

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL REVISION APPLICATION NO. 164 of 2021****FOR APPROVAL AND SIGNATURE:****HONOURABLE DR. JUSTICE ASHOKKUMAR C. JOSHI**

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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

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POONAM MADHA PARMAR
Versus
STATE OF GUJARAT

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Appearance:

MR VIRAT G POPAT(3710) for the Applicant(s) No. 1
MR MITESH AMIN, PP with MS JIRGA JHAVERI, APP for the
Respondent(s) No. 1

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CORAM: HONOURABLE DR. JUSTICE ASHOKKUMAR C. JOSHI**Date : 07/07/2022****ORAL JUDGMENT**1. **Rule.**

2. This revision application under Sections 397 and 401 read with Section 482 of the Criminal Procedure Code, 1973 (CrPC) is filed by the applicant - original accused assailing the order dated

01.02.2021 passed in Criminal Revision Application No. 1/2021 by the learned 6th Additional Sessions Judge, Khambhat, whereby, the said application, filed at the instance of the respondent herein - State, came to be allowed. By the said order, the learned Sessions Judge set aside the order dated 23.12.2020, passed below Exh. 99 in Criminal Case No. 129/2017, by the learned Judicial Magistrate First Class, Tarapur by which, the learned Magistrate had rejected the application filed by the respondent - State for further investigation under Section 173(8) CrPC by taking voice sample of the applicant - original accused and get the same analyzed.

3. Shearing off the unnecessary details, the facts are that an FIR being II-C.R. No. 3001 of 2014, registered with Tarapur Police Station, District: Anand for the offences punishable under Sections 504 and 506(2) of the Indian Penal Code, 1860 (IPC) is filed against the present applicant, for which, Criminal Case No. 129 of 2017 is registered in the Court of learned Judicial Magistrate First Class, Tarapur. In the said proceedings, the respondent - complainant filed an application, Exh. 99 under Section 173(8) CrPC seeking further investigation, to be precise, to take voice sample of the applicant - accused for voice spectrography. The said application came to be allowed by the learned Magistrate by an order dated 23.12.2020. The said order was the subject matter of revision before the learned Sessions Judge and the learned Sessions Judge, *vide* order dated 01.02.2021 allowed the said revision application, setting aside the order of learned Magistrate. Accordingly, the grieved applicant - accused is before this Court by this revision application.

4. Heard, learned advocate Mr. Virat Popat for the applicant - accused and learned Public Prosecutor Mr. Mitesh Amin with learned Additional Public Prosecutor for the respondent - State.

4.1 The crux of the submissions of the learned advocate for the applicant is that the learned Sessions Judge ought not to have allowed the revision in view of the fact that the trial is on its fag end and almost all the witnesses have been examined and only the investigating officer has remained to be examined. It is submitted that the powers to grant further investigation under Section 173(8) are available upto the pre-trial stage only and once the trial commences, such powers cease to be exercised. The learned advocate for the applicant further submitted that even otherwise, if the facts of the case are referred to, it is the case of the prosecution that the applicant - accused had abused and threatened the original complainant on phone and they are also having the recording. Accordingly, the prosecution could very well collect such voice sample of the applicant at the time of investigation at first instance and send the same for voice spectrophony, however, it is not done so and now, at the fag end of trial, only with a view to fill up the lacunae in the investigation, such an application is preferred, which is against the settled principle of law and is not permissible. However, the learned Sessions Judge has failed to take into consideration such an important aspect of the matter and thereby, has erred in setting aside the order of the learned Magistrate. It is submitted that whether further investigation is to be ordered or not, rests upon the discretion of the learned Magistrate and the discretionary order could not have been disturbed by the learned Sessions Judge in revision and thereby, the learned Sessions Judge has exceeded jurisdiction by interfering in such an order passed by

the learned Magistrate. Accordingly, it is urged that this application may be allowed and the order impugned herein may be set aside.

