

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

MONDAY, THE 7TH DAY OF NOVEMBER 2022/16TH KARTHIKA, 1944

CRL.MC NO.651 OF 2021

AGAINST THE ORDER/JUDGMENT CRL.M.P.No.487/2020 OF SPECIAL COURT FOR SC/ST (POA) ACT AND NDPS ACT CASES, MANJERI DATED 05.01.2021 IN VENGARA POLICE CRIME NO.150/2018, MALAPPURAM DISTRICT.

PETITIONER/RESPONDENT/ACCUSED NO.1:

ABU THAHIR, AGED 37 YEARS,
S/O.KUNHALIKUTTY, PANDIKKADAVATH HOUSE,
KARATHODU, VENGARA, MALAPPURAM DISTRICT.

BY ADV. SRI.BABU S. NAIR

RESPONDENTS/STATE/PETITIONER/COMPLAINANT:

- 1 THE STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM,
KOCHI, PIN-682031.
- 2 THE SUPERINTENDENT OF POLICE
STATE SPECIAL BRANCH, MALAPPURAM, PIN-676505.

BY ADVS.
SRI.JAMSHEED HAFIZ
SRI.GRASHIOUS KURIAKOSE (SENIOR COUNSEL),
ADDL.DIRECTOR GENERAL OF PROSECUTION

SRI. C.K.SURESH
SMT.K.K.NESNA

THIS CRIMINAL MISC. CASE HAVING COME UP FOR HEARING ON 20.11.2022, THE COURT ON 07.11.2022, PASSED THE FOLLOWING:

O R D E R

Dated, this the 7th November, 2022

Accused No.1 in Crime No.150/2018 of Vengara Police Station has filed this petition under Section 482 of the Code of Criminal Procedure (hereinafter referred as 'Cr.P.C', for short) to quash Annexure-H order passed by the learned Special Judge under the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred as 'NDPS Act', for short) and Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act (hereinafter referred as 'SC/ST Act', for short) and Annexure-I, the consequential order issued by the Investigating Officer. Respondents are State of Kerala and the Investigating Officer.

2. Heard the learned counsel for the petitioner as well as the learned Additional

Director General of Prosecution, Sri.Grashious Kuriakose. Adv. Jamsheed Hafiz, who represented Mr.Fajid also was heard.

3. It is submitted by the learned counsel for the petitioner that as per Annexure-H order in Cr1.M.P.No.487/2020 dated 05.01.2021, the learned Special Judge directed the 1st accused in the above crime, who is the petitioner herein, to appear before the Director of All India Radio Station, Kozhikode on the date and time fixed by the Investigating Officer for the purpose of obtaining voice sample. In consequence thereof, Deputy Superintendent of Police (special branch)/Investigating Officer issued Annexure-I notice to the petitioner to appear before the All India Radio Station, Kozhikode on 04.02.2021 at about 10:30 a.m. According to the learned counsel for the petitioner, Annexures-H and I orders are illegal and the same are liable to be set aside.

4. It is submitted by the learned counsel for the petitioner that Crime No.150/2018 of Vengara Police Station was initially registered against one Fajid, on seizure of 2.100 Kg of Ganja from an autorickshaw belonged to Fajid at 13:50 hrs on 22.06.2018. Annexure-A FIR also was registered and Fajid was arrested. Later he was released on bail. Thereafter, Fajid was removed from the array of accused. Later the petitioner and two other persons were implicated in the crime on the allegation that they have committed offences under Section 193 and 201 read with Section 34 of Indian Penal Code (hereinafter referred as 'IPC' for short) and under Section 20 (b) (ii) (B) of NDPS Act. Then the petitioner herein approached this Court for anticipatory bail and as per Annexure-B order in B.A. No.491/2019 dated 26.02.2019, this Court granted anticipatory bail to the petitioner, on appraisal of the history of the case, as

espoused.

