In the court of Shri Naresh Kumar Laka
Special Judge (PC Act), CBI-20,
Rouse Avenue District Courts, New Delhi

CBI- 31/2021
FIR No. RC-DAI-2020-A-0026/CBI/ACB/ND
CNR No. DLCT11-000233-2021

In the matter of:

Central Bureau of Investigation

.....Applicant

vs.

Mahesh Kumar Sharma & Anrs.

.....Respondent/Accused

O R D ER

In the instant application, a very interesting question arose on the point of power of investigating agency (Police) to seek password (user ID) of the computer system seized from the accused along with password of a Tally Software which was being used by the accused in the said computer system. Notice of the said application was served upon the accused and a reply was filed opposing the present application. I have heard arguments at length from Sh. Pramod Singh, Ld. PP for CBI and Sh. Aditya Wadhwa, Ld. Counsel for the accused.

2. Detailing of entire facts of the present case are

not necessary and it is suffice to state that during the course of investigation, a computer system was seized by the CBI from the custody of accused and when it was sent to CFSL agencies, the data of the said computer system could not be obtained for want of password and user ID. Accordingly, present application has been filed seeking a direction to the accused to provide the same.

3. Ld. PP for CBI submitted that such direction can be given to the accused as he was released on bail on the condition that he will cooperate in the investigation as and when required and there is no violation of any right of the accused in this regard as the said information has been sought for a fair investigation. In this regard, he heavily relied on the judgment of the Hon'ble Karnataka High Court, namely, **Virendra Khanna vs. State of Karnataka, decided on 12.03.2021 in W.P. No. 11759 of 2020** where it has been held that investigating agency has a right to seek password and biometrics from an accused for accessing/opening his computer system and mobile phone which was/were seized during investigation and no constitutional right of the accused violates.

4. However, the Ld. Counsel for accused raised various objections on the maintainability of the present application on the following grounds:

(i) The present application has been filed without indicating any specific provision of law and this court has no inherent power to give any such direction and there is no specific provision under law which enables IO or this court to pass a direction.

(ii) The Section 91 of Cr. P.C cannot be invoked by the IO or this court as it does not apply to an 'accused' in view of various judgments of the Superior Courts.

(iii) The accused has a right to maintain silence as per Article 20(3) of the Constitution of India as well as Section 161 (2) Cr.P.C. and, therefore, accused cannot be compelled to give his password which will tantamount giving of self-incriminating testimony.

(iv) The Judgment passed in Virendra Khanna vs. State of Karnataka by the Hon'ble High Court of Karnataka as relied by prosecution is not binding on this court on account of territorial limitation and even otherwise it is a judgment per incuriam.

(v) The said computer system may contain private data of accused and if it is revealed to the investigating agency, it may interfere into the right of privacy of the accused.

(vi) If accused refuses to provide such information, no adverse inference can be drawn against him.

5. In support of the aforesaid objections, the Ld. Counsel for the accused relied on the following case

laws/precedents:

1) ‘King Emperor vs. Khwaja Nazir Ahmed, ILR 26 Lah 1 (Pricy Council)’
2) ‘S.N. Sharma vs. Bipen Kumar Tiwari & Ors.’, (1970) 1 SCC 653
3) ‘Sakiri Vasu vs. State of Up & Ors’. (2008) 2 SCC 409
4) ‘Dharmeshbhasi Vasudevbhai & Ors. v. State of Gujarat & ors.’, (2009) 6 SCC 576
5) ‘Balachandran vs. State of Kerala’, 2009 SCC Online Ker 6544
6) ‘Nandini Satpathy v. P.L. Dani & Anr.’, (1978) 2 SCC 424 (3JB)
7) Proceedings of the ‘Indian Legislate Council, Vol. 59(27 August, 1920)
8) Law Commission of India, 87th Report on Identification of Prisoners Act, 1920 (1980)
9) ‘Ram Sunder v. State of U.P.’, 1997 SCC Online All 241
10) ‘State of Bombay vs. Kathi Kalu Oghad’, (1962) 3SCR 10 (11 JB)
11) ‘Smt. Selvi vs. State of Karnataka’ (2010) 7 SCC 263
12) ‘State of Uttar Pradesh v. Ram babu Mishra’, (1980) 2 SCC 343
13) ‘Ritesh Sinha vs. State of Uttar Pradesh & Anr.’, (2019) 8 SCC 1 (3 JB)
14) ‘State of Punjab & Ors. vs. Surinder Kumar & Ors.’ (1992) 1 SCC 489 (3JB)
15) ‘State of U.P. & Anr. vs. Johari Mal’, (2004) 4 SCC 714
16) ‘Anil Kumar Jain vs. maya Jain’, (2009) 10 SCC 41
17) ‘State of Gujarat vs. Shyamlal Mohanlal Choksi’, (1965) 2 SCR 457 (5JB)
18) ‘M.P. Sharma vs. Satish Chandra’, 1954 SCR 1077

19) ‘V.S. Kuttan Pillai vs. Ramakrishanan & Anr.’, (1980) 1 SCC 264
20) ‘K.S. Puttaswamy vs. Union of India’ (2017) 10 SCC 1 (9 JB)
21) ‘State of M.P. vs. Ramesh’, (2011) 4 SCC 786
22) ‘Amrit Singh vs. State of Punjab’ (2006) 12 SCC 79
23) ‘Official Liquidator vs. Dayanand & ors.’, (2008) 10 SCC 1
24) ‘R. Thiruvirkolam vs. Presiding Officer & Anr.’ (1997) 1 SCC 9
25) ‘V. Kishan Rao vs. Nikhil Super Specialty Hospital & Anr.

6. On the other hand, Ld. PP for CBI relied on the following cases:

1) Virendra Khanna vs. State of Karnataka, WP No. 11759/2020, Hon’ble High Court of Karnataka
2) ‘P. Gopalakrishanan Alia Dileep vs. State of Kerala’, Crime No. 6/2022 dated 29.01.2022
3) Ajay Bhardwaj vs. Union of India & ors. IA No. 82439/2020, Hon’ble Supreme Court of India

Reasons for decision

7. Before considering the merits of the present application, it is important to know the historical background and the statutory provisions relating to powers of the investigating agency (including this court) to seek such information from an accused and the right of the accused to maintain silence or to refuse to provide such information to the IO or whether he can be compelled by

the IO or this court to give such information.

