

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**R/CRIMINAL REVISION APPLICATION (FOR DOMESTIC VIOLENCE) NO.
1243 of 2023**

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE GITA GOPI

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

JIL W/O PRIYANK MANUBHAI CHOKSI
Versus
STATE OF GUJARAT & ANR.

Appearance:

MS HETU M SUDARSHAN(10051) for the petitioner(s) No. 1
MR NARENDRA K AMIN(9506) for the petitioner(s) No. 1
MR HARDIK MEHTA, ADDITIONAL PUBLIC PROSECUTOR for the Respondent(s) No. 1
MR M M SHAIKIH(11314) for the Respondent(s) No. 2
MR PRATIK B BAROT(3711) for the Respondent(s) No. 2

CORAM:HONOURABLE MS. JUSTICE GITA GOPI

Date : 16/07/2024

ORAL JUDGMENT

1. The revisionist is the petitioner in Criminal Misc. Application no.12/2016 before the learned

Additional Chief Metropolitan Magistrate, Court no.9, Ahmedabad. She had moved an application Exh.46 on 2.7.2022 making a prayer to preliminary decide about the voice in the conversation recorded in the CD which has been produced along with Exh.37 affidavit to be sent to the FSL, State of Gujarat, Gandhinagar and further urged to take a voice sample of both the parties for necessary technical comparison/examination through the forensic expert.

2. Criminal Misc. Application no.12/2016 is before the Court of learned Metropolitan Magistrate under the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as "the DV Act"). On hearing the parties, the learned Magistrate passed the order on 20.10.2022 which is reproduced hereunder:-

"Read the application and heard the Ld. Advocate for the parties and perused the record put before me. The petitioner/wife has preferred this application and prayed for

voice. Spectrograph test of the opponent/husband to prove the voice of husband in the C.D. submitted at mark 38/1. The husband side has strongly oppose the application arguing that it is infringement of his fundamental right guaranteed Under Article 20(3)

Heard the Ld. advocate of both the side before passing any order it is important to discuss the legal proposition pertaining to this application To the best of my knowledge there is no express provision under the law in force in India empowering the courts to order any person to undergo voice spectrograph test, the said order cannot be passed in present proceeding. However the Hon'ble Supreme Court in Ritesh Sinha V/s. State of U P reported in AIR 2019 SC 3592 held that the Magistrate must be conceded the power to order a person to give voice sample for the purpose of investigation of a crime. So in the present proceedings, since there is no question of investigation of crime, no such kind of order can be passed in the absence of any provision of law empowering the court to do so considering above discussion petitioner's present application is rejected without any cost."

3. Aggrieved by the order, the wife as the petitioner was before the learned Appellate Court in Criminal Appeal no.197/23. The learned Appellate Court rejected the appeal and the order passed below Exh.46 dated 20.10.2022 by the learned Additional Chief Judicial Magistrate, Court no.9, Ahmedabad was made absolute. Aggrieved by both the orders, the petitioner is before this Court.
4. Learned advocate Mr. Narendra K. Amin for the petitioner raised a contention that in a proceeding between husband and wife under the DV Act, the cruelty meted out by the wife in the matrimonial home are required to be proved during the trial proceedings. Mr. Amin submitted that in the matrimonial home, there would not be any witness who would be supporting the wife, since all the family members are with the husband, in most of the cases, such cruelty, harassment and torture would not get proved in absence of corroborative evidence. Advocate Mr. Amin submitted that in the age of technology

when such act of cruelty are recorded in electronic evidence, then in matrimonial proceedings, such documents are required to be taken on record and exhibited during the trial. Advocate Mr. Amin submitted that insistence of filing certificate under Section 65B of the Indian Evidence Act would also be asking from a wife a hard task who would be living in a very threatening position where she would be continuously monitored and observed by the husband and the family members inspite of that such certificate is produced on record to prove the authenticity of the C.D. Advocate Mr. Amin submitted that a prayer which was made for sending CD at Mark 38/1 for examination to the FSL was on the cause which is on record as the respondent-husband had denied for such examination through FSL. Referring to the cross-examination at Exh.41 of the husband, Advocate Mr. Amin submitted that the husband has categorically denied of examination of his voice from the forensic department. Advocate Mr. Amin submitted that the learned Trial Court has

