

(2012) 02 BOM CK 0044

In the Bombay High Court

Case No : Criminal Revision Application No. 57 of 2011

Shri Madhukar K. Farde

APPELLANT

Vs

Central Bureau of Investigation

RESPONDENT

Date of Decision : 28-02-2012

Acts Referred:

Constitution of India, 1950 — Article 20(3)
Criminal Procedure Code, 1973 (CrPC) — Section 161(2)
Evidence Act, 1872 — Section 7, 8

Citation : (2012) 02 BOM CK 0044

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : R. Menezes, for the Appellant; J. Vaz, Special Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

F.M. Reis, J.—Heard Shri R. Menezes, learned Counsel appearing for the petitioner and Shri J. Vaz, learned Special Public Prosecutor for the respondent. The above revision petition challenges the order dated 30/09/2011 passed by the learned Principal District and Sessions Judge, North Goa, Panaji in Criminal Miscellaneous Application No.38/2011.

2. Briefly the facts of the case are that the respondent/CBI had registered RC5(A)/2010 against the petitioner for demanding a bribe of Rs. 1,00,000/- from Ms. Bharati Roy of M/s. Vidya Industrial Services for the release of the attachment of the shop and firm. It is further their contention that he was caught red handed while accepting an amount of Rs.25,000/-from the complainant through her advocate in the course of the trap laid out. It is further their case that the conversation that ensued between the accused, the complainant and her advocate were recorded in the presence of the panch witnesses and sealed under their signature. It is further their case that the petitioner, the complainant and the witnesses were called to the CBI office for recording their voice specimen on

3/03/2011 when they gave her voice specimen unlike the petitioner who refused to do so. A notice to that effect was given through the advocate to the petitioner to give such voice specimen. It is further their case that it was vital for the voice spectrographic test by the CFSL, New Delhi on the recorded conversation that his voice specimen is essential for such test and crucial for the investigation. The petitioner opposed the said application and disputed the right of the respondent to carry out such voice specimen. It was his case that by indulging in such exercise the petitioner would have to give evidence against himself which is not permissible in view of Article 20(3) of the Constitution of India. It is further his case that the application itself was malafide attempt on the part of the respondent and that the earlier attempt by the respondent to take such voice sample was not permitted by the learned Judge. It is further his case that such tests are not at all crucial or vital for the purpose of investigations and prayed that the application be rejected.

3. The learned Judge vide impugned order dated 30/09/2011 upon hearing the parties allowed the application filed by the respondent. Being aggrieved by the said order, the petitioner has preferred the above revision petition.

4. Shri R. Menezes, the learned Counsel appearing for the petitioner advanced three submissions assailing the impugned order passed by the learned Sessions Judge. The first contention is that such direction to take voice sample cannot be done at the stage of investigations. It is further his contention that by directing the grant of such voice sample the respondent may force the petitioner to record some incriminating statements against the petitioner which may implicate him for the alleged crime. It is further his case that granting of such application for voice sample is opposed to the provisions of Article 20(3) of the Constitution of India. It is further his case that the question of seeking any voice sample by reading the script as proposed by the respondent would not arise as at the most the respondent can call upon the petitioner to read some neutral statements if at all the respondent is entitled to take such voice sample. The learned Counsel has further pointed that though the charge sheet has been filed during the pendency of the above revision petition, nevertheless, the petitioner disputes the existence of the voice recording which has been produced along with the charge sheet which is alleged to have been sent to the CFSL for test. In support of his submissions, the learned Counsel has relied upon paras 13 and 18 of the judgment of the Hon"ble Delhi High Court reported in *Om Parkash and Others Vs. Financial Commissioner Delhi and Others*, which thus:

13. An examination of the decision in *Kathi Kalu (supra)*, as well as other decisions on the subject of an accused being a witness against himself makes it clear that the taking of an handwriting sample in the course of a trial to establish the identity of a person would not be hit by Article 20(3) of the Constitution of India. However, it may be mentioned that if an accused is asked to give a handwriting sample and the matter which he writes contains inculpatory statements, then the same would be hit by Article 20(3) of the Constitution, as

then he would be a witness against himself. For example, if an accused in a car theft case is compelled to write "I stole the car", although it would constitute a handwriting sample, it would be hit by Article 20(3) of the Constitution because the accused was compelled to be a witness against himself. On the other hand, if the accused were asked to give a handwriting sample by copying some known classical work in his handwriting, that would not be hit by Article 20(3) of the Constitution as then he would not be a witness against himself and his handwriting specimen would only be for the purposes of identification.

18. The accused, at the stage of investigation, cannot be compelled to give his voice sample just as he cannot be compelled to undergo a test identification parade. It is for him to give or not to give his voice sample in the course of investigation and the court cannot, during investigation, direct the accused to give his voice sample. It would be interesting to note a recent decision of the Supreme Court in the case of *Amrit Singh v. State of Punjab* AIR 2006 SCW 5712 wherein the question of obtaining a hair specimen of the accused was in issue. An application was filed by the investigating officer in the court of the Judicial Magistrate for obtaining a specimen of the hair of the accused, but he refused to give any such specimen of hair. He made a statement before the court which was recorded, but he did not assign any reason for refusing to give samples of his hair. It was contended on behalf of the State of Punjab before the Supreme Court that an adverse inference, in the least, ought to have been drawn against him. In repelling this contention, the Supreme Court in para 19 of the said decision held as under:

Appellant had a right to give or not to give sample of his hair. He could not have been made a witness against himself against his will.

