



2024:KER:85215

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

THURSDAY, THE 14TH DAY OF NOVEMBER 2024 / 23RD KARTHIKA, 1946

CRL.MC NO. 9284 OF 2024

AGAINST THE ORDER DATED 23.10.2024 IN VC NO.7 OF 2024 OF
THE ENQUIRY COMMISSIONER AND SPECIAL JUDGE (VIGILANCE),
KOZHIKODE

PETITIONER/ACCUSED:

SUNIL RAJAN K,


BY ADV K.M.SATHYANATHA MENON

RESPONDENTS/STATE AND COMPLAINANT:

- 1 INSPECTOR OF POLICE,
VIGILANCE AND ANTI-CORRUPTION BUREAU, MALAPPURAM,
PIN - 676509
- 2 STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
PIN - 682031
BY ADV.A.RAJESH-SPECIAL PUBLIC PROSECUTOR (VIGILANCE)
ADV.REKHA S.- SENIOR PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
14.11.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:



“C.R.”

ORDER

Dated this the 14th day of November, 2024

Legal intricacies which stems from the protection under Article 20(3) of the Constitution never subsumes and here, it surfaces by way of a voice sample.

2. The petitioner - the sole accused in Crime bearing V.C.No.7/2024 of the Vigilance and Anti-Corruption Bureau, Malappuram - is aggrieved by Annexure-C Order, which permitted the petitioner's voice sample being taken at the Forensic Science Laboratory, Thiruvananthapuram on 04.11.2024 at 10.00 a.m.

3. Heard Sri.K.M.Sathyanatha Menon, the learned counsel for the petitioner and Sri.A.Rajesh, learned Special Public Prosecutor (Vigilance). Perused the records.



4. The prosecution case in brief is that, the petitioner/accused demanded a bribe of Rs.52,000/- for issuing necessary records from the Village Office, so as to enable the defacto complainant to apply for 'Pattayam' in respect of 35 cents of land. The petitioner accordingly received Rs.30,000/- from the defacto complainant. A trap was laid, based upon which the crime was registered against the petitioner.

5. The Order impugned is assailed on various grounds by the learned counsel for the petitioner. It was first pointed out that, during the alleged time of conversation between the defacto complainant and the petitioner/accused, the petitioner was not an accused, wherefore, his voice sample cannot be compelled, as per law. Simultaneous with this point, it was pointed out that the petitioner was not in the custody of the Investigating Officer, for which reason also, his voice sample cannot be



mandated. It was then pointed out that the phenolphthalein test turned negative as against the petitioner and that the decoy notes were not seized from the custody of the petitioner, but from a window which is away from the seat of the petitioner. It was suggested that the original conversation as available in the phone could have been produced, instead of producing a C.D., which allegedly retrieved such conversation. Learned counsel would submit that Annexure-A application preferred by the Investigating Officer would not reveal as to (1) how the alleged conversation was downloaded from the mobile phone?; (2) who did it?; and (3) whether it was downloaded from the phone of the defacto complainant's sister's son? The C.D. produced was unaccompanied by a certificate under Section 65B of the Indian Evidence Act, 1872, for which reason, the CD cannot be accepted. Learned counsel relied upon the judgments of the Hon'ble Supreme Court in *Anvar v. Basheer* [(2014) 10 SCC 473] and *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Others* [(2020)



7 SCC 1]. Reliance was placed on a judgment of the Chhattisgarh High Court in *Aasha Lata Soni v. Durgesh Soni* [2023 SCC Online Chh 3959], to point out that recording a conversation without the petitioner's knowledge, behind his back, amounts to violation of his right to privacy, guaranteed under Article 21 of the Constitution, wherefore, the instant application to take the voice sample should have been refused. Thus, according to the learned counsel, without any material, whatsoever, the petitioner has been directed to supply voice sample, which renders the impugned Annexure-C Order unsustainable in law. The petitioner seeks the same to be set aside.

6. Per contra, learned Special Public Prosecutor (Vigilance) would submit that the mobile phones in question were seized by the Investigating Officer, as could be seen from the recitals in paragraph no.10 of the impugned Order. According to the learned Special Public Prosecutor, the F.I.R. was registered on 20.06.2024, that



is to say before the coming into force of the Bharatiya
Nagarik Suraksha Sanhita, 2023 ('B.N.S.S.', for short).
Thus, the investigation which commenced as per the old
Code, will continue as such, as per the provisions of
Section 531(2)(a) of the B.N.S.S. Thus reckoned, the voice
sample is taken, not on the strength of any enabling
provision, but by virtue of the decision of a three Judges
Bench decision of the Hon'ble Supreme Court in ***Ritesh
Sinha v. State of Uttar Pradesh and Another*** [2019 (8) SCC
1]. The Bench held that until explicit provisions are
en-grafted to the Code, a Judicial Magistrate must be
conceded the power to order a person to give sample of his
voice for the purpose of investigation of a crime. This
direction was issued by the Supreme Court in exercise of
its powers under Article 142 of the Constitution. Thus,
there is no requirement that the petitioner should be an
accused, or for that matter, he should have been arrested
and in custody at the relevant time. Nevertheless, the
petitioner was both an accused and was also arrested, in



connection with the subject crime, though he was not in custody at the time when the alleged conversation took place, or at the time when, the impugned Order was passed. According to the learned Special Public Prosecutor, there is no reason, whatsoever, to interfere with the impugned Order.