referred to the judgment in the case of **Ritesh Sinha v. State of UP, AIR 2019 SC 3592** which is also reported in **(2019) 8 SCC 1** but has failed to understand the power which has been entrusted to the Magistrate through the judgment for sending the voice sample of any person for examination of voice spectography test. Advocate Mr. Amin submitted that it is the prime duty of the Court to find out the truth and such voice recorded would prove the case of the petitioner. It is the contention of Mr. Amin that the rejection of the application and reaffirmation by the Appellate Court of the order of rejection by the learned Additional Chief Metropolitan Magistrate would almost non-suit the petitioner as the very base on which the reliance has been placed for proving her case of domestic violence and cruelty meted out and suffered by the petitioner would fall flat.

4.1 Referring to the provisions of Section 28(2) of the Act, Advocate Mr. Amin submitted that the Act gives absolute power to the Magistrate for

laying down its own procedure for examination of an application under Section 12 or under subsection (2) of Section 23. Advocate Mr. Amin stated that by drawing the power under Section 28(2) with the authority given by the Hon'ble Apex Court to the Courts in the ratio which has been laid down in the case of **Ritesh Sinha** (supra), the Court was required to send the CD for examination with sample of both the parties.

4.2 Advocate Mr. Amin has placed reliance on the judgments in the case of **Ritesh Sinha** (supra), **Ziyauddin Burhannuddin Bukhari v. Brijmohan Ramdass Mehra & Ors.**, (1976) 2 SCC 17, **R.M. Malkani v. State of Maharashtra**, AIR 1973 SC 157, **Pravinsinh Nrupatsinh Chauhan V. State of Gujarat**, 2023 (2) GLR 1381 and **Samirkumar Chandubhai Joshi v. State of Gujarat**, rendered in Special Criminal Application no.1303 of 2023 dated 26.4.2023 passed by this Court in support of his arguments.

4.3 While the matter was considered by the learned Appellate Court, the order of the learned Trial

Court below Exh.46 was reaffirmed and the appeal was rejected. The learned Additional Sessions Judge, City Sessions Court, Ahmedabad has considered the submissions and has laid down the reasons in Paragraph 14 as under:-

“14. Considering the reasons assigned by the learned Trial Judge, I am of the opinion that order passed by the learned trial judge cannot be said to be erroneous, without application of mind, perverse and illegal as the trial court has rightly observed that no express provision under the law enforce empowering the courts to order any person to undergo voice spectrography test but the Hon'ble Apex Court held that Magistrate must be conceded to power to order a person to give sample for the purpose of investigation of a crime. In the present case, investigation is not going on but during cross examination under exhibit-41 the husband of the appellant refused and denied digital evidence in CD bearing mark 38/1 and further the opponent refused give his voice sample for voice spectrography to compare his voice, therefore, the appellant had filed an application vide exhibit-46 before the trial court seeking voice test of her husband. So it clearly appears that matter is not in the investigating

stage but at trial stage. Further learned Advocate for the complainant relied on the report of the voice spectrographic examination but the learned Magistrate can adjudicate the Criminal Misc. Application No.12/2016 without report of voice spectrographic examination. So no interference is called for, considering the reasons assigned by the learned trial judge in his order.”

5. Learned advocate Mr. Pratik Barot for respondent no.2 in support of the orders of both the Courts submitted that the orders of the Courts are just, legal and valid. Referring to the provisions of Section 31 of the DV Act, Advocate Mr. Barot submitted that the respondent before the learned Trial Court under the DV Act do not fall in the category of being termed as an accused. Advocate Mr. Barot submitted that the proceedings under the DV Act till the provision of Section 30 are civil in nature. It is only when there is breach of protection order or an interim protection order by the respondent then that would be termed as an offence under the DV Act and then the respondent no.2 would be tried

by the learned Magistrate who has passed the order for the alleged breach to have been caused by the accused. Advocate Mr. Barot submitted that the expression “accused” finds place only in sub-section (2) of Section 31 of the DV Act and only thereafter on finding the breach of the protection order, the respondent no.2 would be proceeded as accused and not before that. Therefore, Mr. Barot submitted that rejection of the application placing reliance on the judgment in the case of **Ritesh Sinha** (supra) is just and proper.

