

NOTES AND COMMENTS

OBLIGATED VOICE SAMPLING: A JUDICIAL ENDORSEMENT IN *RITESH SINHA V. STATE OF UTTAR PRADESH*

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Abstract

The voiceprint is a potent forensic tool for speaker's identification mainly used for corroboration to help in determination of culpability. Reference voice sample is required from a suspect for comparing the voice in question. The procedural laws in India are silent on the subject involving order by a court for providing voice sample a suspect without taking informed consent. In *Ritesh Sinha* case, the apex court, by using extraordinary powers under article 142 of the Indian Constitution, has made contingent arrangement to empower a magistrate in this regard till the Parliament enacts the law. The court verdict has dealt with several significant issues related to self-incrimination and power of a court in expanding the scope of law in absence of unequivocal legislative intent.

*"Procedure is the handmaid, not the mistress, of justice and cannot be permitted to thwart the fact-finding course in litigation."*¹

- Justice V.R. Krishna Iyer (1975).

I Introduction

RECENTLY, THE Supreme Court of India by using its extraordinary power enshrined under article 142 of the Indian Constitution, for the purpose of "doing complete justice", has empowered a judicial magistrate to direct a person to give sample of his voice for identification of the speaker in a criminal investigation.² In deed the matter was long awaited, when in 2012 the double bench of the apex court had conflicting views on giving order to tender voice sample for matching purpose,³ consequently

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1 *Vatal Nagaraj v. Dayanand Sagar* (1975) 4 SCC 127 at para 12 : AIR 1975 SC 349 : 1975 SCR (2) 384.

2 *Ritesh Sinha v. State of Uttar Pradesh* 2019 SCC OnLine 956.

3 *Ritesh Sinha v. State of Uttar Pradesh* (2013) 2 SCC 357.

matter was referred to a larger bench. In the times of acknowledging 'informational privacy' as component of right to life by the apex judiciary,⁴ extending scope of procedural laws by conceding power to a magistrate for ordering to give voice sample caused a stir amongst human right activists. For better appreciation of the judicial approach, it may be looked from the view point of combating against misuse of advance technologies during commission of organized crimes such as terrorism, drug and human trafficking, kickbacks, waging war against the state *etc.*

Voiceprint for the forensic purpose necessitates availability of the questioned sample and the reference sample. In criminal domain, the questioned sample is collected secretly either by the state actors or by a private person, which is likely to attract issue of infringement to the privacy right. Further for matching purpose, the reference sample collected from the subject ignites debate on compromising the right against self-incrimination. These intertwined concepts related to technical surveillance and collecting voice samples have been deliberated in this article especially in the light of catena of judgements recently delivered by the apex court of India.

II Legal issues

In *Ritesh Sinha* case,⁵ the district police lodged an FIR against the appellant alleging for engaging in collection of money from different persons by promising employment in police department. For the purpose of matching the voice recorded in the mobile phone seized from the accused, investigating agency was permitted by the trial court for taking voice sample of the accused persons. The aggrieved accused approached the high court, but the appeal was dismissed. Consequently, an appeal was raised before the apex court.

There are three legal questions to be addressed in the issue of taking voice samples against the consent of the subject. *Firstly*, whether compelling the subject to furnish voice sample during investigation amounts to infringement of the right against self-incrimination? *Secondly*, whether existing procedural laws in India have provisions enabling a magistrate for ordering to record voice sample? *Thirdly*, in absence of explicit legal provisions under procedural codes, whether a magistrate can be empowered for issuing such order? These issues are addressed here in addition to deliberation on other interconnected issues involved therein.

III Self-incrimination *vis-a-vis* voice sampling

The issue of sampling of handwriting, impression of palm, finger or foot for forensic analysis was dealt in the famous case *State of Bombay v. Kathi Kalu Oghad*,⁶ where the

4 *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017) 10 SCC 1; *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2019) 1 SCC 1 : 2018 SCC OnLine SC 1642.

5 *Supra* 2 and 3.

