Ritesh Sinha vs State Of U.P.& Anr on 7 December, 2012

Equivalent citations: AIR 2013 SUPREME COURT 1132

Bench: Aftab Alam, Ranjana Prakash Desai

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2003 OF 2012
[Arising out of Special Leave Petition (Crl.) No.7259 of 2010]

RITESH SINHA … APPELLANT

Vs.

THE STATE OF UTTAR PRADESH
& ANR. … RESPONDENTS

JUDGMENT

(SMT.) RANJANA PRAKASH DESAI, J.

1. Leave granted.

2. On 7/12/2009, one Prashant Kapil, In-charge, Electronics Cell, P.S. Sadar Bazar, District Saharanpur lodged a First Information Report alleging that one Dhoom Singh in connivance with the appellant was collecting money from people on the pretext that he would get them recruited in the police department. After his arrest, one mobile phone was seized from Dhoom Singh. As the police wanted to verify whether the recorded conversation, which is in their possession, is between accused Dhoom Singh and the appellant, they needed voice sample of the appellant. The police, therefore, filed an application before learned Chief Judicial Magistrate, Janpad Saharanpur, praying that the appellant be summoned to the court for recording the sample of his voice. On 8/1/2010, learned Chief Judicial Magistrate, Saharanpur issued summons to the appellant to appear before the investigating officer and give his voice sample. The appellant approached the Allahabad High Court under Section 482 of the Code of Criminal Procedure, 1973 (for short, "the Code") for quashing of the said order. The High Court by the impugned order dated 9/7/2010 rejected the said application, hence, this appeal by special leave.

3. In my view, two important questions of law raised in this appeal, which we need to address, are as under:

> "(i) 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?
>
> ii) 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?"

4. We have heard, at considerable length, Mr. Siddhartha Dave, learned counsel for the appellant, Mr. Aman Ahluwalia, learned amicus curiae and Mr. R.K. Dash, learned counsel for the respondent – State of Uttar Pradesh. We have also perused the written submissions filed by them.

5. Mr. Dave, learned counsel for the appellant, at the outset, made it clear that he was not pressing the challenge that the order passed by the Magistrate violates the appellant's fundamental right of protection from self-incrimination as guaranteed under Article 20(3) of the Constitution. Counsel submitted, however, that there is no provision in the Code or in any other law which authorizes the police to make an application for an order directing the accused to permit recording of his voice for voice sample test. Counsel submitted that a Magistrate has no inherent powers and, therefore, learned Magistrate could not have given such a direction (Adalat Prasad v. Rooplal Jindal[1]). Counsel submitted that because there is no other provision providing for a power, it ought not to be read in any other provision (State of U.P. v. Ram Babu Misra[2], S.N. Sharma v. Bipen Kumar Tiwari[3]). Counsel pointed out that in Ram Babu Misra, this Court restricted the scope of Section 73 of the Indian Evidence Act and took-out from the purview of Section 5 of the Identification of Prisoners Act, 1920 (for short, "the Prisoners Act), handwritings and signatures. As suggested by this Court, therefore, the Code was amended and Section 311A was inserted. Counsel submitted that Section 5 of the Prisoners Act is inapplicable to the present case because it is enacted only for the purpose of keeping a record of the prisoners and other convicts and not for collection of evidence (Balraj Bhalla v. Sri Ramesh Chandra Nigam[4]). Counsel submitted that this is supported by Section 7 of the Prisoners Act, which provides for destruction of photographs and records of measurement on acquittal. The term "measurement" defined in Section 2(a) of the Prisoners Act covers only those things which could be physically measured. Counsel submitted that the Prisoners Act, being a penal statute, the term measurement appearing therein must be given a restricted meaning (Regional Provident Fund Commissioner v. Hooghly Mills Co. Ltd. and others[5]). Counsel submitted that investigation has to be conducted within the parameters of the Code. It is not uncontrolled and unfettered (State of West Bengal v. Swapan Guha[6]). Counsel submitted that the High Court judgments, where unamended Section 53 of the Code is involved, are not relevant. Counsel submitted that Explanation (a) to Section 53 of the Code was introduced in 2005 and, therefore, those judgments cannot be relied upon for interpreting the said Section as it stands today. Counsel submitted that various examinations listed in the said Explanation are the ones for which the police can have the accused examined by a medical practitioner. These tests are all of physical attributes present in the body of a person like blood, nail, hair etc., which once taken can be examined by modern and scientific techniques. Voice sample specifically has not been included as one of the tests in the said Explanation even though the amendment was made in 2005 when

Parliament was well aware of such test being available and, has, therefore, been intentionally omitted. Counsel submitted that the words "such other tests" mentioned in the said Explanation are controlled by the words "which the registered medical practitioner thinks necessary". Therefore, the discretion, as to the choice of the test, does not vest in the police but it vests in the medical practitioner. This would clearly exclude voice test on the principle of ejusdem generis. Counsel submitted that in Selvi and others v. State of Karnataka[7] this Court has held that Section 53 of the Code has to be given a restrictive interpretation and not an expansive one. Counsel submitted that the decision of this Court in Sakiri Vasu v. State of Uttar Pradesh[8] is inapplicable since to do an act under ancillary power the main power has to be conferred, which has not been conferred in this case. Therefore, there is no question of resorting to ancillary power. Counsel submitted that the High Court fell into a grave error in refusing to quash the order passed by learned Magistrate summoning the appellant for the purpose of giving sample of his voice to the investigating officer.

6. Mr. Aman Ahluwalia, learned Amicus Curiae has submitted a very detailed and informative note on the issues involved in this case. Gist of his submissions could be stated. Counsel submitted that voice sample is only a material for comparison with something that is already in possession of the investigating agency. Relying on 11 Judges' Bench decision of this court in State of Bombay v. Kathi Kalu Oghad & Ors.,[9] counsel submitted that evidence for such identification purposes would not attract the privilege under Article 20(3) of the Constitution. According to learned counsel, there is no specific provision enabling the Magistrate to direct an accused to give his voice sample. There are certain provisions of the Code in which such power can be read into by the process of implication viz. Section 2(h), Section 53, Section 311A and Section 54A. So far as Section 311A of the Code is concerned, counsel however, fairly pointed out that in Rakesh Bisht v. C.B.I.[10] the Delhi High Court has held that with the aid of Section 311A of the Code the accused cannot be compelled to give voice sample. Counsel also relied on Section 5 of the Prisoners Act and submitted that it expressly confers power on the Magistrate to direct collection of demonstrative evidence during investigation. Counsel submitted that in Central Bureau of Investigation, New Delhi v. Abdul Karim Ladsab Telgi and others[11] the Bombay High Court has interpreted the term "measurement" appearing in Section 5 of the Prisoners Act expansively and purposefully to include measurement of voice i.e. speech sound waves. Counsel submitted that Section 53 of the Code could be construed expansively on the basis of presumption that an updating construction can be given to the statute (Bennion on Statutory Interpretation[12]). Relying on Selvi, counsel submitted that for the purpose of Section 53 of the Code, persons on anticipatory bail would be deemed to be arrested persons. It is, therefore, reasonable to assume that where the person is not actually in the physical custody of the police, the investigating agency could approach the Magistrate for an order directing the person to submit himself for examination under Section 53 of the Code. Counsel also submitted that in Sakiri Vasu, this Court has referred to the incidental and implied powers of a Magistrate during investigation. Counsel submitted that in Selvi, Explanation to Section 53 has been given a restrictive meaning to include physical evidence. Since voice is physical evidence, it would fall within the ambit of Section 53 of the Code. The Magistrate has, therefore, ancillary or implied powers under Section 53 of the Code to direct a person to give voice sample in order to aid investigation. Counsel submitted that the most natural construction of the various statutes may lead to the conclusion that there is no power to compel a person to give voice sample. However, the administration of justice and the need to control crime effectively require the strengthening of the investigative machinery. While considering

various provisions of law this angle may be kept in mind.