5.1 Advocate Mr. Barot has relied upon the decision of the Allahabad High Court in the case of **Saleem Ahmad v. State of U.P.** dated 14.5.2024 rendered in Matters Under Article 227 no.339 of 2024 to submit that the Court while considering the proceedings under the DV Act as quasi civil in nature, has laid down the interpretation of Sections 31 and 32 to specifically note that the criminality under Section 31 is attached only to the breach of protection order. Advocate Mr.

Barot submitted that no person can be compelled to give his voice sample for examination, wherein in the present matter, the respondent no.2 has specifically denied of any such test. Advocate Mr. Barot submitted that the Court at Allahabad has also referred to the case of **Kunapareddy @ Nookala Shanka Balaji v. Kunapareddy Swarna Kumari, (2016) 11 SCC 774.** Mr. Barot has placed reliance on Paragraphs 14 and 15 of the said judgment, which are reproduced hereunder:-

“14. Procedure for obtaining order of reliefs is stipulated in Chapter IV of the DV Act which comprises Sections 12 to 29. Under Section 12 an application can be made to the Magistrate by the aggrieved person or Protection Officer or any other person on behalf of the aggrieved person. The Magistrate is empowered, under Section 18, to pass protection order. Section 19 of the DV Act authorizes the Magistrate to pass residence order which may include restraining the respondent from dispossessing or disturbing the possession of the aggrieved person or directing the respondent to remove himself from the shared household or even restraining

the respondent or his relatives from entering the portion of the shared household in which the aggrieved person resides etc. Monetary reliefs which can be granted by the Magistrate under Section 20 of the DV Act include giving of the relief in respect of the loss of earnings, the medical expenses, the loss caused due to destruction, damage or removal of any property from the control of the aggrieved person and the maintenance for the aggrieved person as well as her children, if any. Custody can be decided by the Magistrate which was granted under Section 21 of the DV Act. Section 22 empowers the Magistrate to grant compensation and damages for the injuries, including mental torture and emotional distress, caused by the domestic violence committed by the appellant. All the aforesaid reliefs that can be granted by the Magistrate are of civil nature. Section 23 vests the Magistrate with the power to grant interim ex-parte orders. It is, thus, clear that various kinds of reliefs which can be obtained by the aggrieved person are of civil nature. At the same time, when there is a breach of such orders passed by the Magistrate, Section 31 terms such a breach to be a punishable offence.

15. In the aforesaid scenario, merely because Section 28 of the DV

Act provides for that the proceedings under some of the provisions including Sections 18 and 20 are essentially of civil nature. We may take some aid and assistance from the nature of the proceedings filed under Section 125 of the Code. Under the said provision as well, a woman and children can claim maintenance. At the same time these proceedings are treated essentially as of civil nature.”

6. The DV Act has come in force on 26.10.2006 to provide for more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental thereto. The statement of objects and reasons show the intent of the legislature which gets reflected to ensure the protection of the rights of the women guaranteed under the Constitution who are victims of violence within the matrimonial family. The statement of objects and reasons read as under:-

“STATEMENT OF OBJECTS AND REASONS

Domestic violence is undoubtedly a human rights issue and serious deterrent to development. The Vienna Accord of 1994 and the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) in its General Recommendation No. XII (1989) has recommended that State parties should act to protect women against violence of any kind especially that occurring within the family.

2. The phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Presently, where a woman is subjected to cruelty by her husband or his relatives, it is an offence under section 498A of the Indian Penal Code. The civil law does not however address this phenomenon in its entirety.

3. It is, therefore, proposed to enact a law keeping in view the rights guaranteed under articles 14, 15 and 21 of the Constitution to provide for a remedy under the civil law which is intended to protect the woman from being victims of domestic violence and to prevent the occurrence of domestic violence in the society.

4. *The Bill, inter alia, seeks to provide for the following:-*

(i) It covers those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or through a relationship in the nature of marriage or adoption. In addition, relationships with family members living together as a joint family are also included. Even those women who are sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection under the proposed legislation. However, whereas the Bill enables the wife or the female living in a relationship in the nature of marriage to file a complaint under the proposed enactment against any relative of the husband or the male partner, it does not enable any female relative of the husband or the male partner to file a complaint against the wife or the female partner.

(ii) It defines the expression "domestic violence" to include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition.

(iii) It provides for the rights of

women to secure housing. It also provides for the right of a woman to reside in her matrimonial home or shared household, whether or not she has any title or rights in such home or household. This right is secured by a residence order, which is passed by the Magistrate.