4.2 In support, the learned advocate for the applicant has relied upon following decisions:

- i) *Vinubhai Haribhai Malaviya and Others v. State of Gujarat and Another, (2019) 17 SCC 1 : MANU/SC/1427/2019;***
- ii) *Athul Rao v. State of Karnataka and Another, (2018) 14 SCC 298 : MANU/SC/1017/2017;***
- iii) *Ram Lal Narang v. State (Delhi Administration) and Om Prakash Narang and Another v. State (Delhi Administration), (1979) 2 SCC 322.***

5. As against this, learned Public Prosecutor Mr. Amin for the respondent - State, while supporting the impugned order passed by the learned Sessions Judge, submitted that no error, much less, an error apparent is committed by the learned Sessions Judge, which requires interference at the hands of this Court. It is submitted that it is the high prosecution that the applicant - accused had abused and threatened to kill the original complainant and recordings are also available. In the circumstances, with a view to do the voice spectrography, voice sample of the applicant - accused is necessary, more particularly, with a view to do the complete justice. The learned Public Prosecutor submitted that the applicant has dissented from giving his voice sample, which is crucial for the fair and impartial justice and accordingly, it is submitted that the learned Sessions Judge has rightly passed the order, which requires no interference in this revision and accordingly, it is urged that his application may be rejected.

5.1 In support, the learned Public Prosecutor has relied upon a decision of the Apex Court in ***Ritesh Sinha v. State of Uttar Pradesh and Another, (2019) 8 SCC 1 : MANU/SC/1023/2019.***

6. Having heard the rival submissions as also going through the impugned order passed by the learned Sessions Judge and the material available on record *vis-a-vis* the decisions relied upon by the learned advocates for the respective parties, it appears that prosecution moved an application Exh. 99 under Section 173(8) of the CrPC for further investigation, by collecting the voice sample of the applicant - accused and send the same for voice spectrography. It is pertinent to note that the said application has been moved by the prosecution at the stage when the trial has already commenced and admittedly, almost all the witnesses, except the investigating officer, have been examined and the trial is at its fag end. Further, the learned Magistrate, by an order dated 23.12.2020 dismissed the said application against which, revision application was moved by the prosecution before the learned Sessions Judge, who, by an order dated 01.12.2021 allowed the said revision and permitted further investigation. The said order of the learned Sessions Judge is the subject matter of this revision at the instance of the applicant - accused.

6.1 In this regard, Section 173(8) of CrPC is significant, which reads as under:

“173(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or

documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

6.2 Thus, bare reading of this section suggests that a police officer, even after forwarding the report under Section 173(2) CrPC, can investigate further into the offence in question. In this regard, if the latest decision of the Apex Court in **Vinubhai Haribhai Malaviya and Others** (supra) is referred to, the Court has held as under:

"Held, while disposing off the appeal:

(i) It was clear that the Magistrate's power under Section 156(3) of the Code of Criminal Procedure was very wide, for it was this judicial authority that must be satisfied that a proper investigation by the police takes place. To ensure that a proper investigation takes place in the sense of a fair and just investigation by the police-which such Magistrate is to supervise-Article 21 of the Constitution of India mandates that all powers necessary, which may also be incidental or implied, were available to the Magistrate to ensure a proper investigation which, without doubt, would include the ordering of further investigation after a report was received by him under Section 173(2) of Act and which power would continue to enure in such Magistrate at all stages of the criminal proceedings until the trial itself commences. Indeed, even textually, the investigation referred to in Section 156(1) of the Code of Criminal Procedure would, as per the definition of investigation under Section 2(h) of Act, include all proceedings for collection of evidence conducted by a police officer which would undoubtedly include proceedings by way of further investigation under Section 173(8) of the Code of Criminal Procedure. [23]

(ii) There was no good reason given by the Court in various decisions as to why a Magistrate's powers to order further investigation would suddenly cease upon process being issued, and an Accused appearing before the

