HIGH COURT OF MADHYA PRADESH, PRINCIPAL SEAT AT JABALPUR

Case No.	**M.Cr.C. No.45036/2020**
Parties Name	R.K. Akhande vs. Special Police Establishment, Lokayukt, Bhopal and another
Date of Order	**30/06/2021**
Bench Constituted	**Division Bench:** **Justice Prakash Shrivastava** **Justice Virender Singh**
Judgment delivered by	**Justice Prakash Shrivastava**
Whether approved for reporting	Yes
Name of counsels for parties	Shri Manoj Kushwaha, learned counsel for the petitioner. Shri Abhijeet Awasthi, learned counsel for respondent No.1.
Law laid down	**1**. Direction by the Magistrate to give voice sample during investigation does not violate Article 20(3) of the Constitution of India. **2**. Article 20 of the Constitution of India extends certain protection to a person in respect of the conviction for offence and sub-clause (3) thereof provides that no person accused of any offence shall be compelled to be a witness against himself. The protection extended by Article 20(3) is only to the extent of being written against himself. Thus, it is clear that clause (3) of Article 20 extends

	protection against self incrimination to an accused person. Self incrimination is held to mean conveying information based upon the personal knowledge of the person giving the information and it does not mean to include merely the mechanical process of producing document in the Court which may throw a light on any points of controversy but which does not contain any statement of accused based upon his present knowledge. Requiring an accused to give voice sample does not mean that he is asked to testify against himself. Voice sample is taken only for comparison. Hence, it cannot be said that when an accused is asked to give voice sample, he is compelled to be a witness against himself. Therefore fundamental right under Article 20(3) of the Constitution is not violated in such a case. **3**. No oportunity of hearing to

	the accused is necessary while issuing such a direction. Since power exists with the Magistrate to issue a direction to give voice sample during investigation and such a direction does not violate Article 20(3) of the Constitution of India, therefore, unless the accused is in a position to show that any prejudice is caused with the direction, he has no right of hearing at the stage of issuing the direction.
Significant paragraph numbers	6 & 9

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30.06.2021

Per: Prakash Shrivastava, J.

IA No.12586/2020, an application for amendment in the petition is allowed.

2. By this writ petition under Section 482 of the Criminal Procedure Code, petitioner has challenged the order of the trial Court dated 21.10.2020 whereby for the purpose of investigation permission has been granted to take the voice sample of the petitioner.

3. The submission of learned counsel for the petitioner is that such a direction violates the petitioner's right under Article 20(3) of the Constitution of India and infringes the petitioner's privacy. In support of his submission, he has placed reliance upon the judgment of the Supreme Court in the matter of ***Selvi and others vs. State of Karnataka*** reported in ***AIR 2010 SC 1974***. He has

also submitted that no opportunity of hearing has been given to the petitioner before passing the order.

4. Opposing the prayer, learned counsel for the respondent No.1 has submitted that the matter is at the investigation stage and the petitioner's right under Article 20(3) of the Constitution is not violated and that no prejudice is caused to the petitioner by the impugned order.

5. Having heard the learned counsel for the parties and on perusal of the record, it is noticed that the petitioner is an accused in a trap case and the voice sample of the petitioner is required to tally it with the recorded voice, hence the petitioner was given a notice to appear in the Office of the Collector and give his voice sample which was refused by him, therefore, the investigating agency had approached the trial court and the trial court after examining the entire case and the case diary has found that the voice sample of the petitioner is required, hence it has granted permission to the investigating agency to take the voice sample and directed the petitioner to give the voice sample.

6. Article 20 of the Constitution of India extends certain protection to a person in respect of the conviction for offence and sub-clause (3) thereof provides that no person accused of any offence shall be compelled to be a witness against himself. Article 20(3) reads as under:

> *"20(3) No person accused of any offence shall be compelled to be a witness against himself."*

The protection extended by Article 20(3) is only to the extent of being witness against himself. Thus, clause (3) of Article 20 extends protection against self incrimination to an accused person. Self incrimination is held to mean conveying information based upon the personal knowledge of the person giving the information and it does not mean to include merely the mechanical process of

producing document in the Court which may throw a light on any points of controversy but which does not contain any statement of accused based upon his present knowledge. Requiring an accused to give voice sample does not mean that he is asked to testify against himself. Voice sample is taken only for comparison. Hence, it cannot be said that when an accused is asked to give voice sample, he is compelled to be a witness against himself. Therefore, fundamental right under Article 20(3) of the Constitution is not violated in such a case.