6 (1962) 3 SCR 10; AIR 1961 SC 1808 : (1961) 2 Cri LJ 856.

apex court observed, "... It has to be noted 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." Self incrimination means conveying information based on personal knowledge and does not include mechanical process of producing any document before court which do not contain any statement of the accused based on his personal knowledge. Giving 'personal testimony' before a court or any competent authority must depend upon his volition for making any statement or refusing to do so. "But his finger impression or handwriting, in spite of efforts at concealing the nature of it by dissimulation cannot change their intrinsic character" observed the eleven judges bench in the *Kathi Kallu Oghad*.⁷ Having same analogy of the *Kathi Kallu* both judges of the double bench in the *Ritesh Sinha* unanimously held that giving voice sample does not tantamount to witness against himself. However, the lack of legal provisions for empowering a magistrate for ordering voice sampling continued to remain as a bone of contention.

IV Section 53 and 311-A of the Code of Criminal Procedure, 1973

There is no specific provision in the Indian procedural laws to direct a person for giving his voice sample. However, by applying the doctrine of *ejusdem generis* the phrase "such other tests" appearing in the explanation (a) to section 53 Cr PC, the magistrate may pass an order to give voice sample to aid criminal investigation was argued by Desai J in the order of double bench. A voice sample by itself is fully innocuous. Desai J. opined that voice sample is like fingerprint impression, signature or specimen handwriting of an accused and hence cannot attract the expression "to be a witness."⁸ By giving voice sample an accused does not convey information based upon his personal knowledge which can incriminate him. *Per contra*, it was argued by Alam J. the dissenting judge that section 53, 53-A and 311-A of Cr PC were amended by the no. 25 of 2005⁹ but no provision was made to compel the subject to give sample of his voice. Alam J. holds that for compelling an accused to give a voice sample, the law must come from the legislature and not through court process since such compulsive orders of the court attract invasion of the right. Thus the matter was referred to larger bench, which also observed that procedural law in India is silent on the issue.

7 *Id.*, para 11.

8 *Supra* 3 at para 27.

9 The Criminal Law Amendment was introduced in reference to the observations of the apex court in the *State of Uttar Pradesh v. Ram Bau Misra* (1980) 2 SCC 343 : AIR 1980 SC 791 : 1980 SCR (2) 1067.

V 87th report of the Law Commission of India¹⁰

The Commission has emphasized the importance of voiceprint in criminal investigation. It observed, “A voiceprint 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 “frequency domain” is unique to each speaker. Voiceprint resembles fingerprints, in that each person has a distinct voice with characteristic features dictated by vocal activities and articulates.” Section 5 of the Identification of Prisoners Act, 1920 empowers the magistrate to order any person to allow his measurements or photographs to be taken for the purpose of any investigation or proceeding.

The Law Commission kept on observing, “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 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.”¹¹ The Commission has advocated for extending the scope of section 5 by saying, “In view of this scientific advance, it may be useful to expand the scope of the coercive measures sanctioned by the Act, so as to cover identification by voice. Though the need of such identification may arise only occasionally, such a provision could be of great value.”¹²

VI Informational privacy *vis-à-vis* public interest

A telephonic interception, without informed consent of the subject, tantamount to an infringement of the right to informational privacy, which has now been recognized as a fundamental right under article 21. The apex court hold that “... the right to hold a telephone conversation in the privacy of one’s home or office without interference can certainly be claimed as “right to privacy”. Conversation on the telephone are often of an intimate and confidential character.”¹³ In *KM Malkani v. State of Maharashtra*,¹⁴ the apex court emphasized upon protection of right of innocent person against

10 Law Commission of India, “87th Report on Identification of Prisoners Act, 1920” (Aug, 1980).

11 *Id.*, para 5.26.

12 *Id.*, para 5.28

13 *People’s Union for Civil Liberties v. Union of India*, AIR 1997 SC 568 : (1997) 1 SCC 301 : 1996 (9) SCALE 318 at para 19.