8. From perusal of large number of cases as cited by the Ld. Counsel for the accused and the cases cited by Ld. PP for CBI, this court finds that the detailed historical background of the aforesaid rival rights of the State (Police Agency) and the individual accused has been articulated by the three Judges Bench of Hon'ble Justices Shri **K.G. Balakrishnan, R.V. Raveendran, J.M. Panchal** of the Supreme Court of India in the case of **Selvi v. State of Karnataka, (2010) 7 SCC 263.** In the said case, the issue of narco-analysis/lie detection test of the accused (with or without consent) was dealt with. The relevant observations elucidating the principles of law are reproduced as under:

Historical Background & Observations

> **"87.** The interrelationship between the "right against self-incrimination" and the "right to fair trial" has been recognised in most jurisdictions as well as international human rights instruments. For example, the US Constitution incorporates the "privilege against self-incrimination" in the text of its Fifth Amendment. The meaning and scope of this privilege has been judicially moulded by recognising its interrelationship with other constitutional rights such as the protection against "unreasonable search and seizure" (Fourth Amendment) and the guarantee of "due process of law" (Fourteenth Amendment). In the International Covenant on Civil and Political Rights, 1966, Article 14(3)(*g*) enumerates the minimum guarantees that are to be accorded during a trial and states that everyone has a right not to be compelled to testify against himself or to confess guilt. In the European Convention for the Protection of Human

Rights and Fundamental Freedoms, 1950, Article 6(1) states that every person charged with an offence has a right to a fair trial and Article 6(2) provides that “everybody charged with a criminal offence shall be presumed innocent until proved guilty according to law”. The guarantee of “presumption of innocence” bears a direct link to the “right against self-incrimination” since compelling the accused person to testify would place the burden of proving innocence on the accused instead of requiring the prosecution to prove guilt.

90. Undoubtedly, Article 20(3) has an exalted status in our Constitution and questions about its meaning and scope deserve thorough scrutiny. In one of the impugned judgments, it was reasoned that all citizens have an obligation to cooperate with ongoing investigations. For instance reliance has been placed on Section 39 CrPC which places a duty on citizens to inform the nearest Magistrate or police officer if they are aware of the commission of, or of the intention of any other person to commit the crimes enumerated in the section. Attention has also been drawn to the language of Section 156(1) CrPC which states that a police officer in charge of a police station is empowered to investigate cognizable offences even without an order from the jurisdictional Magistrate. Likewise, our attention was drawn to Section 161(1) CrPC which empowers the police officer investigating a case to orally examine any person who is supposed to be acquainted with the facts and circumstances of the case. While the overall intent of these provisions is to ensure the citizens' cooperation during the course of investigation, they cannot override the constitutional protections given to the accused persons. The scheme of CrPC itself acknowledges this hierarchy between constitutional and statutory provisions in this regard. For instance, Section 161(2) CrPC prescribes that when a person is being examined by a police officer, he is not bound to answer such questions, the answers of which would have a tendency to expose him to a criminal charge or a penalty or forfeiture.

93. In an academic commentary, Leonard Levy

(1969) had pointed out that the doctrinal origins of the right against self-incrimination could be traced back to the Latin maxim *nemo tenetur seipsum prodere* (i.e. no one is bound to accuse himself) and the evolution of the concept of "due process of law" enumerated in the Magna Carta. [Refer Leonard Levy, "The Right against Self-Incrimination: History and Judicial History" [84(1) Political Science Quarterly 1-29 (March 1969)] .]

103. The concerns about the "voluntariness" of statements allow a more comprehensive account of this right. If involuntary statements were readily given weightage during trial, the investigators would have a strong incentive to compel such statements—often through methods involving coercion, threats, inducement or deception. Even if such involuntary statements are proved to be true, the law should not incentivise the use of interrogation tactics that violate the dignity and bodily integrity of the person being examined. In this sense, "the right against self-incrimination" is a vital safeguard against torture and other "third-degree methods" that could be used to elicit information. It serves as a check on police behaviour during the course of investigation. The exclusion of compelled testimony is important otherwise the investigators will be more inclined to extract information through such compulsion as a matter of course. The frequent reliance on such "short cuts" will compromise the diligence required for conducting meaningful investigations. During the trial stage, the onus is on the prosecution to prove the charges levelled against the defendant and the "right against self-incrimination" is a vital protection to ensure that the prosecution discharges the said onus.

106. A similar view was articulated by Lord Hailsham of St Marylebone in *Wong Kam-ming* v. *R.* [1980 AC 247 : (1979) 2 WLR 81 : (1979) 1 All ER 939 (PC)] , All ER at p. 946: (AC p. 261 B-C)

"… any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by

improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary."

107. V.R. Krishna Iyer, J. echoed similar concerns in *Nandini Satpathy case* [(1978) 2 SCC 424 : 1978 SCC (Cri) 236] : (SCC p. 442, para 34)

"34. ... And Article 20(3) is a human article, a guarantee of dignity and integrity and of inviolability of the person and refusal to convert an adversary system into an inquisitorial scheme in the antagonistic ante-chamber of a police station. And in the long run, that investigation is best which uses stratagems least, that policeman deserves respect who gives his fists rest and his wits restlessness. The police are part of us and must rise in people's esteem through firm and friendly, not foul and sneaky strategy."

135. The relationship between Section 27 of the Evidence Act and Article 20(3) of the Constitution was clarified in *Kathi Kalu Oghad* [AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10] . It was observed in the majority opinion by Jagannadhadas, J., at SCR pp. 33-34: (AIR pp. 1815-16, para 13)

"*13*. ... The information given by an accused person to a police officer leading to the discovery of a fact which may or may not prove incriminatory has been made admissible in evidence by that section. If it is not incriminatory of the person giving the information, the question does not arise. It can arise only when it is of an incriminatory character so far as the giver of the information is concerned. If the self-

> incriminatory information has been given by an accused person without any threat, that will be admissible in evidence and that will not be hit by the provisions of clause (3) of Article 20 of the Constitution for the reason that there has been no compulsion. *It must, therefore, be held that the provisions of Section 27 of the Evidence Act are not within the prohibition aforesaid, unless compulsion [has] been used in obtaining the information*."
>
> (emphasis supplied)
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> This position was made amply clear at SCR pp. 35-36: (AIR p. 1816, para 15)
> "*15*. ... Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was in fact exercised. In other words, it will be a question of fact in each case to be determined by the court on weighing the facts and circumstances disclosed in the evidence before it."

9. In the light of aforesaid observations of the Hon'ble Supreme Court of India elucidating the legal position, now this court proceeds to decide the issues as raised in this case, point-wise, as under:

Point (i) The present application has been filed without indicating any specific provision of law and this court has no inherent power to give any such direction and there is no specific provision under law which enables IO or this court to pass a direction.

and

Point (ii) The Section 91 of Cr. P.C cannot be invoked

by the IO or this court as it does not apply to an 'accused' in view of various judgments of the Superior Courts.