7. The question relating to violation of Article 20(3) of the Constitution came up before 11 Judges Bench of Hon'ble Supreme Court in the matter of ***State of Bombay vs. Kathi Kalu Oghad*** reported in ***AIR 1961 SC 1808*** wherein the issue was about the specimen writing and the Hon'ble Supreme Court held that -

> *"11. The matter maybe looked at from another point of view. 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 fact, 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 Sharma's case 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. The accused may have documentary evidence in his possession which may throw some light on the controversy. If it is a document, which is not his statement conveying his personal knowledge relating to the charge against him,*

he may be called upon by the Court to produce that document in accordance. with the provisions of Section 139 of the Evidence Act, which, in terms, provides that a person may be summoned to produce a document in his possession or power and that he does not become a witness by the mere fact that he has produced it; and therefore, he cannot be cross-examined. Of course, he can be cross-examined if he is called as a witness who has made statements conveying his personal knowledge by reference to the contents of the document or if he has given his statements in Court otherwise than by reference to the contents of the documents. In our opinion, therefore, the observations of this Court in Sharma's case that Section 139 of the Evidence Act has no bearing on the connotation of the word 'witness' is not entirely well-founded in law. 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. 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 atleast probable, considered by itself. A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of 'testimony'."*

The Hon'ble Supreme Court took the view that the specimen handwriting or signature or finger impression by themselves are not testimony at all and they are only materials for comparison. It has further been held that they are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of testimony. When voice sample is taken that also stands on the same footing and therefore same reasoning applies for voice sample also.

8. The issue relating to the power of the Magistrate to direct giving of voice sample came up before the Hon'ble Supreme Court in the matter of ***Ritesh Sinha vs. State of Uttar Pradesh and another*** reported in ***2019 (8) SCC 1*** wherein the three Judge Bench of the Hon'ble Supreme Court has held that the Magistrates are conceded with such power. In this regard, it is held that -

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

Thus, now it is settled that the Magistrate has the power to order a person to give his voice sample for the purpose of investigation of a crime.

9. The next question which is raised by counsel for the petitioner that the petitioner has not been heard while passing the impugned order. The counsel for the petitioner has failed to point out any prejudice caused to him while passing the impugned order without hearing him. The prejudice is required to be pointed out as the issue is squarely covered by the judgment of the Supreme Court and the power exists with the Magistrate to issue such a direction. The Supreme Court in the matter of ***Natwar Singh vs. Director of Enforcement and another*** reported in ***2010 (13) SCC 255*** has held that even in the application of doctrine of fair play there must be real flexibility and mere technical infringement of natural justice is not enough but some real prejudice is required to be shown. In the matter of ***Rafiq Ahmad @ Rafi vs. State of Uttar Pradesh*** reported in ***2011 (8) SCC 300***, the Supreme court has held that -

> *"35. When we speak of prejudice to an accused, it has to be shown that the accused has suffered some disability or detriment in the protections available to him under the Indian criminal jurisprudence. It is also a settled canon of criminal law that this has occasioned the accused with failure of justice. One of the other cardinal principles of criminal justice administration is that the courts should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage, as this expression is perhaps too pliable. With the development of law, Indian courts have accepted the following protections to and rights of the accused during investigation and trial:*
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> *(a) The accused has the freedom to maintain silence during investigation as well as before the Court. The accused may choose to maintain silence or make complete denial even when his statement under Section 313 of the Code of Criminal Procedure is being recorded, of course, the Court would be entitled to draw an inference, including adverse*

inference, as may be permissible to it in accordance with law;

(b) Right to fair trial;
(c) Presumption of innocence (not guilty);
(d) Prosecution must prove its case beyond reasonable doubt.

36. Prejudice to an accused or failure of justice, thus, has to be examined with reference to these aspects. That alone, probably, is the method to determine with some element of certainty and discernment whether there has been actual failure of justice. `Prejudice' is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope. Once the accused is able to show that there is serious prejudice to either of these aspects and that the same has defeated the rights available to him under the criminal jurisprudence, then the accused can seek benefit under the orders of the Court.

37. Right to fair trial, presumption of innocence until pronouncement of guilt and the standards of proof, i.e., the prosecution must prove its case beyond reasonable doubt are the basic and crucial tenets of our criminal jurisprudence. The Courts are required to examine both the contents of the allegation of prejudice as well as its extent in relation to these aspects of the case of the accused. It will neither be possible nor appropriate to state such principle with exactitude as it will always depend on the facts and circumstances of a given case. Therefore, the Court has to ensure that the ends of justice are met as that alone is the goal of criminal adjudication.

38. Thus, wherever a plea of prejudice is raised by the accused, it must be examined with reference to the above rights and safeguards, as it is the violation of these rights alone that may result in weakening of the case of the prosecution and benefit to the accused in accordance with law."

10. The Supreme Court in the matter of ***Sunil Mehta and another vs. State of Gujarat and another*** reported in ***2013 (9) SCC 209*** while considering the question of issuing show cause notice to the accused while examining the complainant under Section 200 of the Cr.P.C. has held that there is a qualitative

difference between the approach that the court adopts and the evidence adduced at the stage of taking cognizance and summoning of the accused and that recorded at the trial. The difference lies in the fact that the former is a process that is conducted in absence of accused and latter is undertaken in his presence with an opportunity to him to cross-examine the witnesses produced by the prosecution.

11. In the present case also, the matter is at the investigating stage where the prosecution is only collecting the evidence, hence no error has been committed by the trial court in passing the impugned order without giving opportunity of hearing to the petitioner. Thus, no case for interference is made out.

12. The petition is accordingly dismissed.

(PRAKASH SHRIVASTAVA)	**(VIRENDER SINGH)**
JUDGE	**JUDGE**

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