7. Mr. Dash, learned counsel for the State of Uttar Pradesh submitted that the definition of the term 'investigation' appearing in the Code is inclusive. It means collection of evidence for proving a particular fact. A conjoint reading of the definition of the term 'investigation' and Sections 156 and 157 of the Code would show that while investigating a crime, the police have to take various steps (H.N. Rishbud & Anr. v. State of Delhi[13]). Counsel pointed out that in Selvi, meaning and scope of the term 'investigation' has been held to include measures that had not been enumerated in the statutory provisions. In this connection, in Selvi, this Court took note of Rajasthan High Court judgment in Mahipal Maderna & Anr. v. State of Rajasthan[14] and Allahabad High Court judgment in Jamshed v. State of U.P.[15] Relying on Kathi Kalu Oghad & Ors., counsel submitted that taking of thumb impressions, impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused for the purpose of identification is not furnishing evidence in the larger sense because Constitution makers never intended to put obstacles in the way of effective investigation. Counsel also relied on State of U.P. v. Boota Singh[16] where the contention that taking specimen signatures of the respondents by police during investigation was hit by Section 162 of the Code was rejected. Counsel submitted that the question of admissibility of tape recorded conversation is relevant for the present controversy. In this connection, he relied on R.M. Malkani v. State of Maharashtra[17]. Counsel submitted that under Section 5 of the Prisoners Act, a person can be directed to give voice sample. In this connection, he relied on the Bombay High Court's judgment in Telgi. Counsel submitted that a purposive interpretation needs to be put on the relevant sections to strengthen the hands of the investigating agency to deal with the modern crimes where tape recorded conversations are often very crucial.

8. Though, Mr. Dave, learned counsel for the appellant has not pressed the submission relating to infringement of guarantee enshrined in Article 20(3) of the Constitution, since extensive arguments have been advanced on Article 20(3) and since the right against self-incrimination enshrined therein is of great importance to criminal justice system, I deem it appropriate to deal with the said question also to make the legal position clear.

9. Article 20(3) of the Constitution reads thus:

> "Article 20: Protection in respect of conviction for offences.
>
> (1) … … …
>
> (2) … … …
>
> (3) No person accused of any offence shall be compelled to be a witness against himself."

10. In M.P. Sharma v. Satish Chandra & Ors.[18], a seven Judges Bench of this court did not accept the contention that the guarantee against testimonial compulsion is to be confined to oral testimony

while facing trial in the court. The guarantee was held to include not only oral testimony given in the court or out of court, but also the statements in writing which incriminated the maker when figuring as an accused person.

11. In Kathi Kalu Oghad, this court agreed with the above conclusion drawn in M.P. Sharma. This court, however, did not agree with the observation made therein that "to be a witness" may be equivalent to "furnishing evidence" in larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for the purpose of identification. This court expressed that the observations in M.P. Sharma that Section 139 of the Evidence Act which says that a person producing a document on summons is not a witness, has no bearing on the connotation of the word "witness" is not entirely well-founded in law. It is necessary to have a look at Kathi Kalu Oghad.

12. In Kathi Kalu Oghad, the prosecution adduced in evidence a chit stated to be in the handwriting of the accused. In order to prove that the chit was in the handwriting of the accused, the police had taken specimen signatures of the accused while he was in police custody. Handwriting expert opined that the chit was in the handwriting of the accused. Question was raised as to the admissibility of the specimen writings in view of Article 20(3) of the Constitution. The High Court had acquitted the accused after excluding the specimen writings from consideration. The questions of constitutional importance which this court considered and which have relevance to the case on hand are as under:

> a) Whether by production of the specimen handwriting, the accused could be said to have been a witness against himself within the meaning of Article 20(3) of the Constitution?
>
> b) Whether the mere fact that when those specimen handwritings had been given, the accused was in police custody, could by itself amount to compulsion, apart from any other circumstances which could be urged as vitiating the consent of the accused in giving these specimen handwritings?
>
> c) Whether a direction given by a court to an accused present in court to give his specimen writing and signature for the purpose of comparison under Section 73 of the Indian Evidence Act infringes the fundamental right enshrined in Article 20(3) of the Constitution?

13. While departing from the view taken in M.P. Sharma that "to be witness is nothing more than to furnish evidence" and such evidence can be furnished through lips or by production of a thing or of a document or in other modes, in Kathi Kalu Oghad this Court was alive to the fact that the investigating agencies cannot be denied their legitimate power to investigate a case properly and on a proper analysis of relevant legal provisions it gave a restricted meaning to the term "to be witness". The relevant observations may be quoted.

"'To be a witness' may be equivalent to 'furnishing evidence' in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression

or impression of palm or foot or fingers or specimen writing or exposing a part of the body. 'Furnishing evidence' in the latter sense could not have been within the contemplation of the Constitution-makers for the simple reason that – thought they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject – they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions or parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice."

14. In support of the above assertion, this court referred to Section 5 of the Prisoners Act which allows measurements and photographs of an accused to be taken and Section 6 thereof which states that if anyone resists taking of measurements and photographs, all necessary means to secure the taking of the same could be used. This court also referred to Section 73 of the Indian Evidence Act which authorizes the court to permit the taking of finger impression or specimen handwriting or signature of a person present in the court, if necessary for the purpose of comparison. This court observed that 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. Example was cited of an accused who may be in possession of a document which is in his writing or which contains his signature or his thumb impression. It was observed that production of such document with a view to comparison of the writing or the signature or the impression of the accused is not the statement of an accused person, which can be said to be of the nature of a personal testimony. I may quote another relevant observation of this court:

> "When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness."

15. Four of the conclusions drawn by this court, which are relevant for our purpose, could be quoted:

> "(3) 'To be a witness' is not equivalent to 'furnishing evidence' in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.

(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.

(5) 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise.

(6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence, orally or in writing."

16. Before I proceed further, it is necessary to state that our attention was drawn to the judgment of this Court in Shyamlal Mohanlal v. State of Gujarat[19]. It was pointed out that, there is some conflict between observations of this Court in M.P. Sharma as reconsidered in Kathi Kalu Oghad and, Shyamlal Mohanlal and this is noted by this Court in V.S. Kuttan Pillai v. Ramakrishnan & Anr.[20]. I, however, find that in V.S. Kuttan Pillai, this Court has not specifically given the nature of the conflict. Having gone through Shyamlal Mohanlal v. State of Gujarat[21], I find that in that case, the Constitution Bench was considering the question whether Section 94 of the Code of Criminal Procedure (Act 5 of 1898) (Section 91(1) of the Code) applies to accused persons. The Constitution Bench observed that in Kathi Kalu Oghad it has been held that an accused person cannot be compelled to disclose documents which are incriminatory and based on his own knowledge. Section 94 of the Code of Criminal Procedure (Act 5 of 1898) permits the production of all documents including the documents which are incriminatory and based on the personal knowledge of the accused person. The Constitution Bench observed that if Section 94 is construed to include an accused person, some unfortunate consequences follow. If the police officer directs an accused to attend and produce a document, the court may have to hear arguments to determine whether the document is prohibited under Article 20 (3). The order of the trial court will be final under the Code for no appeal or revision would lie against that order. Therefore, if Section 94 is construed to include an accused person, it would lead to grave hardship to the accused and make investigation unfair to him. The Constitution Bench concluded that Section 94 does not apply to an accused person. Though there is reference to M.P. Sharma as a judgment stating that calling an accused to produce a document does amount to compelling him to give evidence against himself, the observations cannot be read as taking a view contrary to Kathi Kalu Oghad, because they were made in different context. As I have already noted, the conclusion drawn in Kathi Kalu Oghad that the accused cannot be compelled to produce documents which are incriminatory and based on his own knowledge has been restated. I, therefore, feel that it is not necessary to go into the question of alleged conflict.