10. No doubt, the CBI did not mention any specific provision of Cr.P.C. in the present application seeking password from the accused, but it is a settled proposition of law that in the absence of citing any specific provision of law or even when quoting wrong provision of law, such application should not be rejected straightaway and rather such application should be treated under specific provision of law which applies keeping in mind the substance/content and the prayer as made in the said application. The Ld. Counsel for the accused further argued that this Court has no inherent power, therefore, the present application without having been filed with any specific provision of law cannot be entertained.

11. Unlike Civil Procedure Code, 1908 (Ref. Section 151 CPC) and Section 482 Cr.P.C. (which gives inherent powers to High Court only), the Criminal Courts at the District level do not have any inherent power to pass an order giving a relief to a party in the absence of application of any specific statutory provision. Therefore, it is now essential to know as to what provision of Cr.P.C. would apply to the present application.

12. The power of the Investigating Agency (Police) to ask question(s) from an accused or to seek production of any document from him has not been provided in the Cr.P.C. by specifically using the word **“accused”** but the same are implicit in Sections 91, 93, 102 and 161 of Cr.P.C. which relate to ‘any person’ acquainted with the facts and circumstances of the case or to the person who is in possession of such information or document/thing. However, the Ld. Counsel for the accused has relied on the cases of **Kathi Kalu Oghad (supra)** to contend that the Section 91 Cr.P.C. does not apply to an “accused”. In my considered opinion, the Section 102 and 161 of Cr.P.C. give power to the investigating agency exclusively or with the help of court under Section 91 and 93 Cr.P.C. to seek any information or document from any person including an accused but at the same time, the accused (or a witness) is not obliged or bound to give answer or information/document which is/are self-incriminatory being protected by his independent constitutional right as guaranteed by Article 20(3) of the Constitution of India which is reproduced as under:

> **“(3) No person accused of any offence shall be compelled to be a witness against himself.”**

13. Even Sub-clause (2) of Section 161 Cr.P.C provides such protection to the accused and witness by

enacting that **“Such person shall be bound to answer truly all questions, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture”**. The said Section 161(2) Cr.PC is on the same principle as Article 20(3).

14. Apart from the aforesaid specific statutory provisions, the words **‘To investigate the facts and circumstances of the case’** as given in Section 157 of Cr.P.C. are wide enough to include any kind of information, thing or object which the IO may require from an accused or a witness or a third person, needed for fair investigation, provided it does not violate any established provision of law. In this regard, it is pertinent to mention that even without there being specific provision in the Cr.P.C. and before making subsequent amendments in it as well as enacting the Criminal Procedure (Identification) Act, 2022 pertaining to taking of blood sample, finger prints, hair/DNA sample, etc. such power of the IO was held permissible by Hon’ble Apex Court within the realm of “Investigation”. Reliance can be placed in this regard on the observations which were made in the case of **Selvi (supra)** as under:

> “In the past, the meaning and scope of the term “investigation” has been held to include measures that had not been enumerated in statutory provisions. For example, prior to the enactment of an express

> provision for medical examination in CrPC, it was observed in *Mahipal Maderna* v. *State of Rajasthan* [1971 Cri LJ 1405 (Raj)] , that an order requiring the production of a hair sample comes within the ordinary understanding of "investigation" (at Cri LJ pp. 1409-10, para 17).
>
> We must also take note of the decision in *Jamshed* v. *State of U.P.* [1976 Cri LJ 1680 (All)], wherein it was held that a blood sample can be compulsorily extracted during a "medical examination" conducted under Section 53 CrPC. At that time, the collection of blood samples was not expressly contemplated in the said provision. Nevertheless, the Court had ruled that the phrase "examination of a person" should be read liberally so as to include an examination of what is externally visible on a body as well as the examination of an organ inside the body (*see* Cri LJ p. 1689, para 13)."

15. Therefore, the present application is being treated under Section 102 and 161 of Cr.P.C. read with Section 91 Cr.P.C. and/or the provisions which relate to "investigation" as given in Cr.P.C. However, the said provisions like any other statutory legislation or delegated laws/rules are always subject to Constitutional law especially the Fundamental Rights as given*, inter alia,* in Article 20(3) of the Constitution of India which gives protection to the persons who are accused of committing criminal offences to maintain silence when they are compelled to give self-incriminating testimony.

Point (iii) The accused has a right to maintain silence as per Article 20(3) of the Constitution of India as well as Section 161 (2) Cr.P.C. and, therefore,

accused cannot be compelled to give his password which will tantamount giving of self-incriminating testimony.

16. Now the most important question arises as to what constitutes an "incriminating testimony". The Section 161(2) Cr.P.C uses the words "answer which may have a tendency to expose an accused to a criminal charge, penalty or forfeiture". The Article 20(3) uses the words "no person accused of an offence shall be compelled to be a witness against himself." In the **Selvi** case, Hon'ble Supreme Court of India observed as under:

> **"148.** The question of what constitutes "testimonial compulsion" for the purpose of Article 20(3) was addressed in *M.P. Sharma case* [AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077] . In that case, the Court considered whether the issuance of search warrants in the course of an investigation into the affairs of a company (following allegations of misappropriation and embezzlement) amounted to an infringement of Article 20(3). The search warrants issued under Section 96 of the erstwhile Code of Criminal Procedure, 1898 authorised the investigating agencies to search the premises and seize the documents maintained by the said company. The relevant observations were made by Jagannadhadas, J., at SCR pp. 1087-88: (AIR p. 304, para 10)
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> "*10*. ... The phrase used in Article 20(3) is 'to be a witness'. A person can 'be a witness' not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see Section 119 of the Evidence Act) or the like. 'To be a witness' is nothing more than 'to furnish evidence', and such

evidence can be furnished through the lips or by production of a thing or of a document or in other modes.

… Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part."

150. Both the majority and minority opinions ruled that the other statutory provisions mentioned above were compatible with Article 20(3), but adopted different approaches to arrive at this conclusion. In the majority opinion it was held that the ambit of the expression "to be a witness" was narrower than that of "furnishing evidence". B.P. Sinha, C.J. observed, SCR at pp. 29-32: (*Kathi Kalu Oghad case* [AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10] , AIR pp. 1814-15, paras 10-12)

"*10*. 'To be a witness' may be equivalent to 'furnishing evidence' in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification. 'Furnishing evidence' in the latter sense could not have been within the contemplation of the Constitution-makers for the simple reason that—though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject—they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions of parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with

legitimate powers to bring offenders to justice. Furthermore it must be assumed that the Constitution-makers were aware of the existing law, for example, Section 73 of the Evidence Act or Sections 5 and 6 of the Identification of Prisoners Act (33 of 1920). ...