*Magistrate, while concomitantly, **the power of the police to further investigate the offence continues right till the stage the trial commences.** Such a view would not accord with the earlier judgments of this Court, in particular, Sakiri, Samaj Parivartan Samudaya, Vinay Tyagi, and Hardeep Singh, Hardeep Singh having clearly held that a criminal trial does not begin after cognizance is taken, but only after charges are framed. What was not given any importance at all in the recent judgments of this Court was Article 21 of the Constitution and the fact that the Article demands no less than a fair and just investigation. **To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate's nod under Section 173(8) of Act to further investigate an offence till charges were framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases midway through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person was not wrongly arraigned as an Accused or that a prima facie guilty person is not so left out. There was no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers were traceable to Section 156(3) read with Section 156(1), Section 2(h), and Section 173(8) of the Code of Criminal Procedure, and would be available at all stages of the progress of a criminal case before the trial actually commences.** It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered was within the discretion of the Magistrate who would exercise such discretion on the facts of each case and in accordance with law. [38]*

(iii) Given the allegations in the communication made by the Commissioner of Revenue, to the Collector, it was found that this was not a case which calls for any further investigation into the facts alleged in the FIR lodged. Yet, having regard to what was stated by the Commissioner in the said letter, the police be directed to register an FIR qua these facts, which needs to be investigated by a senior police officer nominated by the concerned Commissioner of Police. [42]

(iv) Therefore, set aside the impugned High Court judgment insofar as it states that post-cognizance the Magistrate was denuded of power to order further investigation. However, given that the facts stated in the application for further investigation had no direct bearing on the investigation conducted pursuant to the FIR, upheld the impugned High Court judgment insofar as it had set aside the judgment of the Second Additional Sessions Judge which had ordered further investigation, and also the consequential order setting aside the two additional interim reports. [43]”

6.3 Thus, such powers of further investigation are available upto the pre-trial stage and not beyond that. Admittedly, in the case on hand, trial has commenced and is at the fag end.

6.4 Yet in another decision, as relied by the learned advocate for the applicant – accused in **Athul Rao (supra)**, it is held by the Court as under:

“Held, while allowing the appeal:

(i) The High Court, on the one hand, noted its reservation as to how a complaint for the offence punishable under Sections 417, 465, 468 and 471 of Code would be consistent with the allegations for the offence punishable under Sections 306, 497, 498 of Code, yet, it proceeded to direct further investigation on the sole consideration that in the earlier round of proceeding instituted by the Appellant for quashing of the private complaint filed against him by 2nd Respondent in respect of the same incident, liberty was given to 2nd Respondent to approach the Trial Court for issuing direction to the investigating officer for further investigation. The High Court was of the view that rejection of the application preferred by 2nd Respondent for further investigation, therefore, would run counter to the liberty so granted and, on that consideration, directed the Trial Court to issue direction to the investigating officer for further investigation in respect of allegation made by the 2nd Respondent in his complaint. [12]

(ii) The High Court had not overturned the satisfaction

recorded by the Trial Court that the two charge-sheets filed by the investigating agency in connection with the same incident were founded on statements of witnesses and seizure of four articles. The statements of the Accused and two witnesses so recorded were already on record. Further, charge-sheets had been filed after thorough investigation of the allegations made by the complainant from all angles and charges have also been framed. **The case has been set down for trial. Considering all these, it was not just and proper to direct further investigation.** This opinion reached by the Trial Court was not in conflict with the liberty given by the High Court to 2nd Respondent in the earlier round of proceeding instituted by the Appellant. That liberty was hedged with the observation that the Trial Court was expected to consider the application in accordance with law. It was, therefore, inapposite for the High Court to conclude that in view of the liberty given to 2nd Respondent on the earlier occasion, it was necessary to issue direction for further investigation. High Court committed manifest error in interfering with the discretionary order passed by the Trial Court in the fact situation of the present case. [13] and[15]"

7. The learned Public Prosecutor has relied upon a decision of the Apex Court in **Ritesh Sinha (supra)**, wherein, it is held as under:

"Held, while disposing of the appeal:

1. Medical examination of an Accused for the purposes of effective investigation of a criminal charge has received a wider meaning by the amendment to the Explanation to Section 53 CrPC made by Act No. 25 of 2005 with effect from 23rd June, 2006. Similarly, Section 53A has been inserted by the same Amending Act (No. 25 of 2005) to provide for examination of a person Accused of rape. Likewise, by insertion of Section 311-A by the same Amending Act (No. 25 of 2005), a Magistrate has been empowered to order any person, including an Accused person, to give specimen signatures or handwriting for the purposes of any investigation or proceeding under the Code of Criminal Procedure. [11]