5. Subsequently, the investigating officer/ 2nd respondent had filed an application before the Learned Special Judge, stating that the petitioner had spoken to the Sub Inspector from 23.58 hours on 21.06.2018 till 04.12 hours on 22-6-2018, and the same was recorded in the official telephone of the Sub Inspector which was recorded on a C.D. and therefore, to ascertain the voice of the petitioner, the petitioner was directed to appear for collecting the voice sample, so as to compare the same with the recorded voice in the C.D. A true copy of the application submitted by the 2nd respondent- Investigating Officer dated, 23-7-2020 is Annexure-C. The Learned Special Judge considered the matter in detail and dismissed the said petition as per Annexure-D order on 29-8-2020, stating that there was no certification under Section 65B of the Evidence Act and the official

phone of the Sub Inspector was not seized or produced.

6. After Annexure-D order, a second application for the same relief was filed and the learned Special Judge, dismissed the same.

7. Subsequently, on 22-9-2020, another application for the third time was filed for the same relief, stating that the official phone of the Sub Inspector was seized on 3-9-2020. True copies of the notice and the report filed by the 2nd respondent before the Special Court, Manjeri dated, 28-9-2020 and 22-9-2020 are Annexures-E and F.

8. It is submitted by the learned counsel for the petitioner further that the present application which led to Annexure-H order was filed as a third attempt, at a much belated stage. The petitioner filed a very detailed objection stating that the mere production of the phone of the Sub Inspector, at a very

belated stage did not improve the prayer made in earlier occasions by the very same investigating officer and there were possibilities of manipulation in the phone and several other conversations would have been definitely erased from the phone and when the petitioner surrendered, his voice was recorded several times by the investigating officer, in the studio as well as from the office of the 2nd respondent. Therefore, the belated application, on the facts of the case could be allowed and the petitioner could not be compelled to give evidence against himself, which would amount to testimonial compulsion. Annexure-G, is the copy of the said objection.

9. Precisely, it is submitted by the learned counsel for the petitioner that earlier two applications were filed for the same relief and were dismissed by the learned Special Judge and, thereafter, the 3rd application as

Annexure-F was filed and the same culminated in Annexure-H order even though the petitioner filed detailed objection as per Annexure-G.

10. According to the learned counsel for the petitioner, the specific case put up by the petitioner in the objection as could be read out from the paragraph 7 of the objection is that this petitioner was called to the police station several times by the Sub Inspector of Police and also by the present investigating officer. This was done at the initial stages and also prior to the appearance of the petitioner on getting anticipatory bail. On these occasions, the petitioner was made to write as dictated by the Investigating Officer. The voice of the accused was also recorded on several occasions. The accused was made to speak the sentences dictated by the Investigating Officer. The accused was also made to speak the matter which was written and given by the Investigating Officer. All

these were recorded. On all these occasions, several persons from various offices including Radio stations and studios were present and the voice of the accused was recorded. Apart from this, the petitioner was also taken to the Radio station and studios for the purpose of voice recording.

11. However, the learned Special Judge not given emphasis to the contentions urged by the petitioner. Accordingly, Annexure-H order was passed. He pressed for setting aside the order.

12. Whereas, the learned Additional Director of General of Prosecution argued that on 22.06.2018, the petitioner herein, who is the 1st accused in the above crime at present, conspired with three others and as part of conspiracy, hatched between them, 2.100 Kgs of Ganja was put in an autorickshaw bearing registration No.KL-10AR-8385 belonged to one Fajid, so as to implicate him as an accused in

NDPS offence.

13. The police party, on detecting Ganja in the autorickshaw, nabbed the above said Fajid and later he was released on bail. But later the CCTV footages, the voice of the petitioner, and other materials revealed that the petitioner along with the other accused intentionally put Ganja in the autorickshaw of Fajid. The voice sample of the 1st accused sought to be compared in this matter is a very relevant piece of evidence and the attempt of the petitioner is to avoid voice sample testing with a view to stall collection of evidence by the Investigating Officer. According to the learned ADGP, Annexure-H order passed by the learned Special Judge is well within the power of the court and, therefore, the order does not require any interference.