11. ... The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not 'to be a witness'. '***To be a witness' means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing 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*.** A person is said 'to be a witness' to a certain state of facts which has to be determined by a court or authority authorised to come to a decision, by testifying to what he has seen, or something 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.

Evidence has been classified by text writers into three categories, namely, (*1*) oral testimony; (*2*) evidence furnished by documents; and (*3*) material evidence. We have already indicated that we are in agreement with the Full Court decision in *M.P. Sharma case* [AIR 1954 SC 300 : 1954 Cri LJ 865 : 1954 SCR 1077] , that the prohibition in clause (3) of Article 20 covers not only oral testimony given by a person accused of an offence but also his written statements which may have a bearing on the controversy with reference to the charge against him. ...

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. For example, the accused person may be in possession of a document which is in his writing or which contains his signature or his thumb impression. The production of such a document, with a view to comparison of the writing or the signature or the impression, is not the statement of an accused person, which can be said to be of the nature of a personal testimony. When an accused person is called upon by the court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness'.

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'."

(emphasis supplied)

153. Since the majority decision in *Kathi Kalu Oghad* [AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10] is the controlling precedent, it will be useful to restate the two main premises for understanding the scope of "testimonial compulsion". The first is that ordinarily it is the oral or written statements which convey the personal knowledge of a person in respect of relevant facts that amount to "personal testimony" thereby coming within the prohibition contemplated by Article 20(3). **In most cases, such "personal testimony" can be readily distinguished from material evidence such as bodily substances and other physical objects.** The second premise is that in some cases, oral or written statements can be relied upon but only for the purpose of identification or comparison with facts and materials that are already in the possession of the investigators**. The bar of Article 20(3) can be invoked when the statements are likely to lead to incrimination by themselves or "furnish a link in the chain of evidence" needed to do so.** We must emphasise that a situation where a testimonial response is used for comparison with facts already known to the investigators is inherently different from a situation where a testimonial response helps the investigators to subsequently discover fresh facts or materials that could be relevant to the ongoing investigation.

154. The recognition of the distinction between testimonial acts and physical evidence for the purpose of invoking Article 20(3) of the Constitution finds a close parallel in some foreign decisions. In *Schmerber* v. *California* [16 L Ed 2d 908 : 384 US 757 (1965)] , the US Supreme Court had to determine whether an involuntary blood test of a defendant had violated the Fifth Amendment. The defendant was undergoing treatment at a hospital following an automobile accident. A blood sample

was taken against his will at the direction of a police officer. Analysis of the same revealed that Schmerber had been intoxicated and these results were admitted into evidence, thereby leading to his conviction for drunk driving. An objection was raised on the basis of the Fifth Amendment and the majority opinion (Brennan, J.) relied on a distinction between evidence of a "testimonial" or "communicative" nature as opposed to evidence of a "physical" or "real nature", concluding that the privilege against self-incrimination applied to the former but not to the latter.

155. In addition to citing John Wigmore's position that "the privilege is limited to testimonial disclosures" the Court in *Schmerber* [16 L Ed 2d 908 : 384 US 757 (1965)] also took note of other examples where it had been held that the privilege did not apply to physical evidence, which included "compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture". ..

169. We are inclined towards the view that the results of the impugned tests should be treated as testimonial acts for the purpose of invoking the right against self-incrimination. Therefore, it would be prudent to state that the phrase "and such other tests" [which appears in the Explanation to Section 53 CrPC] should be read so as to confine its meaning to include only those tests which involve the examination of physical evidence. In pursuance of this line of reasoning, we agree with the appellant's contention about the applicability of the rule of "ejusdem generis". It should also be noted that the Explanation to Section 53 CrPC does not enumerate certain other forms of medical examination that involve testimonial acts, such as psychiatric examination among others. This demonstrates that the amendment to this provision was informed by a rational distinction between the examination of physical substances and testimonial acts.

> **173.** However, it must be borne in mind that even though the impugned techniques have not been expressly enumerated in CrPC there is no statutory prohibition against them either. It is a clear case of silence in the law. Furthermore, in circumstances where an individual consents to undergo these tests, there is no dilution of Article 20(3).”

17. From the aforesaid observations of the Hon'ble Supreme Court it is seen that the Hon’ble Supreme Court laid down the test to identify whether a particular fact/information/testimony/evidence comes within the category of “testimonial fact” as protected by Article 20(3) of the Constitution of India which an accused is not bound to give and the second kind of evidence is called physical material or evidence which can be taken by compelling an accused person. In the first category, it is the oral or written statement which convey the personal knowledge of a person in respect of relevant facts that amount to “personal testimony” and in the second case the “personal testimony” can be distinguished from physical material/ evidence such as bodily substances and other physical objects. The fact of first category may be based on oral or written statement of an accused but they can still be compelled for the purpose of identification or comparison with facts and materials which are already in the possession of the investigating agency. The Article 20(3) can be invoked when the statements are likely to lead to

incrimination by themselves or “furnish a link in the chain of evidence” needed to do so but not for comparision/identification with other evidence.

18. For exmample, a testimony in oral (like voice sample) or written form (like specimen hand writing or signature) though may be personal yet they can be taken under compulsion from an accused if it is to be used for the purpose of identification or comparison with already available voice recording or signature/handwriting which is/are obtained from other sources like seizure of document or chance print, finger prints of the scene of crime, etc.

19. In the present application, the CBI/IO is seeking password of computer system from accused for opening/accessing his data and not for comparision or identification purposes. Therefore, the said request of the IO comes within the first category.

20. In the case of Narco Analysis/Lie Detection Test, the Hon'ble Supreme Court of India has held that such procedure involves personal knowledge of the accused, therefore, this cannot be done without his consent. Same logic applies to an password which is sought in this case as it also involves import of personal knowledge. The relevant observations of the Hon'ble Supreme Court in the **Selvi**

case squarely apply to a password also as under:

> **“180.** We have already stated that the narcoanalysis test includes substantial reliance on verbal statements by the test subject and hence its involuntary administration offends the “right against self-incrimination”. The crucial test laid down in *Kathi Kalu Oghad* [AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10] is that of “imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing 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” (*ibid*. at SCR p. 30.).
>
> **184.** Even though the actual process of undergoing a polygraph examination or a BEAP test is not the same as that of making an oral or written statement, the consequences are similar. By making inferences from the results of these tests, the examiner is able to derive knowledge from the subject's mind which otherwise would not have become available to the investigators. These two tests are different from medical examination and the analysis of bodily substances such as blood, semen and hair samples, since the test subject's physiological responses are directly correlated to mental faculties. Through lie detection or gauging a subject's familiarity with the stimuli, personal knowledge is conveyed in respect of a relevant fact. It is also significant that unlike the case of documents, the investigators cannot possibly have any prior knowledge of the test subject's thoughts and memories, either in the actual or constructive sense. Therefore, even if a highly strained analogy were to be made between the results obtained from the impugned tests and the production of documents, the weight of precedents leans towards restrictions on the extraction of “personal knowledge” through such means.
>
> **185.** During the administration of a polygraph test or a BEAP test, the subject makes a mental effort which is accompanied by certain physiological responses. The measurement of these responses then becomes

> the basis of the transmission of knowledge to the investigators. This knowledge may aid an ongoing investigation or lead to the discovery of fresh evidence which could then be used to prosecute the test subject."