7. Having heard the learned counsel appearing for the respective parties, this Court finds little merit in the instant Criminal Miscellaneous Case. The first aspect to be noticed is that the impugned Order has been passed on the basis of the declaration of law made by *Ritesh Sinha* (supra), which is specifically quoted in paragraph no.11 of the impugned Order. This Court finds little force in the submission that the petitioner was not an accused at the time when the alleged conversation took place, or for that matter, the petitioner was not in judicial custody at the time when the impugned order was passed. Neither of the above is a legal requirement to pass an order



mandating an accused person to give his voice sample. As regards the former, usually, a conversation which takes place before the crime, will be propounded as a piece of evidence, wherefore, the argument that he was not an accused at the time of the alleged conversation is devoid of any merit or substance. Similarly, no legal requirement can be read into the declaration of law made in **Ritesh Sinha** (supra), or for that matter Section 349 of the B.N.S.S, that the accused person should have been in custody at the time when an order for voice sample has to be made. While **Ritesh Sinha** (supra) uses the language 'any person', Section 349 B.N.S.S. would separately deal with 'any person', by suffixing with the expression 'including an accused person'. Similarly, the language in the first proviso to Section 349 is that the person should have been arrested at some time in connection with the investigation, which requirement is amply satisfied in the given facts. If this Court has to go by **Ritesh Sinha** (supra), there is no such requirement that the person



should have been in the custody at the time when the order for voice sample is made. The requirement in *Ritesh Sinha* (supra) is that such an order has to be passed 'for the purpose of investigation of a crime'. Under Section 349, the criteria is the satisfaction of the Magistrate that it is expedient to direct any person to provide his voice sample, again, for the purposes of any investigation or proceeding under B.N.S.S. Therefore, the thrust is upon the question whether the voice sample is required for the purpose of investigation in a crime.

8. In the instant facts, this Court notice that the crime in question was registered pursuant to a trap. If, as contended by the learned counsel for the petitioner, the phenolphthalein test has turned negative, that is all the more a reason for the Investigating Agency to produce whatever evidence possible in support of the prosecution case. If, as claimed by the Investigating Officer, there exists a voice clip containing the voice of the



petitioner, wherein, he had allegedly demanded bribe, the same would constitute an important evidence in the armoury of the prosecution. Such an attempt cannot be shut down, since it has to be conceded that it is fully within the realm and prerogative of the Investigating Officer to search, explore and furnish all and whatever legal evidence possible in support of the prosecution case.

9. Coming to the contention with respect to Section 65B, the case is only at the investigation stage and the question of Section 65B applies, when an electronic record is tendered in the Court for the purpose of evidence. That apart, in *Arjun Panditrao* (supra), it was held by the Supreme Court that a certificate under Section 65B can be produced subsequently, if the same was omitted to be produced along with the electronic record, earlier.

10. This Court is not inclined to refuse reliefs on the basis of the dictum laid down in *Aasha Lata Soni* (supra)



of the High Court of Chhattisgarh, for the reason that, the question in that case arose in connection with an application filed under Section 125 of the Cr.P.C. There, the conversation in question will be between the spouses, which stand on a different footing altogether. A passing reference is made to the question, whether an accused can claim the benefit of the right to privacy in *Ritesh Sinha* (supra). It was held that the fundamental right of privacy cannot be construed as absolute and the same will have to bow down to compelling public interest, which proposition was laid down after taking into account the nine Judges Bench decision of the Hon'ble Supreme Court in *K.S.Puttaswamy and Another v. Union of India and Others* [(2017) 10 SCC 1], as well. If that be so, *Aasha Lata Soni* (supra) cannot be followed.

11. As to who downloaded the controversial conversation and whether it was from the phone used by the sister's son of the defacto complainant etc., are not matters, wherein



the petitioner/accused has got a say at this stage of investigation. It is the lookout of the Investigating Officer to adduce satisfactory evidence in this regard, during the course of trial, at which point of time the accused/petitioner - needless to say - will get adequate opportunity to confront the Investigating Officer or such other witnesses as regards the modality and the way and manner in which the conversation was retrieved. At the present stage, such contentions cannot be propounded as a reason for not giving the voice sample. The question whether the phenolphthalein test turned negative and whether the currency notes were recovered from the body of the petitioner, or from a nearby window etc., are also not germane for consideration now.

12. In short, the contentions urged by the petitioner cannot be recognized in law as a ground to interfere with the order, which directed the petitioner to provide the voice sample. In the circumstances, the challenge espoused

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in this Criminal Miscellaneous Case fails, and the same will stand dismissed.

Sd/-
C. JAYACHANDRAN
JUDGE

TR



APPENDIX OF CRL.MC 9284/2024

PETITIONER ANNEXURES

- Annexure A** A TRUE COPY OF THE PETITION FILED BY THE 1ST RESPONDENT ON THE FILE OF THE COURT OF ENQUIRY COMMISSIONER AND SPECIAL JUDGE (VIGILANCE), KOZHIKODE AS CMP NO. 432/2024 IN PCC 3/2024
- Annexure B** A TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER/ ACCUSED IN CRL. M. P NO. 432/2024 IN PCC 3/2024 ON THE FILE OF THE COURT OF ENQUIRY COMMISSIONER AND SPECIAL JUDGE (VIGILANCE), KOZHIKODE
- Annexure C** A TRUE COPY OF THE ORDER IN CRL. M. P NO. 432/2024 IN PCC 3/2024 ON THE FILE OF THE COURT OF ENQUIRY COMMISSIONER AND SPECIAL JUDGE (VIGILANCE), KOZHIKODE