17. In Selvi a three Judge Bench of this Court was considering whether involuntary administration of certain scientific techniques like narco- analysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) tests and the results thereof are of a 'testimonial character' attracting the bar of Article 20(3) of the Constitution. This Court considered the protective scope of right against self-incrimination, that is whether it extends to the investigation stage and came to the conclusion

that even the investigation at the police level is embraced by Article 20(3). After quoting extensively from Kathi Kalu Oghad, it was observed that the scope of 'testimonial compulsion' is made clear by two premises. The first is that ordinarily it is the oral or written statements which convey the personal knowledge of a person in respect of relevant facts that amount to 'personal testimony' thereby coming within the prohibition contemplated by Article 20(3). In most cases, such 'personal testimony' can be readily distinguished from material evidence such as bodily substances and other physical objects. The second premise is that in some cases, oral or written statements can be relied upon but only for the purpose of identification or comparison with facts and materials that are already in the possession of the investigators. The bar of Article 20(3) can be invoked when the statements are likely to lead to incrimination by themselves or furnish a link in the chain of evidence. It was held that all the three techniques involve testimonial responses. They impede the subject's right to remain silent. The subject is compelled to convey personal knowledge irrespective of his/her own volition. The results of these tests cannot be likened to physical evidence so as to exclude them from the protective scope of Article 20(3). This Court concluded that compulsory administration of the impugned techniques violates the right against self-incrimination. Article 20(3) aims to prevent the forcible conveyance of personal knowledge that is relevant to the facts in issue. The results obtained from each of the impugned tests bear a testimonial character and they cannot be categorized as material evidence such as bodily substances and other physical objects.

18. Applying the test laid down by this court in Kathi Kalu Oghad which is relied upon in Selvi, I have no hesitation in coming to a conclusion that if an accused person is directed to give his voice sample during the course of investigation of an offence, there is no violation of his right under Article 20(3) of the Constitution. Voice sample is like finger print impression, signature or specimen handwriting of an accused. Like giving of a finger print impression or specimen writing by the accused for the purposes of investigation, giving of a voice sample for the purpose of investigation cannot be included in the expression "to be a witness". By giving voice sample the accused does not convey information based upon his personal knowledge which can incriminate him. A voice sample by itself is fully innocuous. By comparing it with tape recorded conversation, the investigator may draw his conclusion but, voice sample by itself is not a testimony at all. When an accused is asked to give voice sample, he is not giving any testimony of the nature of a personal testimony. When compared with the recorded conversation with the help of mechanical process, it may throw light on the points in controversy. It cannot be said, by any stretch of imagination that by giving voice sample, the accused conveyed any information based upon his personal knowledge and became a witness against himself. The accused by giving the voice sample merely gives 'identification data' to the investigating agency. He is not subjected to any testimonial compulsion. Thus, taking voice sample of an accused by the police during investigation is not hit by Article 20(3) of the Constitution.

19. The next question which needs to be answered is whether there is any provision in the Code, or in any other law under which a Magistrate can authorize the investigating agency to record voice sample of a person accused of an offence. Counsel are ad idem on the point that there is no specific provision either in the Code or in any other law in that behalf. In its 87th Report, the Law Commission suggested that the Prisoners Act should be amended inter alia to include voice sample within the ambit of Section 5 thereof. Parliament however has not amended the Prisoners Act in

pursuance to the recommendation of the Law Commission nor is the Code amended to add any such provision therein. Resultantly, there is no specific legal provision under which such a direction can be given. It is therefore, necessary to see whether such power can be read into in any of the available provisions of law.

20. A careful study of the relevant provisions of the Code and other relevant statutes discloses a scheme which aims at strengthening the hands of the investigator. Section 53, Section 54A, Section 311A of the Code, Section 73 of the Evidence Act and the Prisoners Act to which I shall soon refer reflect Parliament's efforts in that behalf. I have already noted that in Kathi Kalu Oghad, while considering the expressions "to be a witness" and "furnishing evidence", this Court clarified that "to be a witness" is not equivalent to "furnishing evidence" in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused for the purpose of identification because such interpretation would not have been within the contemplation of the Constitution makers for the simple reason that though they may have intended to protect an accused person from the hazards of self-incrimination, they could not have intended to put obstacles in the way of efficient and effective investigation into crime and bringing criminal to justice. Such steps often become necessary to help the investigation of crime. This Court expressed that it is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and law courts with legitimate powers to bring offenders to justice. This, in my opinion, is the basic theme and, the controversy regarding taking of voice sample involved in this case will have to be dealt with keeping this theme in mind and by striking a balance between Article 20(3) and societal interest in having a legal framework in place which brings to book criminals.

21. Since we are concerned with the stage of investigation, it is necessary to see how the Code defines 'investigation'. Section 2 (h) of the Code is material. It reads thus:

> "Investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf."

22. It is the duty of a Police Officer or any person (other than a Magistrate) authorized by a Magistrate to collect evidence and proceedings under the Code for the collection of evidence are included in 'Investigation'. Collection of voice sample of an accused is a step in investigation. It was argued by learned counsel for the State that various steps which the police take during investigation are not specifically provided in the Code, yet they fall within the wider definition of the term 'investigation' and investigation has been held to include measures that had not been enumerated in statutory provisions and the decisions to that effect of the Rajasthan High Court in Mahipal Maderna and Allahabad High Court in Jamshed have been noticed by this Court in Selvi and, therefore, no legal provision need be located under which voice sample can be taken. I find it difficult to accept this submission. In the course of investigation, the police do use force. In a country governed by rule of law police actions which are likely to affect the bodily integrity of a person or likely to affect his personal dignity must have legal sanction. That prevents possible abuse of the power by the police. It is trite that every investigation has to be conducted within the

parameters of the Code. The power to investigate into a cognizable offence must be exercised strictly on the condition on which it is granted. (State of West Bengal v. Swapan Guha). The accused has to be dealt with strictly in accordance with law. Even though, taking of physical evidence which does not amount to communicating information based on personal knowledge to the investigating officer by the accused which may incriminate him, is held to be not violative of protection guaranteed by Article 20(3), the investigating officer cannot take physical evidence from an accused unless he is authorized by a Magistrate to do so. He cannot assume powers which he does not possess. He can only act on the strength of a direction given to him by a Magistrate and the Magistrate must have power to issue such a direction. In Bindeshwari Prasad Singh v. Kali Singh[22], this Court has clarified that subordinate criminal courts have no inherent powers. Similar view has been taken by this court in Adalat Prasad. Our attention was drawn to Sakiri Vasu in support of the submission that the Magistrate has implied or incidental powers. In that case, this Court was dealing with the Magistrate's powers under Section 156(3) of the Code. It is observed that Section 156(3) includes all such powers as are necessary for ensuring a proper investigation. It is further observed that when a power is given to an authority to do something, it includes such incidental or implied powers which would ensure proper doing of that thing. It is further added that where an Act confers jurisdiction, it impliedly also grants power of doing all such acts or employ such means as are essentially necessary for execution. If we read Bindeshwar Prasad, Adalat Prasad and Sakiri Vasu together, it becomes clear that the subordinate criminal courts do not have inherent powers. They can exercise such incidental powers as are necessary to ensure proper investigation. Against this background, it is necessary to find out whether power of a Magistrate to issue direction to a police officer to take voice sample of the accused during investigation can be read into in any provisions of the Code or any other law. It is necessary to find out whether a Magistrate has implied or ancillary power under any provisions of the Code to pass such order for the purpose of proper investigation of the case.

23. In search for such a power, I shall first deal with the Prisoners Act. As its short title and preamble suggests it is aimed at securing identification of the accused. It is an Act to authorize the taking of measurements and photographs of convicts and others. Section 2(a) defines the term 'measurements' to include finger-impressions and foot-print impressions. Section 3 provides for taking of measurements, etc., of convicted persons and Section 4 provides for taking of measurements, etc., of non-convicted persons. Section 5 provides for power of a Magistrate to order a person to be measured or photographed. Section 6 permits the police officer to use all means necessary to secure measurements etc. if such person puts up resistance. Section 7 states that all measurements and photographs taken of a person who has not been previously convicted shall be destroyed unless the court directs otherwise, if such person is acquitted or discharged. In Kathi Kalu Oghad, this Court referred to the Prisoners Act as a statute empowering the law courts with legitimate powers to bring offenders to justice.