14. To be on the core issue, it is to be noted that after the arrest of Fajid along with

2.100 Kms of Ganja in his autorickshaw bearing registration NO.KL-10AR-8385, the CCTV footage collected by the Investigating Officer showed that the petitioner herein, who is the 1st accused along with the other accused, hatched conspiracy to implicate Fajid as an accused in an NDPS Act crime, and, accordingly, they had placed Ganja in the autorickshaw of the above said Fajid. In order to substantiate the said prosecution case, the voice sample of the petitioner recorded in the official mobile phone of the Superintendent of Police, Vengara in between 23.58 hrs on 21.06.2018 and 4.12 hrs of 22.06.2018, which was produced before the Special Court to be compared with his specimen voice sample to be collected. In this connection, the learned ADGP placed decision of the Apex Court reported in [2019(4) KHC 183] ***Ritesh Sinha v. State of Uttar Pradesh and Another***. The said decision was rendered by three

bench judges of the Apex Court, when a two Bench Judge of the Apex Court disagreed on the question whether, in the absence of any provision in the Code, a Magistrate can authorize the investigating agency to record the voice sample of the person accused of an offence. Hence the matter was referred to a three Judge Bench. It is worthwhile to note that the said two Judges agreed on the point that Art.20(3) of the Constitution of India, which protects a person accused of an offence from being compelled to be a witness against himself, does not extend to protecting an accused from being compelled to give his voice sample during the course of investigation into an offence. Ultimately, it was held by the three bench that the legislative response in remaining silent or acting at a "slow" pace can always be explained by legislative concerns and considerations of care and caution. It is in the aforesaid context

and in the admitted absence of any clear statutory provision that the question arising has to be answered which is primarily one of the extent to which by a process of judicial interpretation a clear gap in the statute should be filled up pending a formal legislative exercise. It is the aforesaid question that we shall now turn to. 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 Art.142 of the Constitution of India.

15. The learned ADGP also placed a

constitution bench decision of the Apex Court reported in [2020 (4) KHC 101] **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Others** dealing with mandate of certificate required under Section 65B(4) of the Evidence Act as mandatory as regards to electronic records.

16. The learned ADGP also argued that even though two petitions were filed earlier to send the voice sample as prayed for in the present petition, the same were dismissed by the learned Special Judge since the original mobile phone was not produced before the trial court and in the mean while, **Ritesh Sinha's** case (supra) and **Arjun Panditrao Khotkar's** case (supra) were rendered by the Apex Court and, thereafter the Investigating Officer produced the original mobile phone before the court and, accordingly, voice sample test was sought for. Therefore, the trial court rightly allowed the petition and the

said order requires no interference.

17. Adv.Jamsheed Hafiz appearing for Fajid as an intervenor also supported the prosecution case to the effect that Fajid was implicated in this case, as the out come of conspiracy hatched between the petitioner and the other accused in this case.

18. To be on the crux of the matter, now the original mobile phone, where the voice sample alleged to be that of the petitioner was recorded, was produced before the learned Special Judge. In view of production of the original mobile phone, the prosecution wants to get the voice sample tested and, accordingly, as per the impugned order, he was directed to appear before the Director of All India Radio Station, Kozhikode.

19. In this context, the legal questions emerge for consideration are;

1) In the absence of express provision in

the procedure law, can a Magistrate or Special Judge authorise the investigating agency to record the voice sample of the accused, for comparison with the disputed voice of the accused?

2) Would a judicial order compelling an accused to give his/her voice sample amounts to testimonial compulsion under Article 20(3) of the Constitution of India?

20. The first query is specifically answered by the Apex Court in **Ritesh Sinha's** case (supra) holding 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 Art.142 of the Constitution of India.

21. Regarding the second query, the Apex Court in paragraph No.24 of **Ritesh Sinha's** case (supra) observed and held that *the issue is interesting and debatable but not having been argued before us it will suffice to note that in view of the opinion rendered by this Court in Modern Dental College and Research Centre and others v. State of Madhya Pradesh and others, 2016 KHC 6313 : 2016 (7) SCC 353 : 2016 (4) SCALE 478 : AIR 2016 SC 2601 : 2016 (3) KLT SN 32Gobind v. State of Madhya Pradesh and another, 1975 KHC 561 : 1975 (2) SCC 148 : 1975 SCC (Cri) 468 : AIR 1975 SC 1378 : 1975 (1) ALR 252 : 1975 CriLJ 1111 and the Nine Judge's Bench of this Court in K.S. Puttaswamy and another v. Union of India and others, 2017 KHC 6577 : 2017 (10) SCC 1 : 2017 (4) KHC SN 21 : 2017 (10) SCALE 1 : 2017 (3) KLJ NOC 17 : 2017*

(4) KLT 1 : AIR 2017 SC 4161 the fundamental right to privacy cannot be construed as absolute and but must bow down to compelling public interest. We refrain from any further discussion and consider it appropriate not to record any further observation on an issue not specifically raised before us.

