'ble Supreme Court.”

19. At the outset, it may be stated that in **Jitender Pal Singh** (supra) the issue with regard to interception of the calls was considered by the Trial Court at the stage of order on charge. The present case is still at the stage of investigation and charges are yet to be framed. Further, in the present case, the learned APP has produced the permission obtained by the prosecution from the competent authority in terms of Section 5(2) of the Telegraph Act to intercept the number of the accused.

20. Counsel for the petitioner submits that the aforesaid authorisation has not been shared with the petitioner and therefore, no reliance can be placed on them.

21. In this regard, the learned APP has correctly placed reliance on Section 173(6) of the CrPC which states that if the police officer is of the opinion that disclosure of certain statements to the accused are not essential in the interest of justice and inexpedient in the public interest, copies of such statements may not be provided to the accused. I have perused the aforesaid communication which has been filed by the learned APP in a sealed cover. The aforesaid communication notes that authorisation by the competent authority has been given for interception of the phone of the petitioner. However, since the aforesaid communication also provides authorisation for interception of telephone numbers of other persons, sharing of this communication with the petitioner would amount to violation of the privacy of the aforesaid persons. Therefore, in my opinion, the prosecution has correctly claimed privilege with regard to the said communication.

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22. On a *prima facie* view, this Court is satisfied that the prosecution has complied with the provisions of the Telegraph Act and obtained the necessary authorization to intercept the phone of the petitioner. Therefore, the judgments in *PUCL* (supra) and *Jitender Pal Singh* (supra) will not be applicable in the present case.

23. In any event, it would be open for the petitioner to take an objection with regard to non-compliance of the statutory provisions for interception of telephone calls of the petitioner at an appropriate stage or at the time of trial. Therefore, no prejudice would be caused to the petitioner if the petitioner is directed to give his voice samples at this stage.

24. In view of the legal position as discussed above, there is no infirmity in the impugned orders directing the petitioner to give his voice samples.

25. There is no merit in the present petition and the same is dismissed.

AMIT BANSAL, J.

DECEMBER 7, 2023

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