24. In Amrit Singh v. State of Punjab[23] the appellant was charged for offences under Sections 376 and 302 of the Indian Penal Code (for short "the IPC") and an application was filed by the investigating officer for obtaining the appellant's hair sample. He refused to give hair sample. It was argued that hair sample can be taken under the provisions of the Prisoners Act. This Court held that the Prisoners Act may not be ultra vires the Constitution, but it will have no application to the case before it because it cannot be said to be an area contemplated under it.

25. In Telgi, the Bombay High Court was dealing with a challenge to the order passed by the Special Judge, Pune, rejecting application filed by the investigating agency praying that it may be permitted to record the voice samples of the accused. The High Court relying on Kathi Kalu Oghad rejected the contention that requiring the accused to lend their voice sample to the investigating officer amounts to testimonial compulsion and results in infringement of the accused's right under Article 20(3) of the Constitution. The High Court held that measuring frequency or intensity of the speech sound waves falls within the ambit of the scope of the term "measurement" as defined in Section 2(a) of the Prisoners Act. The High Court also relied on Sections 5 and 6 of the Prisoners Act as provisions enabling the court to pass such orders.

26. In Rakesh Bisht, the Delhi High Court disagreed with the view taken by the Bombay High Court in Telgi. The Delhi High Court held that if after investigation, charges are framed and in the proceedings before the court, the court feels that voice sample ought to be taken for the purposes of establishing identity, then such a direction may be given provided the voice sample is taken only for the purposes of identification and it does not contain inculpatory statement so as to be hit by Article 20(3) of the Constitution.

27. Having carefully perused the provisions of the Prisoners Act, I am inclined to accept the view taken by the Bombay High Court in Telgi as against the view taken by the Delhi High Court in Rakesh Bisht. Voice sample stands on a different footing from hair sample with which this Court was concerned in Amrit Singh because there is no provision express or implied in the Prisoners Act under which such a hair sample can be taken. That is not so with voice sample.

28. The purpose of taking voice sample which is non-testimonial physical evidence is to compare it with tape recorded conversation. It is a physical characteristic of the accused. It is identificatory evidence. In R.M. Malkani, this Court has taken a view that tape recorded conversation is admissible provided the conversation is relevant to the matters in issue; there is identification of the voice and the tape recorded conversation is proved by eliminating the possibility of erasing the tape recorded conversation. It is a relevant fact and is admissible under Section 7 of the Evidence Act. In view of this legal position, to make the tape recorded conversation admissible in evidence, there must be provision under which the police can get it identified. For that purpose, the police must get the voice sample of the accused.

29. The dictionary meaning of the term 'measurement' is the act or process of measuring. The voice sample is analysed or measured on the basis of time, frequency and intensity of the speech-sound waves. A voice print is a visual recording of voice. Spectrographic Voice Identification is described in Chapter 12 of the Book "Scientific Evidence in Criminal Cases" written by Andre A. Moenssens, Ray Edward Moses and Fred E. Inbau. The relevant extracts of this chapter could be advantageously quoted.

"Voiceprint identification requires (1) a recording of the questioned voice, (2) a recording of known origin for comparison, and (3) a sound spectrograph machine adapted for 'voiceprint' studies." 12.02 Sound and Speech In order to properly understand the voiceprint technique, it is necessary to briefly review some elementary concepts of sound and speech.

Sound, like heat, can be defined as a vibration of air molecules or described as energy in the form of waves or pulses, caused by vibrations. In the speech process, the initial wave producing vibrations originate in the vocal cords. Each vibration causes a compression and corresponding rarefications of the air, which in turn form the aforementioned wave or pulse. The time interval between each pulse is called the frequency of sound; it is expressed generally in hertz, abbreviated as hz., or sometimes also in cycles-per-second, abbreviated as cps. It is this frequency which determines the pitch of the sound. The higher the frequency, the higher the pitch, and vice versa.

Intensity is another characteristic of sound. In speech, intensity is the characteristic of loudness. Intensity is a function of the amount of energy in the sound wave or pulse. To perceive the difference between frequency and intensity, two activities of air molecules in an atmosphere must be considered. The speed at which an individual vibrating molecule bounces back and forth between the other air molecules surrounding it is the frequency. Intensity, on the other hand, may be measured by the number of air molecules that are being caused to vibrate at a given frequency." "12.03 The Sound Spectrograph The sound spectrograph is an electromagnetic instrument which produces a graphic display of speech in the parameters of time, frequency and intensity. The display is called a sound spectrogram."

30. Thus, it is clear that voiceprint identification of voice involves measurement of frequency and intensity of sound waves. In my opinion, therefore, measuring frequency or intensity of the speech-sound waves falls within the ambit of inclusive definition of the term 'measurement' appearing in the Prisoners Act.

31. There is another angle of looking at this issue. Voice prints are like finger prints. Each person has a distinctive voice with characteristic features. Voice print experts have to compare spectrographic prints to arrive at an identification. In this connection, it would be useful to read following paragraphs from the book "Law Enforcement and Criminal Justice – an introduction" by Bennett-Sandler, Frazier, Torres, Waldron.

"Voiceprints. The voiceprint method of speaker identification involves the aural and visual comparison of one or more identified voice patterns with a questioned or unknown voice. Factors such as pitch, rate of speech, accent, articulation, and other items are evaluated and identified, even though a speaker may attempt to disguise his or her voice. Through means of a sound spectrograph, voice signals can be recorded magnetically to produce a permanent image on electrically sensitive paper. This visual recording is called a voiceprint.

A voiceprint indicates resonance bars of a person's voice (called formants), along with the spoken word and how it is articulated. Figure 9.7 is an actual voiceprint sample. The loudness of a voice is indicated by the density of lines; the darker the lines on the print, the greater the volume of the sound. When voiceprints are being identified, the frequency and pitch of the voice are indicated on the vertical axis; the time factor is indicated on the horizontal axis. At least ten matching sounds are needed to make a positive identification, while fewer factors lead to a probable or highly probable conclusion.

Voiceprints are like fingerprints in that each person has a distinctive voice with characteristic features dictated by vocal cavities and articulators. Oral and nasal cavities act as resonators for energy expended by the vocal cords. Articulators are generated by the lips, teeth, tongue, soft palate, and jaw muscles. Voiceprint experts must compare spectrographic prints or phonetic elements to arrive at an identification. These expert laboratory technicians are trained to make subjective conclusions, much as fingerprint or criminalistic experts must make determinations on the basis of evidence." (emphasis supplied.) Thus, my conclusion that voice sample can be included in the inclusive definition of the term "measurements" appearing in Section 2(a) of the Prisoners Act is supported by the above-quoted observation that voice prints are like finger prints. Section 2(a) states that measurements include finger impressions and foot impressions. If voice prints are like finger prints, they would be covered by the term 'measurements'. I must note that the Law Commission of India in its 87th Report referred to the book "Law Enforcement and Criminal Justice – an introduction". The Law commission observed that voice prints resemble finger prints and made a recommendation that the Prisoners Act needs to be amended. I am, therefore, of the opinion that a Magistrate acting under Section 5 of the Prisoners Act can give a direction to any person to give his voice sample for the purposes of any investigation or proceeding under the Code.

32. I shall now turn to Section 73 of the Indian Evidence Act to see whether it empowers the court to give such a direction. It reads thus:

> "Section 73 - Comparison of signature, writing or seal with others admitted or proved.
>
> In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.
>
> The Court may direct any person present in court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person." [This section applies also, with any necessary modifications, to finger-impressions.]