This decision indicates that in the course of investigation, a accused cannot be compelled to provide a sample of his hair. The same would equally apply to the giving of a voice sample. This decision is also a clear endorsement of the view taken by me that the petitioners could not be directed to give their voice samples in the course of investigation.

5. The learned Counsel also relied upon the judgment of the Apex Court referred to in the said judgment of the Hon"ble Delhi High Court reported in *Amrit Singh Vs. State of Punjab*, . The learned Counsel has pointed out that the observations of the Hon"ble Delhi High Court in the said Judgment

6. have been considered by the Apex Court while passing the judgment relied upon by the learned Counsel appearing for the respondent.

7. On the other hand, Shri J. Vaz, the learned Special Public Prosecutor appearing for the respondent has supported the impugned order. Learned Counsel pointed out that the question of contending that the voice samples are being taken for the purpose of investigations does not survive, as according to him the charge sheet has already been filed before the learned Sessions Judge during the pendency of the above revision petition. The learned Counsel further

pointed out that the apprehension of the petitioners that he would be asked to read some incriminating statements against him is also not well founded as according to him the script has already been produced and copy thereof handed over to the petitioner. The learned Counsel further pointed out that the contention of the petitioners to the effect that the voice recorded itself is not in existence is a matter which cannot be considered at this stage of the proceedings as the respondent will have to establish the existence of such voice recording in accordance with law. The learned Counsel further pointed out that the question of contending that the recording of such voice sample would be hit by Article 20(3) of the Constitution of India is not at all well founded in view of the judgment of this Court reported in 2005 Cri. L.J. 2868 in the case of Central Bureau of Investigation V/s. Abdul Karim Ladsab Telgi and ors. The learned Special Public Prosecutor has further pointed out that the Apex Court has decided the right of the respondents to carry out such voice sample in the judgment reported in Smt. Selvi and Others Vs. State of Karnataka, . The learned Counsel, as such, pointed out that the revision petition deserves to be rejected.

8. Having heard the learned Counsel and on perusal of the record, dealing with the first contention of the learned Counsel appearing for the petitioner, I find that considering that the charge sheet has already been filed before the learned Sessions Judge, which is not disputed by the petitioner the objection of the petitioner to the effect that such recording of voice sample cannot be taken during the course of investigation does not survive. Admittedly, the charge sheet has already been filed and the script is one of the documents produced by the respondent along with the charge sheet and the copy thereof has also been furnished to the petitioner. Hence, the first contention of the learned counsel for the petitioner stands rejected. The next apprehension of the learned Counsel appearing for the petitioner that the respondent may call upon the petitioner to read some incriminating statements which can be used against the petitioner also does not survive. The petitioner is already in possession of the script which is relied upon by the respondent and, as such, such apprehension would also not subsist. Consequently, the said contention of the learned Counsel appearing for the petitioner to that effect deserves to be rejected.

9. With regard to the contention of the learned Counsel appearing for the petitioner to the effect that any incriminating statement given by the petitioner can be used against the petitioner and that such statement would be contrary to Article 20(3) of the Constitution of India is a submission which cannot be accepted for the following reasons. The Apex Court in the judgment reported in the case of Selvi and Ors. (supra) has held at para 179 thus:

179. We now return to the operative question of whether the results obtained through polygraph examination and the BEAP test should be treated as testimonial responses. Ordinarily evidence is classified into three broad categories, namely, oral testimony, documents and material evidence. The protective scope of Article 20(3) read with Section 161(2) CrPC guards against

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

10. Shri J. Vaz, the learned Special Public Prosecutor appearing for the respondents has categorically made a statement that such voice samples are not being taken for the purpose of investigations but only for the purpose of identification and/or comparison with the earlier voice recording which according to him is existing. As such, the contention of Shri R. Menezes, learned Counsel appearing for the petitioner to the effect that the respondent may use such evidence against the petitioner is not well founded. In view of the judgment of the Apex Court referred to herein above, I find that there is no bar to direct the petitioner to give his voice sample for the purpose of identification or comparison with the material that is already in possession of the investigators. The learned Single Judge of this Court in the judgment of the Central Board Investigations (supra) has upheld the right of the respondents to record voice samples of the accused for the purpose of identification of his voice to compare it with the tape recorder or telephonic conversations. This Court at paras 11 and 12 has held thus:

11. Indubitably, requiring the accused to lend his voice sample for the limited purpose of identification of his voice so as to compare the same with the tape-recorded telephonic conversation, is neither requiring him to impart knowledge in respect of relevant facts, by means of oral statements or statements in writing of his personal knowledge of the facts to be communicated to a Court or to a person holding an enquiry or investigation. Besides, the accused will not be called upon to state on any of the state of facts which will have to be determined by a Court or authority authorised to come to a decisions 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 opinions as an expert, in respect of the matters in controversy. Accordingly, applying the principle underlying the statement of law expounded in *State of Bombay vs. Kathi Kalu Oghad* (Supra), in my opinion, the requirement of lending voice sample to the investigating agency by the concerned accused for the purpose of identification of their voice cannot infringe Article 20(3) of the Constitution of India, as it is outside the limit of "testimony" much less, "testimonial compulsion". Be that as it may, as is well established that tape-recorded conversation is admissible in evidence, provided, it fulfills certain conditions. The Apex Court in the case of *R.M. Malkani Vs. State of Maharashtra*, has observed thus:

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 u/s 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 u/s 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.

(emphasis supplied)

One of the precondition for admissibility of tape-recorded conversation is identification of the voice. If identification of the voice is the quintessence for the admissibility of the tape-recorded conversations it is preposterous to suggest that it is not open to the investigating agency to require the concerned accused to lend his voice sample for the purpose of identification of the voice in the tape-recorded conversation.

12. Indubitably, with the advancement of Science and Technology, identity of a person with the aid of finger prints, palm impression, thumb impression, foot marks, blood sample, D.N.A. test, specimen of handwritings-signature or exposing a part of the body or the like, can be established. As observed by the Apex Court in Malkani's case (Supra), a contemporaneous tape-record of a relevant conversation is a relevant fact admissible u/s 8 of the Evidence Act. The same is *res gestae* and also comparable to a photograph of a relevant incident, admissible u/s 7 of the Evidence Act. Just as handwriting and signature are associated with an individual or his personal trait, even the voice of a person is his personal trait. World over, voice identification is employed by police during investigation for identifying individuals by the time, frequency, and intensity of their speech-sound waves. A sound spectrograph is employed to record these waves in the form of a graph that may be compared to graphs of other individuals and differentiated. For the most accurate results from the spectrographic voice identification method, a professional examiner (1) will require the original recordings or the best quality re-recordings if the original is not available; (2) will perform a critical aural review of the suspect and known recordings; (3) will produce sound spectrograms of the comparable words and phrases; (4) will produce a comparison recording juxtaposing the known and unknown speech samples; (5) will evaluate the evidence and classify the results into one of five standard categories (1-positive identification, 2-probable identification, 3-positive elimination, 4-probable elimination, and 5-no decision). The final decision is reached through a combined process of aural and visual

examination.

The spectrographic method of voice identification is a process that interweaves the visual analysis of the sound spectrograms with the critical aural examination of the sounds being viewed. No longer are voices compared on the basis of a limited group of key words. Today's aural/spectrographic voice identification method takes advantage of the latest in technological advancements and interweaves several analysis into one procedure to produce an accurate opinion as to the identity of a voice. This modern technique combines the experience of a trained examiner performing the visual analysis of the spectrograms, and aural analysis of the recordings with the use of the latest instruments modern technology has to offer, all in a standardised methodology to assure reliability. Proper presentation and explanation of the research pertaining to spectrographic voice identification analysis will allow the Court to better understand the accuracy and reliability of the spectrographic voice identification method. When the research is properly presented, the studies show that properly trained individuals, using standard methodology, produce accurate results. It is not necessary for me to dilate on the issue as to whether the spectrograph analysis to be done or as done, would be accurate and reliable, for it will be a matter of evidence to be established by the experts on that subject. Suffice it to observe that as voice is associated with an individual or his person and a personal trait, if scientific analysis for identification of voice is possible then, there is no inhibition in taking the voice sample of a person on the basis of which, his identity in the tape-recorded telephonic conversation can be established.

Considering the said judgment of the learned Single Judge of this Court, I find that merely because such voice samples are being asked of the petitioner for the purpose of comparison does not in any way infringe Article 20(3) of the Constitution of India. The contention of the learned Counsel Shri Menezes based on the judgment of the Hon'ble Delhi High Court cannot be accepted. The learned Counsel has tried to contend that the petitioner should be permitted only to read some neutral statement and not the script which according to him would be incriminating. It is well settled that reading the said script for identification/ comparison by itself cannot be an evidence against the petitioner. The respondent will have to follow the procedure of law to establish the allegations about the existence of the voice recording and their claim that such voice recording is being identified before the CFSL. This aspect in any event would be a matter which would have to be considered after evidence is recorded on merits. The apprehension of the learned Counsel for the petitioner to the effect that the petition disputes the existence of the voice recording itself is also a matter which would have to be considered by the learned Sessions Judge on merits. The question of existence of voice sample is kept open to be decided by the learned Sessions Judge on merits during the course of the trial of the case. At this stage, it would not be appropriate to consider the said aspect while deciding the application seeking permission to take the voice sample of the petitioner. In view of the above, I find no merit in the above revision petition and, consequently, the

same stands dismissed.