

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CRM-M-11141-2022

Reserved on 16th March, 2022

Pronounced on: 29th March, 2022

Sunil Kumar Gulati

Petitioner

Versus

State of Punjab and another

Respondents

CORAM: HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present: Mr. D.S. Sobti, Advocate and
Mr. Prabhneer Swani, Advocate for the petitioner.

Mr. Amit Mehta, Sr. DAG, Punjab.

AVNEESH JHINGAN, J.:

1. Aggrieved of directions of Chief Judicial Magistrate, Patiala for giving voice samples, the petitioner has filed this petition under Section 482 Cr.P.C..

2. The brief facts are that Jaspreet Singh (respondent No.2) -complainant was running a chemist shop. He had made an unauthorized alteration in the shop resultantly, the shop was sealed by authorities. Sunil Kumar Gulati (petitioner) was posted in the Land Branch of Municipal Corporation, Patiala, he demanded Rs.25,000/- for getting the shutter of the shop open. The amount demanded was to be paid to Rakesh Behal one of the chemist known to the petitioner. On complaint, a trap was laid and on 10th October, 2020 Rakesh Behal was apprehended red handed. A telephonic conversation with regard to demand of illegal gratification was recorded and the memory card handed over to the investigation agency.

3. An application was filed by the Vigilance Bureau seeking voice samples of Rakesh Behal and petitioner. Rakesh Behal had no objection for giving his voice samples but petitioner filed a reply opposing the application. The application was allowed vide order dated 30th November, 2021. Petitioner was directed to give his voice sample. Hence the present petition.

4. Learned counsel for the petitioner argued that

(i) the directions issued in the impugned order are for purpose of identifying the petitioner consequently results in self incrimination by the accused;

(ii) the contention is that petitioner's right to privacy is invaded. Reliance is placed upon decision of Supreme Court of India in **Justice K.S. Puttaswamy (Retd.) and another Vs. Union of India and others (2017) 10 SCC 1**.

(iii) further that the memory card being a secondary evidence is not admissible as evidence without certification under Section 65-B of Indian Evidence Act, 1872 (for short 'the Act').

(iv) relying upon the decision of the Supreme Court in **People's Union for Civil Liberties (PUCL) Vs. Union of India and another (1997) I SCC 301**; it is argued that the complainant could not have recorded the conversation without consent of the petitioner.

5. Learned State counsel appearing on advance notice defends the impugned order, relying upon the decision of the Supreme Court in **Ritesh Sinha Vs. State of Uttar Pradesh (2019) 8 SCC 1**.

6. The first two contentions raised by learned counsel for the petitioner are no longer res-integra. The Supreme Court in **Ritesh Sinha (supra)** held that the direction to give voice sample does not infringe Article 20(3) of the Constitution of India. It was held that the voice sample is only for purpose of comparison and is not a testimony. Further it was held that Right to Privacy cannot be construed as absolute.

7. 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** answered the question in negative.

8. Whether compelling to give voice samples infringes Right to Privacy was an issue 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.” (...emphasis supplied)

9. Voice sample in a sense resembles 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.

10. The third contention of the learned counsel for the petitioner that the memory card produced by the complainant cannot be relied upon without certification under Section 65-B of the Act needs no adjudication at this stage. The application for voice sample was filed for further investigation of the matter, it was not the stage for production of certificate under Section 65-B of the Act, even if required.

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

“50. We may hasten to add that Section 65B does not

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

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

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

"32. ... The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the court could have given the prosecution an opportunity to rectify the deficiency."

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

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

53. In a criminal trial, it is assumed that the investigation is completed and the prosecution has, as such, concretised its

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

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

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

part of his defence, this again will depend upon the justice of the case - discretion to be exercised by the Court in accordance with law.

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

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

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

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

One of the principal issues arising for consideration in the above case before Hon'ble Court was the nature and manner of admission of electronic records.

Xxx xxxx xxxx xxxx

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

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

"50. Anwar P.V. (supra) partly overruled the earlier decision of the Supreme Court on the procedure to prove electronic record(s) in Navjot Sandhu (supra), holding that Section 65B is a specific provision relating to the admissibility of electronic record(s) and, therefore, production of a certificate under Section 65B(4) is mandatory. Anwar P.V. (supra) does not state or hold that the said certificate cannot be produced in exercise of powers of the trial court under Section 311 Cr.P.C., 1973 or, at the appellate stage under Section 391 Cr.P.C., 1973 Evidence Act is a procedural law and in view of the pronouncement in Anwar P.V. (supra) partly overruling Navjot Sandhu (supra), the prosecution may

be entitled to invoke the aforementioned provisions, when justified and required. Of course, it is open to the court/presiding officer at that time to ascertain and verify whether the responsible officer could issue the said certificate and meet the requirements of Section 65B."

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

12. The relevancy of the recording would be determined only after comparison of voice sample, the requirement of certification under Section 65-B of the Act would arise later when recording is given in evidence.

13. From the pleadings of the petition, it is evident that the contention raised by learned counsel for the petitioner is without factual foundation rather the pleadings are interrogatory, whether there is certificate under Section 65-B of the Act or not. As per contents of FIR, the original recording of call is available on mobile of the complainant.

14. The reliance on the decision of the Supreme Court in **People's Union for Civil Liberties (PUCL) (supra)** is of no avail to the petitioner. The vires of Section 5(2) of Telegraphs Act, 1885 were challenged and the alternative prayer was that the provision be read down to include procedural safeguards to rule out arbitrariness and to prevent indiscriminate. The Supreme Court till the making of rules, laid down procedural safeguards for exercising of power under Section 5(2) of the Telegraphs Act, 1885.

15. The argument that the complainant could not have recorded the

conversation without consent of the petitioner is rejected, seeking the consent of the petitioner would have defeated the very purpose of the recording.

16. In view of the above discussion, the contentions raised by the learned counsel for the petitioner are rejected. The impugned order is upheld. The petition is dismissed.

[AVNEESH JHINGAN]
JUDGE

29th March, 2022

Parveen Sharma

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| 1. Whether speaking/ reasoned | : | Yes /No |
| 2. Whether reportable | : | Yes /No |



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