REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.2003 OF 2012

RITESH SINHA … APPELLANT(S)

VERSUS

STATE OF UTTAR PRADESH & ANR. … RESPONDENT(S)

WITH

CRIMINAL APPEAL NO.1318 OF 2013

CRIMINAL APPEAL NO.1187 OF 2019
[Arising out of SLP (Criminal) No.9671 of 2017]

CRIMINAL APPEAL NO.1188 OF 2019
[Arising out of SLP (Criminal) No.1048 of 2018]

CRIMINAL APPEAL NO.1189 OF 2019
[Arising out of SLP (Criminal) No.2225 of 2018]

CRIMINAL APPEAL NO.1190 OF 2019
[Arising out of SLP (Criminal) No.3272 of 2018]

J U D G M E N T

RANJAN GOGOI, CJI.

1. Leave granted in Special Leave Petition (Criminal) Nos. 9671 of 2017, 1048 of 2018, 2225 of 2018 and 3272 of 2018.

2. Criminal Appeal No.2003 of 2012.

Facts:

On 7th December, 2009 the In-charge of the Electronics Cell of Sadar Bazar Police Station located in the district of Saharanpur of the State of Uttar Pradesh lodged a First Information Report ("FIR" for short) alleging that one Dhoom Singh in association with the appellant – Ritesh Sinha, was engaged in collection of monies from different people on the promise of jobs in the Police. Dhoom Singh was arrested and one mobile phone was seized from him. The Investigating Authority wanted to verify whether the recorded conversation in the mobile phone was between Dhoom Singh and the appellant – Ritesh Sinha. They, therefore, needed the voice sample of the appellant and accordingly filed an application before the learned jurisdictional Chief Judicial Magistrate ("CJM" for short) praying for summoning the appellant to the Court for recording his voice sample.

3. The learned CJM, Saharanpur by order dated 8th January, 2010 issued summons to the appellant to appear before the Investigating Officer and to give his voice sample.

This order of the learned CJM was challenged before the High Court of Allahabad under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C."). The High Court having negatived the challenge made by the appellant by its order dated 9th July, 2010, the present appeal has been filed.

4. The appeal was heard and disposed of by a split verdict of a two Judge Bench of this Court requiring the present reference.

5. Two principal questions arose for determination of the appeal which have been set out in the order of Justice Ranjana Prakash Desai dated 7th December, 2012 in the following terms.

> "(1) 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?
>
> (2) 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?"

6. While the first question was answered in the negative by both the learned Judges (Justice Ranjana Prakash Desai and Justice Aftab Alam) following the ratio of the law laid down in ***State of Bombay*** vs.***Kathi Kalu Oghad***[1]**,** difference of opinion has occurred insofar as second question is concerned.

7. Justice Desai took the view that voice sample can be included in the phrase "such other tests" appearing in Explanation (a) to Section 53 Cr.P.C. by applying the doctrine of *ejusdem generis* and, therefore, the Magistrate would have an implied power under Section 53 Cr.P.C. to pass an order permitting taking of voice sample in the aid of criminal investigation.

8. On the other hand, Justice Aftab Alam took the view 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. In this regard, the learned judge (Aftab Alam, J.) also took note of the amendments in Sections 53, 53A and 311-A of the Cr.P.C. by Act No.25 of 2005 introduced with effect from 23rd

[1] A.I.R. 1961 SC 1808

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.

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'.
>
> [**emphasis supplied**]"

10. We may now proceed to answer the second question, namely, whether in the absence of any specific provision in the Cr.P.C. would a Court be competent to authorize the Investigating Agency to record the voice sample of a person accused of an offence. We are told that no authoritative pronouncement of this Court has been rendered by this Court.

11. 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 Cr.P.C. 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 Cr.P.C.

12. 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.

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."[2]
>
> *** *** ***
>
> "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."[3]

*** *** ***

"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."[4]

14. Section 5 of the Identification of Prisoners Act, 1920 coincidentally empowers the Magistrate to order/direct any

[3] Paragraph 3.16, 87th Report of the Law Commission of India

[4] Paragraph 5.26, 87th Report of the Law Commission of India

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 Cr.P.C., noticed above, could very well have been a sequel to the recommendation of the Law Commission in its Report dated 29th August, 1980 though the 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*** vs. ***Ram Babu Misra***[5] 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 the Identification of Prisoners 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 Cr.P.C by the Code of Criminal Procedure

[5] A.I.R. 1980 S.C. 791

(Amendment) Act, 2005 (Act No.25 of 2005) with effect from 23rd June, 2006.

15. 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.