(iv) It empowers the Magistrate to pass protection orders in favour of the aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the aggrieved person, attempting to communicate with her, isolating any assets used by both the parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence.

(v) It provides for appointment of Protection Officers and registration of non-governmental organisations as service providers for providing assistance to the aggrieved person with respect to her medical examination, obtaining legal aid, safe shelter, etc.

5. The Bill seeks to achieve the above objects. The notes on clauses explain the various provisions contained in the Bill.”

7. The DV Act was enacted as a law with the purpose for providing speedy remedy in civil laws. The enactment was made keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution of India with an intent to protect the women from being victims of domestic violence with an observation that the phenomenon of domestic violence is widely prevalent but has remained largely invisible in the public domain. Currently remedy observed to be available to the women subjected to cruelty by husband or the relatives, is reflected to be under Section 498A of the IPC but the civil law does not address this phenomenon in its entirety. Hence, the DV Act has come into force to provide for a remedy under the civil law to protect the women and to prevent occurrence of domestic violence in the society.
8. The question before this Court is the admissibility of the CD Mark 38/1 produced along with the affidavit Exh.46 where the prayer was made by the petitioner as a wife to take the

voice sample of both the parties for the examination to the FSL.

9. The application Exh.46 is with that pleading that the CD contains live conversation between the petitioner and the respondent no.2. The CD is supported with an affidavit. The petitioner had moved the Court on the cause of action when in a cross-examination, the respondent husband has denied of any examination to the forensic expert of his voice sample, the petitioner has come up with the fact that the voice in the CD regarding the live conversation is hers as well as her husband and others.
10. The case of **R.M. Malkani** (supra) is relied upon by the learned advocate Mr. Amin. The case before the Court was with regard to the telephonic conversation recorded on the tape. It was contended before the learned Appellate Court that the evidence was illegally obtained in contravention of Section 25 of the Indian Telegraph Act and therefore, the evidence was inadmissible. Secondly the objection was taken

that the conversation was recorded on the tape during the investigation and therefore, the conversation was not admissible under Section 162 of the Cr.P.C. The tape recorded conversation was under challenge for the appellant to be inadmissible contending that it infringes Articles 20(3) and 21 of the Constitution of India and is an offence under Section 25 of the Indian Telegraph Act where the Court while observing the provision of Section 25 has noted in Paragraph 17 as under:-

"Section 25 of the Indian Telegraph Act 1885 states that if any person intending (b) to intercept or to acquaint himself with the contents of any message damages, removes, tampers with or touches any battery, machinery, telegraph line, post or other thin whatever, being part of or used in or about any telegraph or in the working thereof he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both. "Telegraph" is defined in the Indian Telegraph Act in section 3 to mean any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and

sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means.”

11. On consideration of the submissions canvassed, the facts of the case as were noted are that the police officer fixed the tape recording instrument to the telephone instrument under the authority given to the police and the High Court held that the telephone call put by the authority to the appellant was taped by the police officer and therefore, there was violation of Section 25 of the Indian Telegraph Act but the High Court held that the tape recorded conversation was admissible in evidence inspite of violation of the Indian Telegraph Act. It was noted that the police officer could not be said to intercept and message or damage or tamper or remove or touch any of the machinery within the meaning of Section 25 of the Indian Telegraph Act. The reason noted is that the police officer instead of hearing directly to the oral conversation between two

persons recorded the conversation with device of tape recorder. The substance of offence under Section 25 of the Indian Telegraph Act is damaging, removing, tampering, touching any battery, machinery, telegraph lines post or interception or acquainting oneself with the contents of any message. It was noted that when a person talking on the telephone allows another person to record it or to hear it, it cannot be said that the other person who is allowed to do so is damaging, removing, tampering, touching any battery, machinery telegraph lines post or intercepting or acquainting himself the content of any message. There is no element of coercion or compulsion in attaching the tape recorded to the telephone. The Hon'ble Apex Court noted that there is no violation of the Indian Telegraph Act and observed that the High Court is in error on that point.