33. In Ram Babu Misra, the investigating officer made an application to the Chief Judicial Magistrate, Lucknow seeking a direction to the accused to give his specimen writing for the purpose of comparison with certain disputed writings. Learned Magistrate held that he had no power to do so when the case was still under investigation. His view was upheld by the High Court. This Court held that the second paragraph of Section 73 enables the court to direct any person present in court to give specimen writings "for the purpose of enabling the court to compare" such writings with writings alleged to have been written by such person. The clear implication of the words "for the purpose of enabling the court to compare" is that there is some proceeding before the court in which or as a consequence of which it might be necessary for the court to compare such writings. This Court further observed that the direction is to be given "for the purpose of enabling the court to

compare" and not for the purpose of enabling the investigating or other agency to compare. While dismissing the appeal, this Court expressed that a suitable legislation may be made on the analogy of Section 5 of the Prisoners Act to provide for the investiture of Magistrates with the power to issue directions to any person including an accused person to give specimen signatures and writings. Thus Section 73 of the Evidence Act does not empower the court to direct the accused to give his specimen writings during the course of investigation. Obviously, Section 73 applies to proceedings pending before the court. They could be civil or criminal. In view of the suggestion made by this Court by Act 25 of 2005 with effect from 23.6.2006, Section 311A was added in the Code empowering the Magistrate to order a person to give specimen signature or handwriting during the course of investigation or proceeding under the Code.

34. Section 311A of the Code reads thus:

> "311A. Power of Magistrate to order person to give specimen signatures or handwriting:
>
> If a Magistrate of the first class is satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting:
>
> Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding." A bare reading of this Section makes it clear that Section 311A cannot be used for obtaining a direction from a Magistrate for taking voice sample.

35. Section 53 of the Code pertains to examination of the accused by medical practitioner at the request of a police officer. Section 53A refers to examination of person accused of rape by medical practitioner and section 54 refers to examination of arrested person by a medical officer. Section 53 is material. It reads as under:

> "Section 53 - Examination of accused by medical practitioner at the request of police officer (1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonable necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

Explanation:-

In this section and in sections 53A and 54,

(a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) "registered medical practitioner" means a medical practitioner who possess any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956(102 of 1956) and whose name has been entered in a State Medical Register.

1. Substituted by The Code of Criminal Procedure (Amendment) Act, 2005. Earlier the text was as under:

Explanation.-In this section and in section 54, "registered medical practitioner" means a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956), and whose name has been entered in a State Medical Register."

36. In short, this section states that if a police officer feels that there are reasonable grounds for believing that an examination of the person of the accused will afford evidence as to commission of the offence, he may request a registered medical practitioner to make such examination of his person as is reasonably necessary. For such examination, it is permissible to use such force as may be reasonably necessary. Explanation

(a) to Section 53 states what is 'examination'. It is an inclusive definition. It states that the examination shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case.

This explanation was substituted by the Code of Criminal Procedure (Amendment) Act, 2005. The question is whether with the aid of the doctrine 'ejusdem generis' voice sample test could be included within the scope of the term 'examination'.

37. I am not impressed by the submission that the term "such other tests" mentioned in Explanation (a) is controlled by the words "which the registered medical practitioner thinks necessary". It is not possible to hold that Explanation (a) vests the discretion to conduct examination of the accused in the registered medical practitioner and not in the investigating officer and therefore the doctrine of 'ejusdem generis' cannot be pressed into service. Under Section 53(1) the registered medical practitioner can act only at the request of a police officer. Obviously, he can have no say in the process of investigation. The decision to get the accused examined is to be taken by the investigating officer and not by the medical practitioner. It is the expertise of the medical practitioner which the investigator uses to decide the method of the test. It would be wrong, therefore, to state that the discretion to get the accused examined vests in the medical practitioner. This submission must, therefore, be rejected.

38. It is argued that voice sample test cannot be included in the definition of 'examination' because in Selvi, this Court has held that Section 53 needs to be given a restrictive interpretation. I must, therefore, revisit Selvi.

39. In Selvi, it was contended that the phrase "modern and scientific techniques including DNA profiling and such other tests" should be liberally construed to include narco-analysis test, polygraph examination and the BEAP test. These tests could be read in with the help of the words "and such other tests", because the list of "modern and scientific techniques" contemplated was illustrative and not exhaustive. This Court observed that it was inclined to take the view that the results of the impugned tests should be treated as testimonial acts for the purpose of invoking the right against self-incrimination and, therefore, it would be prudent to state that the phrase "and such other tests" appearing in Explanation (a) to Section 53 of the Code should be read so as to confine its meaning to include only those tests which involve the examination of physical evidence. This Court accepted the submission that while bodily substances such as blood, semen, sputum, sweat, hair and finger nail clippings can be characterized as physical evidence, the same cannot be said about the techniques in question. This Court reiterated the distinction between physical evidence and testimonial acts and accepted the submission that the doctrine of 'ejusdem generis' entails that the meaning of general words which follow specific words in a statutory provision should be construed in light of commonality between those specific words. This Court acknowledged that the substances mentioned in Explanation (a) to Section 53 are examples of physical evidence and, hence, the words "and such other tests" mentioned therein should be construed to include the examination of physical evidence but not that of testimonial acts. This Court made it clear that it was not examining what was the legislative intent in not including the tests impugned before it in the Explanation.

40. Our attention was drawn to the observation of this Court in Selvi that the dynamic interpretation of the amended Explanation to Section 53 is obstructed because the general words "and such other tests" should ordinarily be read to include tests which are of the same genus as the other forms of medical examination which are examinations of bodily substances. It is argued that voice sample is not a bodily substance like blood, sputum, finger nail clippings etc.

41. Voice emanates from the human body. The human body determines its volume and distinctiveness. Though it cannot be touched or seen like a bodily substance, being a bodily emanation, it could be treated as a part of human body and thus could be called a bodily substance. But, I feel that there is no need to stretch the meaning of the term 'bodily substance' in this case. I have already expressed my opinion that voice sample is physical non-testimonial evidence. It does not communicate to the investigator any information based on personal knowledge of the accused which can incriminate him. Voice sample cannot be held to be conceptually different from physical non-testimonial evidence like blood, semen, sputum, hair etc. Taking of voice sample does not involve any testimonial responses. The observation of this Court in Selvi that it would not be prudent to read Explanation (a) to Section 53 of the Code in an expansive manner is qualified by the words "so as to include the impugned techniques". What must be borne in mind is that the impugned techniques were held to be testimonial and hit by Article 20(3) of the Constitution. This Court emphasized that Explanation (a) to Section 53 does not enumerate certain other kinds of medical examination that involve testimonial acts, such as psychiatric examination among others and this demonstrates that the amendment made to this provision was informed by a rational distinction between the examination of physical substances and testimonial acts. If this Court wanted to interpret Explanation (a) as referring only to bodily substances there was no reason for it to draw such distinction. Pertinently, this distinction was employed while applying the doctrine of 'ejusdem generis' to Section 53. The tenor of this judgment makes it clear that tests pertaining to physical non-testimonial evidence can be included in the purview of the words "and such other tests" with the aid of the doctrine of 'ejusdem generis'. In my opinion, Selvi primarily rests on the distinction between physical evidence of non-testimonial character as against evidence involving testimonial compulsions. The tests mentioned in Explanation (a) are of bodily substances, which are examples of physical evidence. Even if voice sample is not treated as a bodily substance, it is still physical evidence involving no transmission of personal knowledge. On the reasoning of Selvi which is based on Kathi Kalu Oghad, I find no difficulty in including voice sample test in the phrase "such other tests" appearing in Explanation (a) to Section 53 by applying the doctrine of 'ejusdem generis' as it is a test pertaining to physical non-testimonial evidence like blood, sputum etc. In my opinion, such interpretation of Selvi would be in tune with the general scheme of the Code which contains provisions for collection of evidence for comparison or identification at the investigation stage in order to strengthen the hands of the investigating agency.