21. Further, in the **Selvi** case, it was held by Hon'ble Apex Court that when statements are likely to lead to incrimination by themselves or **“furnish a link in the chain of evidence”**, then bar of Article 20(3) of the Constitution would apply. In the instant case also, the IO is seeking to find out further link in the chain of evidence by utilizing the data which is lying in the computer system of the accused. Therefore, this cannot be allowed being hit by Article 20(3).

Difference between Password and Biometrics

22. In the present application filed by CBI, only password/user ID of the computer system and its Tally Software has been sought by the IO from the accused and there is no prayer with regard to seeking of biometrics of the accused, probably owing to the reason that the said computer system might not be protected with a biometric security feature. Be that as it may, it is seen that in the judgment of **Virender Khanna (supra)**, the password and biometrics have been treated as one and the same thing, but in view of recent enactment of **Criminal Procedure**

(Identification) Act, 2022 (w.e.f. 18.04.2022), this court is of the considered opinion that a different approach is required to be adopted for password and biometrics of the accused.

23. In the said Act, the word **‘measurement’** has been used for referring to various physical evidence which is generally required by the investigating agency from the accused. Definition of the word ‘measurement’ has been given as under:

> **“Section 2(1)(b) "measurements" includes finger-impressions, palm-print impressions, foot-print impressions, photographs, iris and retina scan, physical, biological samples and their analysis, behavioural attributes including signatures, handwriting or any other examination referred to in section 53 or section 53A of the Code of Criminal Procedure, 1973”**

24. The Section 3 of the said Act provides the eventuality when an accused can be directed to provide his measurement. The said Section 3 is reproduced as under:

> **“Sec. 3. Any person, who has been,—**
>
> **(a) convicted of an offence punishable under any law for the time being in force; or**
>
> **(b) ordered to give security for his good behaviour or maintaining peace under section 117 of the Code of Criminal Procedure, 1973 for a proceeding under section 107 or section 108 or section 109 or section 110 of the said**

Code; or

(c) arrested in connection with an offence punishable under any law for the time being in force or detained under any preventive detention law,

shall, if so required, allow his measurement to be taken by a police officer or a prison officer in such manner as may be prescribed by the Central Government or the State Government:

Provided that any person arrested for an offence committed under any law for the time being in force (except for an offence committed against a woman or a child or for any offence punishable with imprisonment for a period not less than seven years) may not be obliged to allow taking of his biological samples under the provisions of this section."

25. Besides giving power to the police officer, wide power has been conferred upon a Magistrate to give direction to the accused to provide such measurement. In this regard, Section 5 is reproduced as under:

"Sec. 5 Where the Magistrate is satisfied that, for the purpose of any investigation or proceeding under the Code of Criminal Procedure, 1973 or any other law for the time being in force, it is expedient to direct any person to give measurements under this Act, the Magistrate may make an order to that effect and in that case, the person to whom the order relates shall allow the measurements to be taken in conformity with such directions."

26. From the perusal of the entire **Criminal Procedure (Identification) Act, 2022,** it is seen that the Legislator did not include the words password and/or user

ID in the definition of “Measurement” or anywhere else. Therefore, it is clear that the aforesaid Act does not apply to the password/User ID of an electronic record (which may be contained in a computer system, mobile phone, hard-disk, memory card, email etc.) or any other documentary evidence (like a suit-case locked with some number code).

27. However, powers have been given to the police agency and the Magistrate to give direction to the accused to provide his biometrics as mentioned in the definition of ‘Measurement’. Therefore, it can be said that an accused can be asked or directed to give his biometrics (in the form of his finger impressions, face or iris recognition) for the purpose of opening of his electronic device by the IO or the court. It is also pertinent to mention that in the various precedents of the Hon'ble Supreme Court of India, emphasize has been given on the point of **“personal knowledge of the accused”** to attract applicability of Article 20(3) of the Constitution of India and the biometrics of the accused are only physical evidence which does not require attribution of his personal knowledge when they are used and rather it is a mechanical process. Consequently, it does not violate Article 20(3) of the Constitution of India.

28. However, at the same time an exception has been made in proviso to Section 3 of the aforesaid Act to

the effect that any person arrested for an offence committed under any law for the time being in force may not be obliged to allow taking of his biological samples under the provisions of this Section. However, the said exception does not aply when offence comes within any of the three categories i.e. (i) offence against a woman, (ii) offence against a child and (iii) when it is punishable for more than 7 years. For example, for lighter offences like theft (S.379 IPC), criminal assault (S.355), simple hurt (S.323 IPC) etc., if they are not against a woman/child and not punishable for more than 7 years, the accused can refuse to provide his biometrics. But when the offences are like rape, murder or a simple hurt (Sec.323 IPC but against a woman or child), said exception does not apply.

29. It is also pertinent to mention that the **Criminal Procedure (Identification) Act, 2022,** nowhere uses the word that the said 'Measurement' will be allowed to be taken for the purpose of comparison of any previous evidence, or identification, etc. as has been held in various judgments/precedents of the Hon'ble Supreme Court of India (already discussed above) to draw a distinction between 'physical evidence' and 'testimonial evidence' for the purpose of applicability of Article 20(3) of the Constitution of India. Therefore, it can be said that police agency can take biometrics from an accused as per Section

3 of the said Act (except where accused uses his exemption clause as provided in proviso to Section 3 wherever it applies) even when the said police officer does not need it as a physical evidence for the purposes of identification or comparison with other existing physical evidence but for other investigation purposes. In other words, said biometrics can be taken from an accused and used for opening of mobile phone/computer system/email/software applications, etc. by the police agency, wherever such need arises for a fair investigation provided accused comes within the category of persons as mentioned in Section 3 of the Identification Act i.e. a convict, arrested person or detainee under preventive provisions of Section 107 to 109 Cr.P.C.

Pattern drawn security feature

30. The drawing of pattern as a security feature on a mobile phone (electronic device) requires application of mind and personal knowledge, therefore, same law would apply as it applies to a password of a electronic device as already held above.

