

115 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRR-677-2021
DECIDED ON: 9th JULY, 2021

KAMAL PAL AND ANOTHER

.....PETITIONERS

VERSUS

STATE OF PUNJAB

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE AVNEESH JHINGAN.

Present: Mr. Manbir Singh Batth, Advocate for the petitioners.

Ms. Monika Jalota, DAG, Punjab.

AVNEESH JHINGAN, J

[1] The matter is taken up for hearing through video conference due to COVID-19 situation.

[2] Aggrieved of the order dated 27th April, 2021 of the learned Additional Sessions Judge, SBS Nagar allowing the application of the Vigilance Bureau for taking voice samples of the petitioners, the present revision petition is filed.

[3] The facts in brief are that Vigilance Bureau, Punjab received an information of money being extorted from local public at Tehsil Banga for getting the sale deeds registered. The information was that the petitioners (both typist at Tehsil Banga Complex) were collecting money for getting the sale deeds registered from the Tehsildar and other revenue officials of the revenue department. After taking approval, the mobile used by the petitioners were tapped. From the transcripts of various dates

finding sufficient evidence the FIR was registered.

[4] During the proceedings, an application was filed by the Vigilance Bureau for permission to take voice samples of the petitioners. The application was allowed, hence, the present petition.

[5] Learned counsel for the petitioners argues that the impugned order is in violation of Article 20(3) of the Constitution of India and infringes the right of privacy. The contention is that in Section 53 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.),' there is no power to order taking of voice samples.

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

[7] The issues raised by counsel for the petitioners are no longer *res-integra*.

[8] 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.

[9] 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'.

[10] Whether compelling to give voice samples infringes Right to Privacy was an issue dealt 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.”*

[11] 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**

I, 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."

[12] 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, rather they are for comparing the evidence already collected.

[13] The Law Commission of India in its 87th report dealt with the issue, same was taken notice by the Supreme Court in ***Ritesh Sinha's case*** (Supra). The extract are quoted:-

"13. A voice print is a visual recording of voice. It mainly depends on the position of "formants". These are concentrates of sound energy at a given frequency. It is stated that their position in the "frequency domain" is unique to each speaker. Voice prints resemble finger prints, in that each person has a distinctive voice with characteristic features dictated by vocal cavities and articulates.

Voice-print Identification seems to have a number of practical uses. In England, in November 1967, at the Winchester Magistrate's Court, a man was accused of making malicious telephone calls. Voice-print Identification (spectrograph) was used and the accused was found guilty."

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"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. A comparison may even be desired between the voice of an accused person and the recorded voice of a criminal which has been obtained by, say, telephone tapping. To facilitate proof of the crime the police may like that the accused should be compelled to speak,- and even that his voice as recorded may be converted into a "voice print"

.....

 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."

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"The scope of Section 5 needs to be expanded in another aspect. 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."

[14] 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 of the tapped phone calls is not of the petitioners and there being no comparables.

[15] 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 tapping of communication devices but after compliance of the procedure laid down. It is in that context that taking of voice samples are necessitated. The samples collected are not evidence in itself, rather are tools to identify the voice recording collected as evidence.

[16] The issue raised by learned counsel for the petitioners that Section 53 Cr.P.C. does not empower for directing the taking of voice samples was the second question dealt by the Supreme Court in *Ritesh Sinha's case (supra)*.

[17] The question considered was "Assuming that there is no violation of Article 20(3) of the Constitution of India, whether in the absence of any provision in the Code, can a Magistrate authorize the investigating agency to record the voice sample of the person accused of an offence?"

[18] The Supreme Court in exercising the powers under Article 142 of the Constitution of India till there is a specific provision in the Cr.P.C. for taking voice samples conceded powers to the Judicial Magistrate to order giving of voice samples. The relevant portion is quoted below:-

"25. 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 the appeals in terms of the above.

[19] In view of above discussion, the contentions raised by learned counsel for the petitioners are rejected. Impugned order is upheld.

[20] The petition is dismissed.

(AVNEESH JHINGAN)
JUDGE

9th JULY, 2021

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Whether speaking/reasoned Yes
Whether reportable Yes



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