

VOICELESS VOICE TEST

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Amendment Act 25 of 2005 Cr.P.C. has made some revolutionary changes in the field of investigation of criminal cases. Section authorizes the police officer not below the rank of a Sub Inspector to request a medical practitioner to conduct various examinations including, examination of blood, blood stain, semen swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings including DNA Profiling and such other tests of an accused which the doctor thinks necessary (See Section 53 Cr.P.C.). Section 53A Cr.P.C. was incorporated for the examination of persons accused of rape. These changes were incorporated for the purpose of collecting evidence as to the commission of offence during investigation. Besides the radical changes in Section 53 and the incorporation of Section 53A another milestone in the field of investigation by way of amendment is the introduction of Section 311A. Section 311A authorize the magistrate to direct a person including an accused to give specimen signature or handwriting for the purpose of investigation or any proceedings under the Code.

Interestingly neither Sections 53, 53A nor 311A deals with the taking of voice sample during the course of investigation, which was a long pending matter and still under the consideration of our Apex Court. In *Ritesh Sinha v. State of U.P.* reported in 2013 (1) KLT SN 1 (C.No.1) SC, our Hon'ble Supreme Court consisting of two Judges bench has got occasion to consider the constitutional validity of taking voice sample of accused. Unfortunately the two Judges delivered two divergent observations and hence the Hon'ble Supreme Court decided to constitute a larger bench to consider the validity of taking voice sample of an accused.

Once our legal fraternity was under the impression that furnishing any information or evidence by the accused amounts to self incrimination and is violative of the rights guaranteed to the accused under Article 20(3) of our Constitution. Article 20(3) simply says that no person accused of any offence shall be compelled to be a witness against himself. In various judgments of our constitutional courts it was repeatedly held that the protection even to the accused commences as soon as a formal accusation is made, whether before or during prosecution. It follows that the lodging of a F.I.R., the filing of a complaint in court or the issuance of a show-cause notice under a special criminal statute will bring Article 20(3) into force.

But it is also settled by various courts that immunity under Article 20(3) does not extend to compulsory production of material objects or compulsion to give specimen writing, specimen signature, finger impression or compulsory exhibition of body or giving of blood specimens. In *State of Bombay v. Kathikalu* reported in 1961 KLT 74 (SC), AIR 1961 SC 1808 our Hon'ble Apex Court took the view that compulsion regarding the documents is prohibited only if the documents convey the personal knowledge of the accused relating to the charge. In *C.Sampath Kumar v. Enforcement Officer Madras* (AIR 1998 SC 16) a different matter in issue was considered by the Hon'ble Supreme Court that whether the statement of a person who is summoned and examined u/S.40 of the Foreign Exchange Regulation Act amounts to self incrimination and the Apex Court held that such a statement cannot be

discarded on the ground of infringement of the protection guaranteed under Article 20(3). In *A.A Mulla v. State of Maharashtra* reported in AIR 1997 SC 1441 the court took the view that when no penalty is prescribed for the contravention in question the right under Article 20(3) does not apply. It is also significant to note that the protection against compulsion "to be a witness" is confined to a person "accused of any offence" and it is not applicable to a witness. But Sections 132 and 148 of the Indian Evidence Act confers protection against self incrimination to witnesses in civil and criminal courts. In *R.Dinesh Kumar v. State Rep. Inspector of Police* reported in 2015 Cr.L.J. 2362 Madras High Court took the view that Section 132 deserves most liberal construction and no prosecution can be launched against the maker of the statement on the basis of the answers given by a person while deposing as witness before court. Again the polygraph test and brain finger printing tests were subjected to the consideration of our constitutional court in *Selvi v. State of Karnataka* reported in AIR 2010 SC 1974 and took the view that those are testimonial compulsions and the bar under Article 20(3) will apply. At the same time it is repeatedly held by our Hon'ble Apex Court that taking specimen finger prints and handwritings from the accused is constitutionally valid and not hit by Article 20(3). See *State through SPE and C.B.I. A.P. v. M.Krishnamohan* reported in 2008 (4) KLT Suppl.722 (SC) = AIR 2008 SC 368.