31. Although it has been held above that the CBI/IO of this case cannot be permitted to compel accused to give password of his computer system yet in a situation when

password is required from an accused not for accessing his data but for comparison of the said password (as a physical evidence) with the other available evidence, a question arises whether the accused can be compelled to give such password. This is permissible under law but when an accused says that he has forgotten such password or pattern, then what will happen. In that case, accused is within his right to say so, as discussed in the last point.

Point (iv) The Judgment passed in Virendra Khanna vs. State of Karnataka by the Hon'ble High Court of Karnataka as relied by prosecution is not binding on this court on account of territorial limitation and even otherwise it is a judgment per incuriam.

32. The Ld. PP for CBI vehemently relied on the case of **Virendra Khanna vs. Sate of Karnataka (Writ Petition no. 11759/2020)** decided by Hon'ble Karnataka High Court and its relevant paragraphs are reproduced as under:

> ***"9. ANSWER POINT No.1: Can a direction be issued to an accused to furnish the password, passcode or Biometrics in order to open the smartphone and/or email account?***
>
> *The Investigating Officer, during the course of an investigation, could always issue any direction and/or make a request to the accused or other persons connected with the matter to furnish information, to provide material objects or the like. These directions are routine in any investigation. Thus, during the course of the investigation, the Investigating Officer could always request and/or direct the accused to furnish the password, passcode or Biometrics, enabling the opening of the smartphone and/or email*

account. It is up to the accused to accede to the said request and or directions. If the accused were to provide such a password, passcode or Biometrics, the Investigating Officer could make use of the same and gain an access to the same.

14. ANSWER TO POINT NO.7: Would providing a password, passcode or Biometrics amount to self-incrimination or testimonial compulsion?

14.1. As regards the contention that providing of the password/pass code will amount to testimonial compulsion, I am of the considered opinion that there is no testimony which is given by the accused by providing the said password, passcode or biometrics by which the document is being accessed by the Investigating officer.

14.2. The XI Judge Bench of the Apex Court in ***Kathi Kalu Oghad's*** *case has categorically held that providing of a thumb impression or impression of the palm or foot or fingers or specimen in writing or exposing a part of the body of an accused person for the purpose of identification would not amount to testimonial compulsion. Mere providing of an access of to smartphone or e-mail account would not amount to being a witness, the information that is accessed by the Investigating officer on the smartphone and or the e-mail account being only access to th e data and/or documents, it is for the Investigating officer to prove and establish the same in a Court of Law by following the applicable Rules of evidence.*

14.3. Merely because any document is present or available on the smartphone and or the e- mail account would not by itself establish the guilt or innocence of an accused. Both the prosecution, as also the accused/defence would be required to prove the said document or data by other evidence also.

14.5. A direction to provide a password, passcode, biometrics would not amount to testimonial compulsion. It is only in the nature of a direction to produce a document. Mere providing access to a smartphone or e-mail account would not amount to self- incrimination since it is for the investigating agency to prove its allegation by cogent material evidence.

14.6. The data available on a smartphone or e-mail account would also have to be proved by the investigating agency in accordance with Law. Mere providing of password, passcode or biometrics would not amount to answering any question put forward by the Investigating Officer, and as such, it would not amount to a violation of Section 161(2) of the Cr.P.C."

33. As regards the answer to point no.1, the Hon'ble High Court of Karnataka has observed that the IO has a right to make a request or issue a direction to the accused to furnish an information or material object and it includes asking an accused to provide a password or biometrics for opening of a device like a computer system/smart phone/e-mail account etc. which has been seized from him or to which accused is the owner/de facto in-charge. The Hon'ble Karnataka High Court, further observed, in the answer to point no. 7, that no testimony is given by the accused by providing a password or biometrics by which a document is accessed by the IO and it does not amount to **testimonial compulsion.**

34. In the considered opinion of the undersigned, as long as the accused voluntarily provides such information to the IO, no dispute arises. However, a question arises whether the investigating agency can compel an accused to provide such information or that the accused has a right to refuse providing of such information and to maintain silence.

35. With due respect and high regard to the Hon'ble Karnataka High Court, this Court is of the considered opinion that the aforesaid observations are not correct being *per incuriam* as the observations of the Hon'ble Supreme Court of India, which were made in the case of ***Selvi*** as "***To be a witness' means imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing 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",*** have not been kept in mind or ignored.

36. When an accused is asked to disclose his pass-word to the investigating agency, he is required to apply his mental faculty and/or memory to recall said password and it is purely based on his personal mental effort or knowledge, therefore, said information comes within the category of **"testimonial fact"** as observed by Hon'ble Supreme Court of India.

37. No doubt, a password does not itself constitute a 'self incriminating testimony' against an accused who gives such password, but from practical point of view, the said password alone is not the sole objective of the IO and in fact he wants to use it for the purpose of accessing the data

which is contained in a computer system or a mobile phone which is/are seized from the accused and, therefore, the said password is to be taken as integral part of the said computer system/mobile phone which is/are not severable from it. While considering the status of such information being incriminating or not, this Court cannot consider password alone in isolation.

38. It is also pertinent to note that such data may or may not contain incriminating evidence but if there is an apprehension that it may probably contain incriminating information, the accused is within his right to maintain silence as per Section 161(2) Cr.P.C. which uses the words "tendency to expose him to a criminal charge or to a penalty or forfeiture."

39. In India, the law on the point of appreciation of evidence which has been obtained illegally is different from USA. In USA, if an evidence is obtained by illegal means, it cannot be relied in court of law based on the doctrine of **"fruit of the poisoned tree"** whereas in India if an evidence is obtained by resorting to illegal means or by not following the established procedure of law, it can still be used in certain circumstances. Therefore, there is a risk of the Constitutional Right under Article 20(3) of the Constitution of India being jeopardized if such request of

the IO to compel an accused to provide his password is allowed because once his data is accessed/opened by IO and if it reveals something incriminating, it may be read against the accused. In the case of **Selvi**, relating to the issue of compelling an accused to undergo a lie detection test/narco-analysis test, also similar situation arose and the right of investigating agency was held inferior to the constitutional right of accused and ultimately it was held that subjecting an accused to disclose information based on his mental effort or knowledge amounts to violation of Article 20(3) of the Constitution of India. The relevant observations of the said case are as under:

> "**180.** We have already stated that the narcoanalysis test includes substantial reliance on verbal statements by the test subject and hence its involuntary administration offends the "right against self-incrimination". The crucial test laid down in *Kathi Kalu Oghad* [AIR 1961 SC 1808 : (1961) 2 Cri LJ 856 : (1962) 3 SCR 10] is that of "imparting knowledge in respect of relevant facts, by means of oral statements or statements in writing 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" (*ibid*. at SCR p. 30.).
>
> **184.** Even though the actual process of undergoing a polygraph examination or a BEAP test is not the same as that of making an oral or written statement, the consequences are similar. By making inferences from the results of these tests, the examiner is able to derive knowledge from the subject's mind which otherwise would not have become available to the investigators. These two tests are different from medical

examination and the analysis of bodily substances such as blood, semen and hair samples, since the test subject's physiological responses are directly correlated to mental faculties. Through lie detection or gauging a subject's familiarity with the stimuli, personal knowledge is conveyed in respect of a relevant fact. It is also significant that unlike the case of documents, the investigators cannot possibly have any prior knowledge of the test subject's thoughts and memories, either in the actual or constructive sense. Therefore, even if a highly strained analogy were to be made between the results obtained from the impugned tests and the production of documents, the weight of precedents leans towards restrictions on the extraction of "personal knowledge" through such means.