42. It was argued that Section 53 of the Code only contemplates medical examination and taking of voice sample is not a medical examination. Section 53 talks of examination by registered medical practitioner of the person of the accused but, does not use the words "medical examination". Similarly, Explanation (a) to Section 53 does not use the words "medical examination". In my opinion, Section 53 need not be confined to medical examination. It is pertinent to note that in Selvi, this court was considering whether narco-analysis, polygraph examination and the BEAP tests violate Article 20(3) of the Constitution. While examining this question, this Court analyzed Section 53 and stated that because those tests are testimonial in nature, they do not fall within the ambit of Section 53 of the Code but this Court did not restrict examination of person contemplated in Section 53 to medical examination by a medical practitioner even though the tests impugned therein were tests that were clearly not to be conducted by the medical practitioner. It must be remembered that Section 53 is primarily meant to serve as aid in the investigation. Examination of the accused is to be

conducted by a medical practitioner at the instance of the police officer, who is in charge of the investigation. On a fair reading of Section 53 of the Code, I am of the opinion that under that Section, the medical practitioner can conduct the examination or suggest the method of examination.

43. I must also deal with the submission of learned counsel for the appellant that non-inclusion of voice sample in Explanation (a) displays legislative intent not to include it though legislature was aware of such test. In Selvi, this court has made it clear that it was not examining the question regarding legislative intent in not including the test impugned before it in Explanation (a). Therefore, Selvi does not help the appellant on this point. On the contrary, in my opinion, by adding the words 'and such other tests' in the definition of term contained in Explanation (a) to Section 53 of the Code, the legislature took care of including within the scope of the term 'examination' similar tests which may become necessary in the facts of a particular case. Legislature exercised necessary caution and made the said definition inclusive, not exhaustive and capable of expanding to legally permissible limits with the aid of the doctrine of 'ejusdem generis'. I, therefore, reject this submission.

44. Section 54A of the Code makes provision for identification of arrested persons. It states that where a person is arrested on a charge of committing an offence and his identification by any other person or persons is considered necessary for the purpose of investigation of such offence, the court having jurisdiction, may on the request of the officer in charge of a police station, direct the person so arrested to subject himself to identification by any person or persons in such manner as the court may deem fit. Identification of the voice is precondition for admission of tape recorded conversation in evidence (R.M. Malkani). Since Section 54A of the Code uses the words "the Court, ... may ..... direct the person so arrested to subject himself to identification by any person or persons in such manner as the court may deem fit", voice sample can be identified by means of voice identification parade under Section 54A or by some other person familiar with the voice.

45. I may usefully refer to the judgment of this Court in Nilesh Paradkar v. State of Maharashtra[24] where the voice test identification was conducted by playing cassette in the presence of panchas, police officers and prosecution witnesses. This Court rejected the voice identification evidence because precautions similar to the precautions which are normally taken in visual identification of suspects by witnesses were not taken. But this court did not reject the evidence on the ground that voice identification parade is not contemplated under Section 54A of the Code. It is important to note that in Mohan Singh v. State of Bihar[25], after noticing Nilesh Paradkar, this Court held that where the witnesses identifying the voice had previous acquaintance with the caller i.e. the accused, such identification of voice can be relied upon; but identification by voice has to be considered carefully by the court. This, however, is no answer to the question of availability of a legal provision to pass an order directing the accused to give voice sample during investigation. The legal provision, in my opinion, can be traced to the Prisoners Act and Section 53 of the Code.

46. I am mindful of the fact that foreign decisions are not binding on our courts. But, I must refer to the judgment of the Supreme Court of Appeal of South Africa in Levack, Hamilton Caesar & Ors. v. Regional Magistrate, Wynberg & Anr.[26] because it throws some light on the issue involved in the

case. In that case, the Magistrate had granted an order under Section 37(3) of the Criminal Procedure Act 51 of 1977 (for short, "South African Act") directing the accused to give voice samples as specified by a named 'voice expert' in the presence of the legal representatives of the accused. The object was to compare the samples with tape recordings of telephone conversations in the State's possession, for possible later use during the trial. The accused were unsuccessful in the High Court in their challenge to the said order of the lower court. Hence, they appealed to the Supreme Court of South Africa. Under Section 37(1) of the South African Act, any police officer may take the fingerprints, palm-prints and foot-prints or may cause any such prints to be taken, inter alia, of any person arrested upon any charge. Sections 37(1)(a)(i) and

(ii) and Section 37(1)(c) of the South African Act read thus:

> "37. Powers in respect of prints and bodily appearance of accused.—(1) Any police official may—
>
> (a) take the finger-prints, palm-prints or foot-prints or may cause any such prints to be taken—
>
> (i) of any person arrested upon any charge;
>
> (ii) of any such person released on bail or on warning under section 72;
>
> (iii) xxx xxx xxx
>
> (iv) xxx xxx xxx
>
> (v) xxx xxx xxx
>
> (b) xxx xxx xxx
>
> (c) take such steps as he may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance: Provided that no police official shall take any blood sample of the person concerned nor shall a police official make any examination of the body of the person concerned where that person is a female and the police official concerned is not a female;" The first question which fell for consideration was whether voice of a person is a characteristic or distinguishing feature of the body. The Supreme Court of South Africa considered the Oxford Dictionary meaning of 'voice' as '1. Sound formed in larynx etc. and uttered by mouth, especially human utterance in speaking, shouting, singing, etc. 2. Use of voice, utterance. 3. (Phonetic) Sound uttered with resonance of vocal chords, not with

> mere breath'. It observed that voice is thus a sound formed in the larynx and uttered by the mouth and emanates from and is formed by the body. Therefore, there can be no doubt that it is a 'characteristic' (in the sense of a distinctive trait or quality) of the human body. Though voice sample was not specifically mentioned in Section 37, it was held that it fell within the scope of Section 37. It was observed that Section 37 does not expressly mention the voice because it is one of the 'innumerable' bodily features that the wording expressly contemplates. Section 37 merely contemplates bodily appearance of the accused. It was further observed that it is true that the voice, unlike palm or other prints, is not itself part of the body. It is a sound. But, the sound is a bodily emanation.

And the body from which it emanates determines its timbre, volume and distinctive modulations. It was further observed that nothing in the provision suggests that the 'distinguishing features' it envisages should be limited to those capable of apprehension through the senses of touch and sight (or even taste or smell). Relevant observation of the Supreme Court of South Africa could be quoted.

"14. Hearing is as much a mode of physical apprehension as feeling or seeing. For the sight-impaired it is indeed the most important means of distinguishing between people. It would therefore be counter- literal to interpret the section as though the ways of 'ascertaining' bodily features it contemplates extend only to what is visible or tangible." The Supreme Court of South Africa then considered the question of self-incrimination. It observed that it is wrong to suppose that requiring the accused to submit voice samples infringes their right either to remain silent in the court proceedings against them or not to give self- incriminating evidence. It was further observed that voice falls within the same category as complexion, stature, mutilations, marks and prints i.e. 'autoptic evidence' – evidence derived from the accused's own bodily features. It was held that there is no difference in principle between the visibly discernible physical traits and features of an accused and those that under law can be extracted from him through syringe and vial or through the compelled provision of a voice sample. In neither case is the accused required to provide evidence of a testimonial or communicative nature, and in neither case is any constitutional right violated. The Supreme Court of South Africa then examined as to under which provision a Magistrate could issue a direction to the accused to supply his voice samples. It observed that Section 37(1)(a)(i) and (ii) permit any police officer to take the finger-prints, palm-prints or foot-prints or may cause any such prints to be taken of any person arrested upon any charge. Section 37(1)(c) states that any police officer may take such steps as he may deem necessary in order to ascertain whether the body of any person referred to in paragraph (a) (i) or (ii) has any mark, characteristic or distinguishing feature or shows any condition or appearance. Though 'voice sample' was not specifically mentioned anywhere, on a conjoint reading of the two provisions, the Supreme Court of South Africa held that the police retained the power under Section 37(1)(c) to take steps as they might deem necessary to ascertain the characteristic or distinguishing features of the accused's voice. That included the power to request the accused to supply voice samples. The court further observed that this power, in turn, could properly be supplemented by a court order requiring the accused to do so.