12. Further noting that in **Sri Rama Reddy etc. v. Shri V.V. Giri**, MANU/SC/0333/1970 : (1971) 1 scr 399 and **Yusufali Esmail nagree v. The State of**

Maharashtra, MANU/SC/0092/1967 accepted the conversation or dialogues recorded on a tape recording machine as admissible evidence. In Paragraph 22, reference has been made about the case of Presidential Election observing that the tape itself becomes primary and direct evidence of what has been said and recorded and under Section 146 of the Evidence Act, questions might be put to the witnesses to test the veracity of the witness and again under Section 153 of the Evidence Act, witness may be contradicted when he denied any question tending to impeach his impartiality. The Hon'ble Apex Court thus observed in following terms as noted in Paragraph 23 as under:-

“23. Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice'; and. thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record. A contemporaneous tape record of a relevant conversation is a relevant

fact and is admissible under Section 8 of the Evidence Act. It is res gestae. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible under Section 7 of the Evidence Act. The conversation between Dr. Motwani and the appellant in the present case is relevant to the matter in issue. There is no dispute about the identification of the voices. There is no controversy about any portion of the conversation being erased or mutilated. The appellant was given full opportunity to test the genuineness of the tape recorded Conversation. The tape recorded conversation is admissible in evidence.”

13. In view of the observations made, the tape recorded conversation is considered to be admissible, provided that the conversation is relevant to the matters in issue. Secondly, when there is an identification of the voice and thirdly the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record.

14. Here in the present matter at hand, the

petitioner wife has produced hash value of the CD and even a certificate under Section 65B of the Indian Evidence Act and the transcript of the conversation between herself and her husband and other family members. The conversation between them is a relevant matter in issue. The petitioner as a wife wants to prove the cruelty which she faced in four walls of the matrimonial house. The identification of the voice would not be a question as recorded in the CD when the petitioner as a wife declares it to be the voice of the husband and other family members with whom she had been living alone from the date of her marriage. The accuracy of CD has been proved by placing on record the hash value. As is noted in the referred judgment in the case of **R.M. Malkani** (supra) in Paragraph 23 contemporaneous tape record of a relevant conversation is relevant fact and is admissible under Section 8 of the Indian Evidence Act. It is res gastea. It is also comparable to a photograph of the relevant incident and the tape recorded conversation is therefore relevant fact and is

admissible under Section 7 of the Indian Evidence Act. Here in this matter, there is no dispute about the identification of the voices. The petitioner as a wife has identified the voice of her husband and other family members. Thus, in that circumstances, and in view of the ratio laid down in the case of **R.M. Malkani** (supra), the CD as produced at Mark 38/1 would be an admissible evidence.

15. The submission of learned advocate Mr. Barot stating that there should not be any compulsion on the respondent no.2 to give his voice sample for verification of his voice more so when he has denied of the same. With a specific reference to Section 31 of the DV Act, Advocate Mr. Barot submitted that the application would be premature since nothing has come on record of any breach of the protection order, where the respondent husband could be termed as an accused and thus, stated that in a domestic violence proceedings, the status of the husband is not as an accused and hence, no voice test can be

conducted and the husband cannot be compelled to give the evidence against him in the proceedings where he is defending his matter for the allegation of domestic violence.

16. The decision in the case of **Ziyauddin Burhannuddin Bukhari** (supra) relied upon by the learned advocate Mr. Amin, the speeches in the course of election campaign was the subject of decision where the Court has observed that the particulars of speeches made by the appellant were given in great detail in the statements annexed to the petition with necessary affidavit. To note with a presumption that if objection on the ground of insufficient particulars is actually given up by a party so that an issue actually formed on it is not tried, the party could have suffered no disadvantage from alleged want of further details which are really matters of evidence. It was observed that the law does not require the whole evidence to be set out with the petition in the form of particulars. Here in the present

matter, the petitioner has set out the details of the conversation that has been recorded in the CD in the transcript form. The Court by way of transcript has been appraised of the conversation that took place between the petitioner as a wife and the respondent as a husband and other family members. In the referred case the tape recorded speeches were considered as document as defined under Section 3 of the Evidence Act and the view taken by the High Court was upheld by the Hon'ble Apex Court observing that it stood on a different footing than photographs and that they were admissible in evidence on satisfying the following conditions:-

- (i) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.
- (ii) Accuracy of what was actually recorded has to be proved by the maker of the record and satisfactory evidence, direct or

circumstantial, had to be there so as to rule out possibilities of tampering with the record.