22. Therefore, recording of voice sample of an accused cannot be held as testimonial compulsion under Article 20(3) of the Constitution of India as of now. But the issue requires deliberation as observed by the Apex Court in **Ritesh Sinha's** case (supra).

23. At this juncture, it is argued by the learned counsel for the petitioner that Section 79A of the Information Technology Act, 2000 (hereinafter referred as 'the IT Act' for short) is relevant in so far as electronic evidence is concerned. It is argued that as per Section 79A, the Central Government may, for the purpose of

providing expert opinion on electronic form evidence before any Court or other authority specify, by notification in the Official Gazette, any Department, body or agency of the Central Government or a State Government as an Examiner of Electronic Evidence. The explanation provides that for the purposes of this section, "electronic form evidence" means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines.

24. According to the learned counsel for the petitioner, however, no notification so far issued in this regard. It is pointed out by the learned ADGP that Cyber Forensic Division, State Forensics Science Laboratory, Vellayambalam, Thiruvananthapuram is the notified lab vide notification dated 05.11.2021, published in the Gazette of India. The copy of the notification

also was produced before this Court. Therefore, the test will be conducted at the said centre as notified under Section 79A of the Act. In view of the submission, this contention at the instance of the petitioner cannot be appreciated.

25. Now the challenge is, who is the person capable of recording the voice sample of the petitioner? In fact, Section 79A of the IT Act, authorises the Central Government to issue notification in this regard. Therefore, the voice sample also can be collected by the Cyber Forensic Division, State Forensics Science Laboratory, Vellayambalam, Thiruvananthapuram.

Therefore, the impugned order is modified. Accordingly, it is ordered that the petitioner shall appear at 10:00 a.m on 15.11.2022 before Cyber Forensic Division, State Forensics Science Laboratory, Vellayambalam, Thiruvananthapuram for giving voice sample and on getting the same,

the learned Special Judge is directed to complete the remaining steps for comparison, in accordance with law.

It is made clear that the Investigating Officer can follow the process of collection of voice sample etc., as part of fair investigation.

Sd/-

A. BADHARUDEEN, JUDGE.

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APPENDIX OF CRL.MC 651/2021

PETITIONER'S ANNEXURES:

- ANNEXURE-A TRUE COPY OF THE FIR IN CRIME NO. 150/2018 OF THE VENGARA POLICE STATION DATED 22/6/2018.
- ANNEXURE-B TRUE COPY OF THE ORDER IN BA NO.491/2019 OF THIS HON'BLE COURT DATED 216/02/2019.
- ANNEXURE-C TRUE COPY OF THE APPLICATION SUBMITTED BY THE 2ND RESPONDENT INVESTIGATING OFFICER, DATED 23/7/2020.
- ANNEXURE-D TRUE COPY OF THE ORDER DATED 29/8/2020 IN CRL.M.P.NO.479/2020 OF THE SPECIAL COURT FOR SC/ST(POA) ACT AND NDPS ACT CASES, MANJERI.
- ANNEXURE-E TRUE COPY OF THE NOTICE ISSUED TO THE PETITIONER FROM THE SPECIAL COURT, MANJERI DATED 28/9/2020.
- ANNEXURE-F TRUE COPY OF THE REPORT SUBMITTED BY THE 2ND RESPONDENT BEFORE THE SPECIAL COURT DATED, 22/9/2020.
- ANNEXURE-G TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER BEFORE THE SPECIAL COURT, MANJERI DATED 8/10/2020.
- ANNEXURE-H CERTIFIED COPY OF THE ORDER OF THE SPECIAL JUDGE FOR SC/ST (POA) CASES AND NDPS ACT CASES, MANJERI DATED 5/1/2021 IN CRL M P NO. 487/2020.
- ANNEXURE-I ORIGINAL OF THE NOTICE ISSUED BY THE 2ND RESPONDENT TO THE PETITIONER DATED, 28/1/2021.