47. In the ultimate analysis, therefore, I am of the opinion that the Magistrate's power to authorize the investigating agency to record voice sample of the person accused of an offence can be traced to

Section 5 of the Prisoners Act and Section 53 of the Code. The Magistrate has an ancillary or implied power under Section 53 of the Code to pass an order permitting taking of voice sample to aid investigation. This conclusion of mine is based on the interpretation of relevant sections of the Prisoners Act and Section 53 of the Code and also is in tune with the concern expressed by this court in Kathi Kalu Oghad that it is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice.

48. The principle that a penal statute should be strictly construed is not of universal application. In Murlidhar Meghraj Loya v. State of Maharashtra[27], this court was dealing with the Prevention of Food Adulteration Act, 1954. Speaking for this court, Krishna Iyer, J. held that any narrow and pedantic, literal and lexical construction of Food Laws is likely to leave loopholes for the offender to sneak out of the meshes of law and should be discouraged and criminal jurisprudence must depart from old canons defeating criminal statutes calculated to protect the public health and the nation's wealth. Similar view was taken in Kisan Trimbak Kothula & Ors. v. State of Maharashtra[28]. In State of Maharashtra v. Natwarlal Damodardas Soni[29], while dealing with Section 135 of the Customs Act and Rule 126-H(2)(d) of the Defence of India Rules, a narrow construction given by the High Court was rejected on the ground that that will emasculate these provisions and render them ineffective as a weapon for combating gold smuggling. It was further held that the provisions have to be specially construed in a manner which will suppress the mischief and advance the object which the legislature had in view. Therefore, whether the penal statute should be given strict interpretation or not will depend on facts of each case. Considerations of public health, preservation of nation's wealth, public safety may weigh with the court in a given case and persuade it not to give a narrow construction to a penal statute. In the facts of this case, I am not inclined to give a narrow construction to the provisions of the Prisoners Act and Section 53 of the Code. Judicial note can be taken of the fact that there is a great deal of technological advance in means of communication. Criminals are using new methodology in committing crimes. Use of landlines, mobile phones and voice over internet protocol (VoIP) in the commission of crimes like kidnapping for ransom, extortion, blackmail and for terrorist activities is rampant. Therefore, in order to strengthen the hands of investigating agencies, I am inclined to give purposive interpretation to the provisions of the Prisoners Act and Section 53 of the Code instead of giving a narrow interpretation to them. I, however, feel that Parliament needs to bring in more clarity and precision by amending the Prisoners Act. The Code also needs to be suitably amended. Crime has changed its face. There are new challenges faced by the investigating agency. It is necessary to note that many local amendments have been made in the Prisoners Act by several States. Technological and scientific advance in the investigative process could be more effectively used if required amendments are introduced by Parliament. This is necessary to strike a balance between the need to preserve the right against self incrimination guaranteed under Article 20(3) of the Constitution and the need to strengthen the hands of the investigating agency to bring criminals to book.

49. In the view that I have taken, I find no infirmity in the impugned order passed by the High Court confirming the order passed by learned Chief Judicial Magistrate, Saharanpur summoning the appellant to the court for recording the sample of his voice. The appeal is dismissed.

50. Before I part with this judgment, I must express my sincere thanks to learned counsel Mr. Siddhartha Dave, Mr. Aman Ahluwalia and Mr. R.K. Dash, who have very ably assisted the court.

.....J. (RANJANA PRAKASH DESAI) NEW DELHI, DECEMBER 7, 2012.

REPORTABLE IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION CRIMINAL APPEAL NO. 2003 OF 2012 [ARISING OUT OF SLP (CRIMINAL) NO.7259 OF 2010] RITESH SINHA ... APPELLANT VERSUS THE STATE OF UTTAR PRADESH & ANR. ... RESPONDENTS J U D G M E N T Aftab Alam, J.

Leave granted.

1. In to-day's world when terrorism is a hard reality and terrorist violence is a common phenomenon, the police needs all the forensic aids from science and technology. The technology is in position to-day to say whether two voice-recordings are of the same person or of two different people and, thus, to provide valuable aid in investigation. But, the question is whether the law has any provision under which a person, suspected of having committed an offence, may be compelled to give his voice sample to aid the police in investigation of the case. The next and the more important question is, in case there is no express or evidently applicable provision in law in that regard, should the court invent one by the process of interpretation. My sister Desai J. seems to think that the gap in the law is so vital that the court must step in to bridge the gap. I hesitate to do so.

2. There are, indeed, precedents where the court by the interpretative process has evolved old laws to meet cotemporary challenges and has planted into them contents to deal with the demands and the needs of the present that could not be envisaged at the time of the making of the law. But, on the question of compelling the accused to give voice sample, the law must come from the legislature and not through the court process. First, because 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. Secondly, if the legislature even while making amendments in the Criminal Procedure Code, aimed at strengthening the investigation, as late as in 2005, is oblivious to something as obvious as this 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, then it may even be contended that in the larger schemes of things the legislature is able to see something which perhaps the Court is missing.

3. Coming now to the specifics, I would briefly record my reasons for not being able to share the view taken by Desai J.

4. At the beginning of her judgment Desai J. has framed two questions that the Court is called upon to answer in this case. These are:

> "(i) 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?
>
> (ii) 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?" (emphasis added)

5. As regards the first question, relying primarily on the eleven (11) Judges' Bench decision of this Court in State of Bombay v. Kathi Kalu Oghad & Others[30] which was followed in the more recent decision in Selvi and others v. State of Karnataka[31] she held that "taking voice sample of an accused by the police during investigation is not hit by Article 20 (3) of the Constitution."

6. I am broadly in agreement with the view taken by her on Article 20 (3) but, since I differ with her on the second question, I think the issue of constitutional validity in compelling the accused to give his/her voice sample does not really arise in this case.

7. Coming to the second question, as may be seen, it has the recognition that there is no provision in the Criminal Procedure Code to compel the accused to give his voice sample. That being the position, to my mind the answer to the question can only be in the negative, regardless of the constitutional guarantee against self-incrimination and assuming that in case a provision in that regard is made in the law that would not offend Article 20 (3) of the Constitution.

8. Desai J., however, answers the question in the affirmative by means of a learned and elaborate discourse. She has navigated the arduous course to the conclusion at which she arrived very painstakingly and skillfully.

9. First, she firmly rejects the submission advanced on behalf of the State that in the absence of any express provision in that regard, it was within the inherent and implied powers of the Magistrate to direct the accused to give his/her voice sample to ensure a proper investigation. In this regard, she observes as follows:-

> "In the course of investigation, the police do use force. In a country governed by rule of law police actions which are likely to affect the bodily integrity of a person or likely to affect his personal dignity must have legal sanction. That prevents possible abuse of the power by the police. It is trite that every investigation has to be conducted within the parameters of the Code. The power to investigate into a cognizable offence must be exercised strictly on the condition on which it is granted. (State of West Bengal v. Swapan Guha). The accused has to be dealt with strictly in accordance with law. Even though, taking of physical evidence which does not amount to communicating information based on personal knowledge to the investigating officer by the accused which may incriminate him, is held to be not violative of protection

> guaranteed by Article 20(3), the investigating officer cannot take physical evidence from an accused unless he is authorized by a Magistrate to do so. He cannot assume powers which he does not possess. He can only act on the strength of a direction given to him by a Magistrate and the Magistrate must have power to issue such a direction."