16. "**Procedure is the handmaid, not the mistress, of justice and cannot be permitted to thwart the fact-finding course in litigation**"[6]. We would like to proceed in the matter keeping the above view of this Court in the backdrop.

[6] A.I.R. 1975 SC 349 [Vatal Nagaraj vs. R. Dayanand Sagar)

17. A detailed reference to the facts of a case decided by this Court in "***Sushil Kumar Sen*** vs. ***State of Bihar"***[7] is deemed appropriate.

The appellant in the above case was the owner of a plot of land measuring about 3.30 acres located in the district of Purnea in Bihar. The said parcel of land was acquired under the provisions of the Land Acquisition Act, 1894. The Land Acquisition Officer by order/Award dated 12th October, 1957 awarded compensation to the appellant(s) therein at the rate of Rs.14 per katha. The learned Additional District Judge, Purnea while hearing the reference under Section 18 of the Land Acquisition Act, 1894 enhanced the compensation to Rs.200 per katha. This was by order dated 18th August, 1961. The State of Bihar sought a review of the aforesaid order dated 18th August, 1961 which was allowed on 26th September, 1961 scaling down the compensation to Rs.75 per katha. Not satisfied, the State of Bihar preferred an appeal before the High Court against the order dated 26th September, 1961 passed in the review application granting compensation at the rate of

[7] (1975) 1 SCC 774

Rs.75 per katha. No appeal was, however, filed by the State of Bihar against the original order dated 18th August, 1961 awarding compensation at the rate of Rs.200 per katha. Cross appeal(s) before the High Court against the order dated 26th September, 1961 passed in the review application was filed by the appellant – landowner. The High Court by its order dated 16th February, 1968 held the review application of the State of Bihar, in which the order dated 26th September, 1961 was passed, to be not maintainable. However, the High Court adjudicated the case on merits and awarded compensation to the landowner(s) at the rate of Rs.75 per katha. Aggrieved, the landowner – Sushil Kumar Sen approached this Court.

Justice K.K. Mathew who delivered the lead judgment in the case took the view that the original decree/award of the Reference Court dated 18th August, 1961 stood superseded by the decree/award dated 26th September, 1961 passed in the review application. However, once the said decree/award dated 26th September, 1961 was set aside in the cross appeal filed by the landowner(s) the earlier decree/award dated 18th August, 1961 stood revived. As there was no appeal against

the said decree/award dated 18th August, 1961 the landowner(s) would be entitled to compensation in terms of the said original decree/award dated 18th August, 1961.

Justice Krishna Iyer delivered a concurring opinion agreeing with the aforesaid conclusions but expressing a thought process which would be of significant relevance to the issue in hand. The position can be best explained by extracting the following observations from the opinion rendered by Justice Krishna Iyer in ***Sushil Kumar Sen*** vs. ***State of Bihar*** (supra)

> "I concur regretfully with the result reached by the infallible logic of the law set out by my learned Brother Mathew, J. **The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer**.
>
> **6. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act ex debito justiciae where the tragic sequel otherwise would be wholly inequitable**. In the present case, almost every step a reasonable litigant could take was taken by the State to challenge the extraordinary increase in the rate of compensation awarded by the civil court. And, by hindsight, one finds that the very success, in the review application, and

> at the appellate stage has proved a disaster to the party. Maybe, Government might have successfully attacked the increase awarded in appeal, producing the additional evidence there. But **maybes have no place in the merciless consequence of vital procedural flaws**. Parliament, I hope, will consider the wisdom of making the Judge the ultimate guardian of justice by a comprehensive, though guardedly worded, provision where the hindrance to rightful relief relates to infirmities, even serious, sounding in procedural law. **Justice is the goal of jurisprudence — processual, as much as substantive. While this appeal has to be allowed, for reasons set out impeccably by my learned brother, I must sound a pessimistic note that it is too puritanical for a legal system to sacrifice the end product of equity and good conscience at the altar of processual punctiliousness and it is not too radical to avert a breakdown of obvious justice by bending sharply, if need be, the prescriptions of procedure. The wages of procedural sin should never be the death of rights**."
>
> [Emphasis is ours]

18. 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 Criminal Procedure Code (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 CR.P.C., 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.

19. Insofar as the first reservation is concerned, the same would stand dispelled by one of the earlier pronouncements of this Court on the subject in ***State of Bombay*** vs.***Kathi Kalu Oghad*** (supra), relevant extracts of which judgment has already been set out. The following views in the concurring opinion of Justice K.C. Das Gupta in ***State of Bombay*** vs.***Kathi Kalu Oghad*** (supra) would further strengthen the view of this Court to the contrary.