(iii) The subject matter recorded has to be shown to be relevant according to rules of relevancy found in the Evidence Act.

17. The petitioner as a wife in the matter has produced the CD along with the transcript with the certificate under Section 65B identifying the voice in the CD as of her as well as husband and other family members. Thus, in view of the judgment in the case of **R.M. Malkani (supra)** and **Ziyauddin Burhannuddin Bukhari (supra)**, the CD which is produced on record would be an admissible evidence.

18. This matter is also required to be appreciated from different angle where the proceedings under the DV Act are between the aggrieved who would be the women which includes the wife and the respondent who would include the husband and the family members. The proceedings are for the

protection of the rights of the women who are the victims of violence and which aims at preventing of such occurrence of domestic violence in the society. The learned Magistrates who are dealing with the cases under the DV Act are required to keep in mind the avowed object of the Act. Thus, in view of that object, the Magistrates are given the authority under Section 28(2) to lay down its own procedure for the disposal of the application under Section 12 or sub-section (2) of Section 23. Every proceedings should be so conducted which would be inclusive in nature. The legislature has also intended to assist the Magistrate in discharge of the function of the Act to take the services of the protection officers. It becomes the duty of the protection officers to assist the Magistrate and to make a domestic incident report on receipt of the complaint of domestic violence. The application under Section 12 of the DV Act can be moved by the aggrieved person or the protection officer or any such person on behalf of the aggrieved may present an

application to the Magistrate seeking one or more relief under the DV Act. The said provision which gives authority to the concerned to move the Magistrate is to ensure that there is no further perpetration of the domestic violence in the society. When the aid of the protection officer has become mandatory and the proceedings with the service of councilors as well as service provides and with the assistance of welfare expert, the Magistrate is equipped with all the assistance to deal with the proceedings under the DV Act. Section 28(2) of the DV Act gives a wide power to the Magistrate to adopt his own procedure for the disposal of the application under Section 12. The rejection of the application Exh.46 and Criminal Misc. Application no. 12 of 2016 is not in conformity of the object which is sought to be achieved through provision of the DV Act. The learned Magistrate dealing with the trial under the DV Act has to keep in mind that the domestic violence complaint by the women is in a household where she is surrounded by the family

members of the husband. She would not have any friend in the matrimonial family. The law would only be her friend supporting her in the family. Latest development of technology would assist her and help her to bring her case of domestic violence suffered by her in the shared household. Such evidence on record should be accepted by the learned Magistrate without asking for the extraordinary proof of such evidence. In family matters, the Courts have all the authority to take into the trial all the reports, statements, documents, information on matters which would assist the Court in effective decision of the dispute whether such documents are relevant or admissible under the Indian Evidence Act. The analogy can be drawn through the provision of Section 14 Family Courts Act, which read as under:-

“14. Application of Indian Evidence Act, 1872.— A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a

dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872)."

19. In the family matters, all such documents would become admissible irrespective that those documents become relevant or not or could not be proved in accordance to the Indian Evidence Act. Here in this case, the petitioner had tried to assist the Court by making a prayer by moving application Exh.46 to get further evidence for the CD which she had produced on record. The report of the FSL authority would have been for the assistance of the Court. The CD itself becomes an admissible evidence in view of the decision in the case of **R.M. Malkani** (supra) and **Ziyauddin Burhannuddin Bukhari** (supra), more so being a matrimonial matter, the parties need not prove the documents or the statement or any other report in accordance to the Indian Evidence Act, without even falling for the relevancy or the admissibility of all those documents, which become part of the trial, it

gets admitted as evidence. Here in the present case, when the wife has already produced the CD and transcript of the CD on record, identifying the voice of the husband and other family members, she need not prove more than that on record. However, to assist the Court and to prove the reliability of the CD, she has placed on record the hash value and even the certificate under Section 65B.

The identification of the voice would not be question, since it is the wife who is identifying the voice of husband and in-laws with whom she had stayed together during the matrimonial life. Though recording would be without the knowledge of husband and family members but the conversation between the persons recorded and placed on record by way of CD is relevant to the matter in issue of domestic violence. The wife by producing the hash value and Section 65B certificate as per the Indian Evidence Act has prima facie proved that there is no erasing or tampering in the recorded

conversation. Now the issue which relates is whether the Magistrate has the power to direct the person to give voice samples. It becomes relevant to note that the proceedings before the Judicial Magistrate are under DV Act and the proceedings are dealt with as per the criminal procedure Code. As per the provision of law, the respondent cannot be considered as an 'Accused' till there is breach of protection order. Here the prayer was not for a direction to any police to collect voice sample of any accused, but an order to both the parties, for the giving their voice sample.