185. During the administration of a polygraph test or a BEAP test, the subject makes a mental effort which is accompanied by certain physiological responses. The measurement of these responses then becomes the basis of the transmission of knowledge to the investigators. This knowledge may aid an ongoing investigation or lead to the discovery of fresh evidence which could then be used to prosecute the test subject.

190. The preceding discussion does not conclusively address the contentions before us. Article 20(3) protects a person who is "formally accused" of having committed an offence or even a suspect or a witness who is questioned during an investigation in a criminal case. However, Article 20(3) is not applicable when a person gives his/her informed consent to undergo any of the impugned tests."

40. The Ld. PP for CBI also pointed to the following observations of the Hon'ble Karnataka High Court in the

case of **Virendra Khanna** –

> *"14.2. The XI Judge Bench of the Apex Court in **Kathi Kalu Oghad's** case has categorically held that providing of a thumb impression or impression of the palm or foot or fingers or specimen in writing or exposing a part of the body of an accused person for the purpose of identification would not amount to testimonial compulsion. Mere providing of an access of to smartphone or e-mail account would not amount to being a witness, the information that is accessed by the Investigating officer on the smartphone and or the e-mail account being only access to the data and/or documents, it is for the Investigating officer to prove and establish the same in a Court of Law by following the applicable Rules of evidence."*

41. With due respect and high regard, the aforesaid observations of the Hon'ble Karnataka High Court are per incuriam because the following observations of Hon'ble Supreme Court in the case of ***Selvi v. State of Karnataka, (2010) 7 SCC 263*** were completely ignored**:**

> "Ordinarily evidence is classified into three broad categories, namely, oral testimony, documents and material evidence. The protective scope of Article 20(3) read with Section 161(2) CrPC guards against the compulsory extraction of oral testimony, even at the stage of investigation. With respect to the production of documents, the applicability of Article 20(3) is decided by the trial Judge but parties are obliged to produce documents in the first place. However, the compulsory extraction of material (or physical) evidence lies outside the protective scope of Article 20(3). Furthermore, even testimony in oral or written form can be required under compulsion if it is to be used for the purpose of identification or comparison with materials and information that is already in the possession of investigators."

42. As such, as per the aforesaid observations, when

password is demanded by the investigating agency for the purpose of identification or comparison of an already existing information/data, the said information was held not violative of Article 20(3) of the Constitution of India but when it is required or sought only for the purpose of accessing data of the accused from his computer system/mobile/email, then the accused is within his right to refuse to provide such password.

43. The Ld. PP for CBI further relied on an order passed in **P. Gopalkrishnan @ Dileep vs. State of Kerala** (**Bail application no. 248 of 2022)** by **Hon'ble High Court of Kerala** and the relevant paragraphs of the said case are reproduced as under:

> "8. Bound, as I am, by the law laid down on Oghad (supra) and being in respectful agreement with the view taken by Suraj Govindraj.J in Virendra Khanna (supra) and also having regard to the provisions of Section 45-A of the Evidence Act and Section 79A of the Information Technology Act (for short, "the IT Act"), I hold that the prosecution has every right to seek that the accused hand over the mobile phones in question for the purpose of forensic examination by an agency identified by the Central Government as 'Examiner of Electronic Evidence' under Section 79-A of the Information Technology Act, 2000. "

44. In the said case, it was specifically observed that in view of Section 79(A) of the Information Technology Act, 2000, *'prosecution has every right to seek from the accused his mobile phone for forensic examination'*. In my

considered opinion, the law with regard to seeking production of documents (including mobile phone) and seeking a password/biometric is different. When a password is asked from an accused which is based on his personal knowledge, then the accused is within his right to refuse providing of such information. Section 79(A) of the IT Act only provides a provision for establishment of laboratory for the purpose of examination of electronic record. There may be many cases where electronic record is supplied voluntarily or it is seized without compelling the accused. In that case, such laboratory is required to examine said electronic record but said provision in no way undermine the protection of Article 20(30) of the Constitution of India. Therefore, the said judgment is distinguishable on the factual as well as legal aspects of the present case.

45. Ld. PP for CBI also relied on an order passed in **Ajay Bhardwaj vs. Union of India & ors. IA No. 82439/2020, by Hon'ble Supreme Court of India** where direction was given to provide password. From the perusal of the said order, it is seen that it was only an interim order which was passed on the consent of accused to provide such information. The said case was not finally decided on its merit and when consent has been given by the counsel for the accused, said case becomes distinguishable to the issues involved in the present case.

Point (v) The said computer system may contain private data of accused and if it is revealed to the investigating agency, it may interfere into the right of privacy of the accused.

46. The Ld. Counsel for the accused vehemently argued that if the Investigating Agency is permitted to access the data of the computer system of the accused, it may interfere into his right of privacy since the said computer system may contain some private data relating to his personal life, financial transactions, his business and various other secret/confidential information or password which are stored in the said computer system and it is alleged that with the help of such information, further data/information of the accused can be accessed, misused and made public by the IO. Therefore, it is prayed that the computer system of the accused should not be permitted to be opened by the IO.

47. It has already been held in the preceding paragraphs that the IO has no right to be provided with the password of the accused without the consent of the accused as it may violate the Article 20(3) of the Constitution of India as well as Section 161(2) of Cr.P.C. But the power of the IO to get opened/dycrypted/accessed the data of the said computer system with the help of specialized agency or person has not been denied.

Therefore, the objecting relating to the right of privacy of the accused viz-a-viz right of the State (Investigating Agency) also needs to be decided.