> "(32) .....**It has to be noticed that Article 20(3) of our Constitution does not say that an accused person shall not be compelled to be a witness. It says that such a person shall not be compelled to be a witness against himself. The question that arises therefore**

> **is: Is an accused person furnishing evidence against himself, when he gives his specimen handwriting, or impressions of his fingers, palm or foot? The answer to this must, in our opinion, be in the negative.**
>
> (33) …….the evidence of specimen handwriting or the impressions of the accused person's fingers, palm or foot, will incriminate him, only if on comparison of these with certain other handwritings or certain other impressions, identity between the two sets is established. By themselves, these impressions or the handwritings do not incriminate the accused person, or even tend to do so. That is why it must be held that by giving these impressions or specimen handwriting, the accused person does not furnish evidence against himself. So, when an accused person is compelled to give a specimen handwriting or impressions of his finger, palm or foot, it may be said that he has been compelled to be a witness; it cannot however be said that he has been compelled to be a witness against himself."
>
> [Emphasis is ours]

20. So far as the second basis for the view taken is concerned, we have already expressed an opinion that what may appear to be legislative inaction to fill in the gaps in the Statute could be on account of justified legislative concern and exercise of care and caution. However, when a yawning gap in the Statute, in the considered view of the Court, calls for

temporary patchwork of filling up to make the Statute effective and workable and to sub-serve societal interests a process of judicial interpretation would become inevitable.

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.

22. Illustratively, we may take the decision of this Court in ***Bangalore Water Supply & Sewerage Board*** vs. ***A Rajappa and others***[8] . A lone voice of dissent against expansion of the frontiers of judicial interpretation to fill in gaps in the Statute enunciated by Lord Denning, L.J, in

[8] (1978) 2 SCC 213

Seaford Court Estates Ltd. vs.***Asher***[9] though did not find immediate favour of the learned Judge's contemporaries was acknowledged to have carried within itself the vision and the perception of the future. Coincidentally, the view enunciated by Lord Justice Denning in ***Seaford Court Estates Ltd.*** vs.***Asher*** (supra) of ironing of the creases in the legislation has been approved by the Indian Supreme Court in the following words of the then Chief Justice M.H. Beg:

> **"147.** My learned Brother has relied on what was considered in England a somewhat unorthodox method of construction in *Seaford Court Estates Ltd.* v. *Asher [(1949) 2 ALL ER 155, 164]* where Lord Denning, L.J., said:
>
> > **"When a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament — and then he must supplement the written words so as to give 'force and life' to the intention of legislature. A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."**
>
> When this case went up to the House of Lords it appears that the Law Lords disapproved of the

[9] (1949) 2 All. E.R. 155 (at 164)

bold effort of Lord Denning to make ambiguous legislation more comprehensible. Lord Simonds found it to be "a naked usurpation of the legislative function under the thin disguise of interpretation". Lord Morton (with whom Lord Goddard entirely agreed) observed: "These heroics are out of place" and Lord Tucker said "Your Lordships would be acting in a legislative rather than a judicial capacity if the view put forward by Denning, L.J., were to prevail."

148. Perhaps, with the passage of time, what may be described as the extension of a method resembling the "arm-chair rule" in the construction of wills. Judges can more frankly step into the shoes of the legislature where an enactment leaves its own intentions in much too nebulous or uncertain a state. In *M. Pentiah* v. *Muddala Veeramallappa [AIR 1961 SC 1107, 1115]* Sarkar, J., approved of the reasoning, set out above, adopted by Lord Denning. And, I must say that, in a case where the definition of "industry" is left in the state in which we find it, **the situation perhaps calls for some judicial heroics to cope with the difficulties raised**."

[Emphasis is ours]

23. A similar view of Lord Justice Denning in ***Magor & St. Mellons Rural District Council*** vs. ***Newport Corporation***[10] would be equally apt to notice.

"we sit here to find out the intention of Parliament and of ministers and carry it

[10] (1951) 2 All.E.R. 1226

> out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."

24. Would a judicial order compelling a person to give a sample of his voice violate the fundamental right to privacy under Article 20(3) of the Constitution, is the next question. 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*** vs.***State of Madhya Pradesh and others***[11], ***Gobind*** vs. ***State of Madhya Pradesh and another***[12] and the Nine Judge's Bench of this Court in ***K.S. Puttaswamy and another*** vs. ***Union of India and others***[13] 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.

[11] (2016) 7 SCC 353
[12] (1975) 2 SCC 148
[13] (2017) 10 SCC 1

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.

……,**CJI**
[RANJAN GOGOI]

……,**J.**
[DEEPAK GUPTA]

……,**J.**
[SANJIV KHANNA]

New Delhi;
August 02, 2019.