Ritesh Sinha v. State of U.P. was decided by two Judges bench consisting of Justice Ranjana P.Desai and Justice Aftab Alam. Both of them delivered two separate judgments. The view taken by Justice Ranjana P.Desai is that direction to give voice sample is not violative of Article 20(3). According to her voice sample is like finger print impression, signature or specimen handwriting of an accused. Hon'ble Justice further added that giving of voice sample cannot be included in the expression "to be a witness" because by giving voice sample accused does not convey any information based upon his personal knowledge which will incriminate him. Hon'ble Justice further added that giving of voice sample is merely giving of an identification data to the investigating agency and he is not subjected to any testimonial compulsion. It is nothing but a physical characteristic of the accused. Hon'ble Judge further observed that voice sample can be included in the inclusive definition of the term "measurements" appearing in Section 2(a) of the Identification of Prisoners Act 1920. But Hon'ble Justice Aftab Alam has expressed his dissenting view that it is impossible to extend the provisions of the Identification of the Prisoners Act to that extent. Since no fruitful purpose was served it is decided to place the issue before a larger bench and the decision of the larger bench is awaited since 2012 December. So far till 2018 no decision was rendered by the Hon'ble Apex Court in this aspect.

At the same time our High Court has got benevolent opportunities to decide on the constitutional validity of taking voice sample. A single learned Judge of our Hon'ble High Court in *Prathap v. C.B.I.* reported in 2017 (3) KLT 458 took the view that if the accused in a criminal case can be directed to provide his hand writing or signature for comparison what is the bar in taking voice sample. The very same principle as that of taking hand writing can be adopted in taking voice sample also. To arrive at that conclusion Hon'ble single Judge has relied upon the dictum laid down by our Hon'ble Apex Court in *State of Bombay v. Kathi Kalu Oghandi* (1961 KLT 74 (SC)) in which our Hon'ble Apex Court has elaborately discussed the concept of testimonial compulsion. The observation of the Apex

Court is that to attract the barriers of testimonial compulsion there should be a direction to the accused to do anything or to make any statement indicating his complicity in an offence, in any manner. The direction to provide voice sample of the accused will not in any way amount to testimonial compulsion because the direction is not to give any statement touching the offence or concerning his role or complicity in the offence. A mere direction to provide specimen voice sample is equal to that of providing hand writing, specimen thumb impression, or impression of foot or palm or finger, Hon'ble Supreme Court further held that if there is a positive direction to the accused to make some statements or to do something against his will or without his consent touching the allegation in the case, certainly it will amount to testimonial compulsion. In *Prathap's* case our Hon'ble High Court observed that the spirit of Section 311A Cr.P.C authorizing collection of specimen hand writing and signature can very well be applied in the case of voice sample also. The High Court further clarified that even though there is no specific provision in any law to authorize a particular course of action to take voice sample, the trial court can use its inherent or ancillary powers to do justice. The above mentioned *Prathap's* case was decided by a single Judge of our Hon'ble High Court on 7th July 2017.

Again a similar matter was decided by two learned Judges of our Hon'ble High Court in *Roopesh v. Union of India* reported in 2018(1) KLT 23 in which our Hon'ble High Court took a complete different view that neither Section 311A of Cr.P.C. nor Section 5 of Identification of Prisoners Act can be invoked to confer powers on the Magistrate to direct the voice sample of the accused. The finding in *Prathap's* case was vehemently attacked and the Division Bench consisting of two learned Judges clarified that a magistrate does not have any inherent powers and it is available to the High Court u/S.482 Cr.P.C. The Division Bench further held that since no statute confers an express power to direct the accused to provide his specimen voice sample it cannot be allowed by the Magistrate in any implied manners. The Division Bench further declared the judgement in *Prathap v. C.B.I.* is not good law. The Division Bench also expressed the view that the decision is subject to the verdict of the apex court yet to be pronounced. Again the entire legal community is awaiting the decision of the Hon'ble Supreme Court.

Tail piece

A buffalo was running like mad

Elephant asked "Why are you running"?

Buffalo: - They are arresting all cows

Elephant: - But you are not a cow!!

Buffalo: - Dear it will take minimum 20 years to prove that in an Indian Court

The Elephant also started running.