14 (1973) 1 SCC 471.

wrongful telephonic surveillance by observing, “Article 21 contemplates procedure established by law with regard to deprivation of life or personal liberty. The telephone conversation of an innocent citizen will be protected by Courts against wrongful or high handed interference by tapping the conversation. The protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants. It must not be understood that the Court will tolerate safeguards for the protection of the citizen to be imperiled by permitting the police to proceed by unlawful or irregular methods.”¹⁵ The Supreme Court, while adjudicating on two public interest litigations of *Puttaswamy Justice (Retd.)*, has protected an individual from illicit intervention in informational privacy.¹⁶ The judicial intent in these judgments evidently protects the rights of innocent citizen and at the same time provides scope to punish the guilty person.

Public emergency or the interest of public safety are mainly two criterion to authorize the central or state government for ordering telephonic interception under the aegis of section 5(2) of the Telegraph Act, 1985. The message interception may be justified provided it serves the interest of (i) the sovereignty and integrity of India, (ii) the security of the state, (iii) friendly relations with foreign states, (iv) maintenance of public order, and (v) preventing incitement to the commission of an offence. In *Union of Civil Liberties v. Union of India*,¹⁷ the Supreme Court of India has culled out certain broad guidelines for intercepting conversation or messages.¹⁸

In 2007, the Department of Communication of the Government of India has substituted rule 419-A by amending the Indian Telegraph Rules, 1951 under the Act, 13 of 1885.¹⁹ In exercise of the powers conferred by clause (y) of sub-section (2) of section 87, read with sub-section (2) of section 69 of the Information Technology Act, 2000, the Central Government construed the Information Technology (Procedure and Safeguards for Interception, Monitoring, and Decryption of Information) Rules, 2009.²⁰ The Central Government and state governments, from time to time, have also framed guidelines to regulate technical surveillance.

15 *Id.*, 476 (para 31).

16 *Supra* note 4.

17 (1997) 1 SCC 301 : AIR 1997 SC 568 : 1996 (9) SCALE 318.

18 *Id.*, para 35.

19 Notification dated Mar. 1, 2007 [G.S.R. 193(E) *w.e.f.* Mar 12, 2007], the Ministry of Communication and Information Technology, *available at*: <http://dot.gov.in/sites/default/files/march2007.pdf?download=1> (last visited on Dec. 9, 2019).

20 G.S.R. 780 (E). notification dated Oct. 27, 2009. [G.S.R. 780 (E) *w.e.f.* Oct. 27, 2009], the Ministry of Communication and Information Technology, *available at*: <http://meity.gov.in/writereaddata/files/Information%20Technology%20%28Procedure%20and%20Safeguards%20for%20Interception%2C%20Monitoring%20and%20Decryption%20of%20Information%29%20Rules%2C%202009.pdf> (last visited on Dec. 9, 2019).

VII Issues in speaker identification

Voiceprint is a 'picture' of the energy emitted by a person's voice.²¹ Spectrographic identification of voice was first used during World War-II to identify enemy radio operators and locate their units.²² There are certain intrinsic issues related to speaker identification by using voice analysis. These include (i) the theory of invariant speech, (ii) the issue of speaker's phonology versus speaker's auditory features, (iii) the role of voice disguise, (iv) the role of memory, and (v) ear witnessing preparedness and expectancy, what Bull and Clifford (1984) call 'ecological validity'.²³ Degree of accuracy of aural visual voice identification for forensic applications is susceptible to various variables such as condition under which sample is recorded, properties of the questioned voice such as pronunciation and dialect features, quality of equipment used for voice recording, skill of the examiner *etc.*

VIII Admissibility of voiceprint for speaker identification

Spectroscopy is the science behind voiceprint or voice spectrogram which helps to corroborate the identity of a person. Voiceprint is a potent forensic tool used for long in Indian courts as corroborative evidence, but neither recognized as "opinion of experts" under section 45 of the Indian Evidence Act, 1872 nor is listed as, "Government scientific experts" in the procedure code under section 293(4). Furthermore, being digital evidence, voiceprint must fulfill several laid down conditions such as certification under section 65-B of the Indian Evidence Act, 1872 integrity of the sample, etc to gain admissibility in the court of law.²⁴ A voice analyst as forensic expert must fulfill requirement of education and experience to validate his expert opinion in the courtroom.²⁵ The accreditation of scientific procedure applied for voice analysis is yet other obligation on the prosecution to validate a voiceprint and expert opinion thereof.