20. In **Ritesh Sinha** (supra), referred by the learned Magistrate, the questions which fell for determination were:-

(i) 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?

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

21. The first question was answered in negative following the ratio laid down in **State of Bombay v. Kathi Kalu Oghad**, MANU/SC/0134/1961:AIR 1961 SC 1808. The difference of opinion occurred to the second question.

22. One view was with an opinion that voice sample can be included in the phrase "such other tests" appearing in Explanation (a) of Section 53 of Cr.P.C. by applying the doctrine of *ejusdem generis* and was considered that the Magistrate would have an implied power under Section 53 of Cr.P.C. to pass an order permitting taking of voice sample in the aid of criminal investigation. While the another view was that

compulsion on an accused to give his/her voice sample must be authorized on the basis of a law passed by the legislature instead of a process of judicial interpretation. While expressing that view, note was taken of amendments in Section 53, 53A and 311-A of the Cr.P.C. by Act No.25 of 2005 introduced with effect from 23rd June, 2006, which amendments did not bring, within the fold of the aforesaid provisions of the Cr.P.C., any power in the Trial Court to compel an accused to give sample of his/her voice for the purpose of investigation of a criminal charge.

23. The reference of following Paragraph of **Ritesh Sinha** (supra) would be relevant to understand the background empowering the Judicial Magistrate to compel an accused to give sample of his voice:-

“13. The Law Commission of India, in its 87th report dated 29th August, 1980, also had an occasion to deal with the question presently confronting the Court. The Law Commission examined the matter

(almost four decades earlier) in the context of the working of the provisions of the [Identification of Prisoners Act, 1920](#). The view taken was that a suitable legislation which could be in the form of an amendment to [Section 5](#) of the Identification of Prisoners Act, 1920 would be appropriate so as to specifically empower a Judicial Magistrate to compel an accused person to give a sample of his voice. The following extract from the 87th Report of the Law Commission dated 29th August, 1980 would be relevant.

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

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

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Often, it becomes desirable to have an accused person speak for the purposes of giving to the police an opportunity to hear his voice and try to identify it as that of the criminal offender. A comparison may even be desired between the voice of an accused person and the recorded voice of a criminal which has been obtained by, say, telephone tapping. To facilitate proof of the crime the police may like that the accused should be compelled to speak,- and even that 2 Paragraph 5.27, 87th Report of the Law Commission of India his voice as recorded may be converted into a "voice print"

.....
.....

However, if the accused refuses to furnish such voice, there is no legal sanction for compelling him to do so, and the use of force for that purpose would be illegal.

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The scope of [Section 5](#) needs to be expanded in another aspect. The general power of investigation given to the police under the [Criminal Procedure Code](#) may not imply the power to require the accused to furnish a specimen of his voice. Cases in which the voice of the accused was obtained for comparison

with the voice of the criminal offender are known but the question whether the accused can be compelled to do so does not seem to have been debated so far in India.

There is no specific statutory provision in India which expressly gives power to a police officer or a court to require an accused person to furnish a specimen of his voice.”

24. The judgment notes that if the accused refuses to furnish such voice, there is no legal sanction for compelling him to do so and the use of force for that purpose would be illegal.
25. What was oblivious in the present proceeding on hand is the trial under DV Act is partly quasi-civil in nature. In criminal proceeding where accused has a right to maintain silence, no compulsion would be there to give voice sample since prosecution has to prove a case against the accused beyond all reasonable doubt. Criminal trial against an accused is not participatory in nature. While under DV Act, both the sides equally contribute in the decision of trial. The appreciation of evidence