2. None of the said amendments specifically authorize or empower a Magistrate to direct an Accused person or

any other person to give his/her voice sample for the purposes of an inquiry or investigation under the Code. "Omission" of the Legislature to specifically so provide has led the learned judge (Justice Aftab Alam) on the two judge Bench to doubt as to whether legislative wisdom was in favour of a specific exclusion or omission so as to make a judicial exercise through a process of interpretation impermissible. [12]

3. 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 Act, 1920. The view taken was that a suitable legislation which could be in the form of an amendment to Section 5 of 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. [13]

4. Section 5 of Act, 1920 coincidentally empowers the Magistrate to order/direct any person to allow his measurements or photographs to be taken for the purposes of any investigation or proceeding. It may be significant to note that the amendments in the Code of Criminal Procedure, noticed above, could very well have been a sequel to the recommendation of the Law Commission in its Report dated 29th August, 1980 though said recommendation was in slightly narrower terms i.e. in the context of Section 5 of the Identification of Prisoners Act, 1920. In this regard, it may also be usefully noticed that though this Court in State of Uttar Pradesh v. Ram Babu Misra after holding that a Judicial Magistrate has no power to direct an Accused to give his specimen writing for the purposes of investigation had suggested to Parliament that a suitable legislation be made on the analogy of Section 5 of Act, 1920 so as to invest a Magistrate with the power to issue directions to any person including an Accused person to give specimen signatures and writings. The consequential amendment, instead, came by way of insertion of Section 311-A in the CrPC by the Code of Criminal Procedure (Amendment) Act, 2005 (Act No. 25 of 2005) with effect from 23rd June, 2006. [14]

5. "Procedure is the handmaid, not the mistress, of justice and cannot be permitted to thwart the fact-finding course in litigation".[16]

6. *In the present case, the view that the law on the point should emanate from the Legislature and not from the Court, as expressed in the judgment of this Court from which the reference has emanated is founded on two main reasons, viz., (i) the compulsion to give voice sample does in some way involve an invasion of the rights of the individual and to bring it within the ambit of the existing law would require more than reasonable bending and stretching of the principles of interpretation and (ii) if the legislature, even while making amendments in the Code of Criminal Procedure (Act No. 25 of 2005), is oblivious and despite express reminders chooses not to include voice sample either in the newly introduced explanation to Section 53 or in Sections 53A and 311A of CrPC, then it may even be contended that in the larger scheme of things the legislature is able to see something which perhaps the Court is missing. [18]*

7. *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. [21]*

8. *Until explicit provisions are engrafted in the CrPC 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. [25]"*

8. The Court has gone through the aforesaid decision in detail. From a perusal of the same, it appears that the same relates to the powers of Magistrate to direct collecting of voice sample of the accused and not on the aspect of directing further investigation under Section 173(8) CrPC and at what stage it can

be granted. Accordingly, this decision would not be of any help to the respondent - State.

9. It is trite principle of law that with a view to fill up the lacunae in investigation, such powers of directing further investigation cannot be exercised, which in the case on hand appears to be, inasmuch as, it is the case of the prosecution that the applicant - accused had abused and given threat on telephone and this fact, was in very well know of the investigating agency since beginning and accordingly, at the inception only, the investigating agency could have sought for the voice sample or at least, prior to the commencement of trial, nonetheless, the same is not the case. Thus, in the totality of facts and circumstances of the case, it appears that the learned Sessions Judge has committed an error apparent on the face of it in setting aside the order passed by the learned Magistrate and allowing the revision, which requires interference at the hands of this Court.

10. Resultantly, ***in fleri***, this revision application succeeds and is allowed accordingly. The order dated 01.02.2021 passed in Criminal Revision Application No. 1/2021 by the learned 6th Additional Sessions Judge, Khambhat is hereby set aside. The order dated 23.12.2020, passed below Exh. 99 in Criminal Case No. 129/2017, by the learned Judicial Magistrate First Class, Tarapur is confirmed. Rule is made absolute accordingly.

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[A. C. Joshi, J.]