IX Judiciary in the law making

Procedural laws are the legal tools to translate legislative intent in administration of substantive justice. Krishna Iyer J., on deficiency in procedural laws had observed,

21 Kamine, "The Voiceprint Technique: Its Structure and Reliability" 6 *San Diego L. Rev.* 213 (1969).

22 Tosi, *Voice Identification for Lawyers* (1974) (unpublished report in Michigan State University Library). Also see: John F. Decker, Joel Handler, "Voiceprint Identification Evidence – Out of the Fyre Pan and Into admissibility" 26.314 *The American University Law Journal* 320 (1977).

23 Bethany K. Dumas, "Voice Identification in a Criminal Law Context" 65(4) *American Speech* (Special Issue: Papers on Language, Variability and Law) 341-348 (Winter, 1990).

24 *Anwar v. PK Basbeer* (2014) 10 SCC 473.

25 *Rajiv Singh v. State of Bihar* 2015(13) SCALE 901; 2015 (12) JT 305; 2015 SCC OnLine SC 1336; G.K. Goswami, "Forensic Law" LIII *ASIL* 409 (2017).

“The mortality of justice in the hands of law troubles a Judge’s conscience and points an angry interrogation at the law reformer. ... The procedural law so dominates in certain systems as to overpower substantive rights and substantive 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 justitiae* where the tragic sequel otherwise would be wholly inequitable.”²⁶

The role of judiciary for correcting the defects in law was succinctly narrated by Lord Denning, “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.”²⁷ However, Lord Simonds described ‘filling in the gaps’ approach as “a naked usurpation of the legislative function under the thin disguise of interpretation”.²⁸ Hence, there is an intrinsic need to maintain a subtle balance and self-restraint by the judiciary during statutory interpretation for the purpose of expansion of legislative intent. The Indian Constitution under article 142 has empowered the apex judiciary to make such order as is necessary for doing complete justice, and such order has force alike any law made by the Parliament.

X Conclusion

The Supreme Court has conceded to judicial magistrate the power to order a person to give sample of his voice for the purpose of investigation of crime “until explicit provisions are engrafted in the Code of Procedure by Parliament”.²⁹ It appears that the apex court has empowered the magistrate by introducing a contingent arrangement for addressing legal necessity without mentioning specific provision of law. Indeed it is the responsibility of the law makers to construe legal provisions to ensure synergy between an individual’s right to informational privacy and protection of public interest by way of intercepting messages under section 5(2) of the Act, 13 of 1985. In democratic governance, observation of Dworkin that, “If the Government does not take right seriously, then it does not take law seriously either”³⁰ has paramount relevance. In the

26 *Sushil Kumar Sen v. State of Bihar* (1975) 1 SCC 774: 1975 AIR 1185 : 1975 SCR (3) 942.

27 *Seaford Court Estates Ltd. v. Asher* [1949] 2 All. E. R. 15 5 at 164.

28 *Magor and St. Mellons Rural district Council v. Newport Corporation* [1951] 2 All ER 839: [1952] AC 189.

29 *Supra* note 2 at para 28.

30 Ronald Dworkin, *Taking Rights Seriously* 2015 (Gerald Duckworth and Co Ltd., London, 1977).

recent past, several judicial pronouncements have created new rights which have direct bearing on Indian procedural laws. Forensic inputs such as DNA, voiceprint *etc.* have evidently played significant role in corroboration of truth in the courtrooms, but various scientific tools are still waiting to find berth in the Indian legal lexicon. With passage of time, several provisions under these statutes have become redundant while many other percepts deserve legal recognition. An overall review of the archaic procedural laws of India is therefore the crying need of the hour.