48. In the famous case of **K.S. Puttaswamy vs. Union of India, 2017 (supra)** on the status of right to privacy, the nine Judges Bench of the Hon'ble Supreme Court of India observed as:

> "Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions.
>
> 'Life' within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfillment of life is as much within the protection of the guarantee of life.
>
> To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasizing, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III"

49. The Hon'ble Supreme Court also described the various categories/facets of 'individual's privacy' into following nine categories:

"(i) bodily privacy which reflects the privacy of the physical body. Implicit in this is the negative freedom of being able to prevent others from violating one's body or from restraining the freedom of bodily movement;

(ii) spatial privacy which is reflected in the privacy of a private space through which access of others can be restricted to the space; intimate relations and family life are an apt illustration of spatial privacy;

(iii) communicational privacy which is reflected in enabling an individual to PART M restrict access to communications or control the use of information which is communicated to third parties;

(iv) proprietary privacy which is reflected by the interest of a person in utilising property as a means to shield facts, things or information from others;

(v) intellectual privacy which is reflected as an individual interest in the privacy of thought and mind and the development of opinions and beliefs;

(vi) decisional privacy reflected by an ability to make intimate decisions primarily consisting one's sexual or procreative nature and decisions in respect of intimate relations;

(vii) associational privacy which is reflected in the ability of the individual to choose who she wishes to interact with;

(viii) behavioural privacy which recognises the privacy interests of a person even while conducting publicly visible activities. Behavioural privacy postulates that even when access is granted to others, the individual is entitled to control the extent of access and preserve to herself a measure of freedom from unwanted intrusion; and

(ix) informational privacy which reflects an interest in preventing information about the self from being

> disseminated and controlling the extent of access to information."

50. After holding the right to privacy as one of the components of Article 21 in particular and Part-III (Fundamental Rights) as a whole, of the Constitution of India, the Hon'ble Apex Court observed on the point of its extent and limitations as under:

> "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.
>
> 21. An invasion of life or personal liberty must meet the three-fold 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;

51. From the aforesaid observations, it is clear that Right to Privacy despite being a facet of Article 21 in particular and Part-III of Constitution of India in general, is not absolute and it is subject to State law which withstands the touchstone of permissible restrictions on fundamental rights.

52. The electronic record, which may be in the form of computer system, mobile, pen-drive, hard-disc, memory card, e-mail communication, cloud storage, etc. containing private data/information of an accused is not immune from being scrutinized by the Investigating Agency as per Section 102 of Cr.P.C. with the help of other statutory provisions of CR.P.C. if the said data is alleged or suspected to have been stolen or which may be found under circumstances which create suspicion of the commission of any offence. As such, it can be said that the Right to Privacy (which is also treated as part of Article 21 of the Constitution) can have some reasonable restrictions in the larger interest of the society subject to law (here Cr.P.C.), especially for detection of crime, protection of the victim and to ensure punishment, discharge or acquittal of the accused.

53. It is also pertinent to mention that the Parliament of India is already in the process of passing a law relating to right to privacy and a Bill in the name of **"The Personal Data Protection Bill, 2019"** is already pending before the legislators. Although till the passage of the said Bill, its provisions are not enforceable yet for the purpose of guidance, its provisions can be seen. The following provisons clearly show that on the ground of right of

privacy, data of an accused cannot be denied from being seized and examined by the investigating agency and the Section 36 is worth noting in this regard:

> "Sec. 4. No personal data shall be processed by any person, except for any specific, clear and lawful purpose.
>
> Sec. 5. Every person processing personal data of a data principal shall process such personal data— (a) in a fair and reasonable manner and ensure the privacy of the data principal; and (b) for the purpose consented to by the data principal or which is incidental to or connected with such purpose, and which the data principal would reasonably expect that such personal data shall be used for, having regard to the purpose, and in the context and circumstances in which the personal data was collected.
>
> Sec. 36. The provisions of Chapter II except section 4, Chapters III to V, Chapter VI except section 24, and Chapter VII shall not apply where—
>
> (a) personal data is processed in the interests of prevention, detection, investigation and prosecution of any offence or any other contravention of any law for the time being in force."

54. However, at the same time, it is the responsibility of the IO not to disclose a private information of an accused to any third person or to make it public without the consent of concerned accused or the lawful owner of such information. In this regard, special provisions have been enacted in the Information Technology Act, 2000 which mandate keeping of such information confidential and a punishment (upto 2 years or with fine upto Rs. 2 lakhs or with both) has been stipulated under Section 72 of the said Act for violation of said right of privacy without the consent

of the concerned person. Although the provisions of the Information Technology Act are not applicable to the general offences under IPC or other statues but an analogy can be drawn that if an IO violates such right of privacy of an accused by disclosing private information to any third person without the consent of the accused or lawful owner or without any support of law, necessary action can be taken against such IO by the court and/or his superior officers upon raising grievances by the affected person.

55. It is also pertinent to mention that there is no exception made in the Cr.P.C that on account of interference in the right of privacy, a piece of evidence (whether electronic record or document) cannot be seized or produced before a court of law. Even there are various provisions under Cr.P.C. which permits interference in the right of privacy of an accused like arrest of the accused, search at the house of accused, detention and punishment to the accused which, in one way or the other, involves his right of privacy or free life but only on account of such interference, the right of the State (including the Investigating Agency) cannot be undermined which have been enacted to establish law and order, peace, public order and safety of its citizens.

Point (vi) If accused refuses to provide such

information, no adverse inference can be drawn against him.

56. Not only does an accused person has the right to refuse to answer any question that may lead to incrimination, there is also a rule against adverse inferences being drawn from the fact of his/her silence. At the trial stage, Section 313(3) CrPC places a crucial limitation on the power of the court to put questions to the accused so that the latter may explain any circumstances appearing in the evidence against him. It lays down that the accused shall not render himself/herself liable to punishment by refusing to answer such questions, or by giving false answers to them. Further, proviso (*b*) to Section 315(1) CrPC mandates that even though an accused person can be a competent witness for the defence, his/her failure to give evidence shall not be made the subject of any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the same trial. It is evident that Section 161(2) CrPC enables a person to choose silence in response to questioning by a police officer during the stage of investigation, and as per the scheme of Section 313(3) and proviso (*b*) to Section 315(1) of the Code, adverse inferences cannot be drawn on account of the accused person's silence during the trial stage.

Conclusion

57. In the light of aforesaid discussion, the present application of the CBI seeking password/User ID of the computer system and Tally Software of the accused is dismissed as the accused cannot be compelled to give such information and in this regard he is protected by Article 20(3) of the Constitution of India as well as Section 161(2) of Cr.P.C. However, the IO is within his right to access the data of the computer system and its soft-wares which were seized from the accused with the help of specialized agency or person at the risk of accused for loss of data, if any. Copy of the order be given dasti.

NARESH KUMAR LAKA

Digitally signed by NARESH KUMAR LAKA
Date: 2022.10.31 15:25:12 +0530

Announced in the open court on 29.10.2022

(Naresh Kumar Laka)
Special Judge (PC Act) (CBI-20),
Rouse Avenue Courts, New Delhi.