in the proceedings are in terms of 'preponderance of probabilities', which means the degree of certainty of belief in the mind of the Court by which it is convinced that the "existence of a fact is more probable than its non-existence". The proceeding under DV Act though follows the Cr.P.C. but being quasi-civil in nature the proceeding is as good as between a plaintiff and defendant in a Civil Suit. The Court has ample power of comparison. During trial, the Court would have already heard the voice of the parties during the Court proceeding more so when they are under cross-examination. The oral evidence are heard by the Court and then are transcribed as deposition in the Court proceedings as evidence of parties. Here in the case on hand, it was not necessary for the Court to send the voice sample of the parties. The evidence recorded of both the parties in this quasi civil proceedings is only after the parties depose orally before the Court. The voice of both the parties are heard by the Court. The Magistrate was only required to

compare the voice of the parties recorded in the CD. The prayer to send the voice samples of both the parties was for the assistance of Court. The rejection of such prayer could only be on the ground that the Court is competent enough to compare the voice without any expert opinion. The Court can draw the authority of comparison under the provision of Section 73 of the Indian Evidence Act, 1872.

Section 73 reads as under:-

“73. Comparison of signature, writing or seal with others admitted or proved.-

In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words

or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

[This section applies also, with any necessary modifications, to finger-impressions.]”

26. Section 73 of the Indian Evidence Act gives power to the Court to direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person. The enabling provision has also empowered the Court, with any necessary modifications, to finger impressions.
27. Here in the present case on hand, the voice of both the parties was heard before the Court as they had deposed the cross-examination before Court, the voice for comparison was already before the Court. Thus, the Court could have on its own compared the voice. As noted in the case of **Ritesh Sinha** (supra) that “procedure is the

handmaid, not the mistress, of justice and cannot be permitted to thwart the fact-finding course in litigation”.

28. The relevant observation in context of first question raised in **Ritesh Sinha** (supra) would be apt for mentioning about the view taken over the testimony of accused person.

“9. Despite unanimity amongst the learned Judges hearing the appeal on the first question on which the learned counsel for the appellant has also not laid much stress it would be appropriate to make the discussions complete to answer the question on the strength of the test laid down by this Court in State of Bombay vs. Kathi Kalu Oghad (supra). Speaking on behalf of the majority the then learned Chief Justice B.P. Sinha was of the view that the prohibition contemplated by the constitutional provision contained in [Article 20\(3\)](#) would come in only in cases of testimony of an accused which are self-incriminatory or of a character which has the tendency of incriminating the accused himself. The issue in the case was with regard to specimen writings taken from the accused for comparison with other writings in order to determine the

culpability of the accused and whether such a course of action was prohibited under [Article 20\(3\)](#) of the Constitution. The following observations of the then Chief Justice B.P. Sinha would be apt for recollection as the same conclusively determines the first question arising. The same, therefore, is extracted below:

“(11)It is well-established that cl. (3) of [Art. 20](#) is directed against self-incrimination by an accused person. Self-Incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge.....

(12) In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least

probable, considered by itself. A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous, because they are unchangeable; except, in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of 'testimony'."

29. While answering the second question, it has been observed in Paragraph 21 as under:-

"21. The exercise of jurisdiction by Constitutional Courts must be guided by contemporaneous realities/existing realities on the ground. Judicial power should not be allowed to be entrapped within inflexible parameters or guided by rigid principles. True, the judicial function is not to legislate but in a situation where the call of justice and that too of a large number who are not parties to the lis before the Court, demands expression of an opinion on a silent aspect of the Statute, such void must be filled up

not only on the principle of ejusdem generis but on the principle of imminent necessity with a call to the Legislature to act promptly in the matter.”

30. And lastly the view taken by the Apex Court in Paragraph 25 in following terms:-

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

31. What thus necessarily follows that the Judicial Magistrate do have power to order a person to give a sample of his voice, such an order can be even against an accused, which would be for the purpose of investigation of crime. However, in matrimonial proceeding, unless under Indian

Penal Code, the status of persons would be of a husband and wife, and no bar would operate against them to disclose the communication during marriage. As provided under Section 122 of the Indian Evidence Act, 1872, husband or wife cannot claim any privilege of non-disclosure of communication during marriage, in a proceeding filed by one against the another. The communication recorded in the CD would become part of the proceeding under the DV Act.

32. In view of the above, the present application is allowed. The order dated 20.10.2022 passed by the learned 9th Additional Chief Metropolitan Magistrate in Criminal Misc. Application no.12 of 2016 and the order dated 18.8.2023 passed by the learned Additional Sessions Judge in Criminal Appeal no.197 of 2023 are quashed and set aside.

Maulik

(GITA GOPI,J)