10. I am fully in agreement with what is said above.

11. However, having rejected the submission based on the inherent and implied powers of the Magistrate she makes a "search" for the power of the Magistrate to ask the accused to give his/her voice sample. She shortlists for that purpose (i) the provisions of the Identification of Prisoners Act, 1920, (ii) Section 73 of the Evidence Act and (iii) Sections 311A and 53 of the Code of Criminal Procedure.

12. She finds and holds that Section 73 of the Evidence Act and Section 311A of the Code of Criminal Procedure are of no help and those two provisions cannot be used for obtaining a direction from the Magistrate for taking voice sample and finally rests her conclusion on the provisions of The Identification of Prisoners Act, 1920 and Section 53 of the Code of Criminal Procedure.

13. Section 53 of the Code of Criminal Procedure originally read as under:-

> "53. Examination of accused by medical practitioner at the request of police officer. – (1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.
>
> (2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner."

14. In the year 2005, a number of amendments were made in the Criminal Procedure Code by Act 25 of 2005. Those amendments included the addition of an explanation to Section 53 and insertion of Sections 53-A and 311-A. The explanation added to Section 53 reads as under:-

> "[Explanation. – In this section and in sections 53A and 54, -
>
> a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings

> by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(emphasis added)

b) "registered medical practitioner" means a medical practitioner who possess any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register.]"

15. Desai J. rejects the submission made on behalf of the appellant that "the term 'such other tests' mentioned in Explanation (a) is controlled by the words 'which the registered medical practitioner thinks necessary'" and relying heavily upon the decision of this Court in Selvi holds:

> "...by adding the words 'and such other tests' in the definition of term contained in Explanation (a) to Section 53 of the Code, the legislature took care of including within the scope of the term 'examination' similar tests which may become necessary in the facts of a particular case. Legislature exercised necessary caution and made the said definition inclusive, not exhaustive and capable of expanding to legally permissible limits with the aid of the doctrine of 'ejusdem generis'."

16. I am completely unable to see how Explanation (a) to Section 53 can be said to include voice sample and to my mind the ratio of the decision in Selvi does not enlarge but restricts the ambit of the expressions 'such other tests' occurring in the Explanation.

17. In my opinion the Explanation in question deals with material and tangible things related to the human body and not to something disembodied as voice.

18. Section 53 applies to a situation where the examination of the person of the accused is likely to provide evidence as to the commission of an offence. Whether or not the examination of the person of the accused would afford evidence as to the commission of the offence undoubtedly rests on the satisfaction of the police officer not below the rank of sub-inspector. But, once the police officer makes a request to the registered medical practitioner for the examination of the person of the accused, what other tests (apart from those expressly enumerated) might be necessary in a particular case can only be decided by the medical practitioner and not the police officer referring the accused to him. In my view, therefore, Mr. Dave, learned counsel for the appellant, is right in his submission that any tests other than those expressly mentioned in the Explanation can only be those which the registered medical practitioner would think necessary in a particular case. And further that in any event a registered medical practitioner cannot take a voice sample.

19. Apart from Section 53 of the Code of Criminal Procedure, Desai J. finds another source for the power of the Magistrate in Section 5 of the Identification of Prisoners Act, 1920. Referring to some technical literature on voice print identification, she holds:

> "Thus, it is clear that voiceprint identification of voice involves measurement of frequency and intensity of sound waves. In my opinion, therefore, measuring frequency or intensity of the speech-sound waves falls within the ambit of inclusive definition of the term 'measurement' appearing in the Prisoners Act" And further:
>
> "Thus, my conclusion that voice sample can be included in the inclusive definition of the term "measurements" appearing in Section 2(a) of the Prisoners Act is supported by the above-quoted observation that voice prints are like finger prints. Section 2(a) states that measurements include finger impressions and foot impressions. If voice prints are like finger prints, they would be covered by the term 'measurements'." She finally concludes:
>
> "I am, therefore, of the opinion that a Magistrate acting under Section 5 of the Prisoners Act can give a direction to any person to give his voice sample for the purposes of any investigation or proceeding under the Code."

20. I am unable to agree.

21. In order to clearly state my views on the provisions of the Identification of Prisoners Act, I may refer to the object and the scheme of the Act. The principal object of the Act is to sanction certain coercive measures (which would otherwise invite criminal or tortuous liability) in order to facilitate the identification of (i) convicts, (ii) persons arrested in connection with certain offences, and (iii) persons ordered to give security in certain cases. The scheme of the Act is as follows. The first section relates to the short title and the extent of the Act. The second section has the definition clauses and defines 'measurements' and 'prescribed' in clauses (a) and (c) respectively which are as under:

> "2. Definitions. – (1) In this Act, unless there is anything repugnant in the subject or context, -
>
> iii) "measurements" include finger impressions and foot-print impressions;
>
> iv) xxx xxx xxx
>
> (c) "prescribed" means prescribed by rules made under this Act."

22. Then there are the three substantive provisions of the Act. Section 3 deals with taking of measurements, etc of convicted persons. It is as under:

> "3. Taking of measurements, etc., of convicted persons. – Every person who has been –
>
> a) convicted of any offence punishable with rigorous imprisonment for a term of one year or upwards, or of any offence which would render him liable to enhanced

punishment on a subsequent conviction; or

b) ordered to give security for his good behaviour under section 118 of the Code of Criminal Procedure, 1898 (5 of 1898), shall, if so required, allow his measurements and photograph to be taken by a police officer in the prescribed manner."

23. Section 4 deals with taking of measurement, etc. of non-convicted persons. It is as under:

"4. Taking of measurements, etc., of non-convicted persons. – Any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards shall, if so required by a police officer, allow his measurements to be taken in the prescribed manner."

24. Section 5 deals with the power of Magistrate to order a person to be measured or photographed. It is as under:

"5. Power of Magistrate to order a person to be measured or photographed. – If a Magistrate is satisfied that, for the purposes of any investigation or proceeding under the Code of Criminal Procedure, 1898 (5 of 1898), it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer:

Provided that no order shall be made directing any person to be photographed except by a Magistrate of the First Class:

Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding."

25. The rest of the provisions from Section 6 to Section 9 deal with incidental or consequential matters. Section 6 deals with resistance to the taking of measurements, etc. and it is as under:

"6. Resistance to the taking of measurements, etc. – (1) If any person who under this Act is required to allow his measurements or photograph to be taken resists or refuses to allow the taking of the same, it shall be lawful to use all means necessary to secure the taking thereof.

(2) Resistance to or refusal to allow the taking of measurements or photograph under this Act shall be deemed to be an offence under section 186 of the Indian Penal Code (45 of 1860)."

26. Section 7 deals with destruction of photographs and records of measurements, etc., on acquittal and it is as under:

> "Destruction of photographs and records of measurements, etc., on acquittal. – Where any person who, not having been previously convicted of an offence punishable with rigorous imprisonment for a term of one year or upwards, has had his measurements taken or has been photographed in accordance with the provisions of this Act is released without trial or discharged or acquitted by any court, all measurements and all photographs (both negatives and copies) so taken shall, unless the court or (in a case where such person is released without trial) the District Magistrate or Sub-Divisional Officer for reasons to be recorded in writing otherwise directs, be destroyed or made over to him."

27. Section 8 gives the State Governments the power to make rules and it is as under:

> "8. Power to make rules. – (1) The State Government may, [by notification in the Official Gazette,] make rules for the purpose of carrying into effect the provisions of this Act.
>
> (2) In particular and without prejudice to the generality of the foregoing provision, such rules may provide for –
>
> a) restrictions on the taking of photographs of persons under section 5;
>
> b) the places at which measurements and photographs may be taken;
>
> c) the nature of the measurements that may be taken;
>
> d) the method in which any class or classes of measurements shall be taken;
>
> e) the dress to be worn by a person when being photographed under section 3; and
>
> f) the preservation, safe custody, destruction and disposal of records of measurements and photographs.
>
> [(3) Every rule made under this section shall be laid, as soon as may be after it is made, before State Legislature.]"

28. Section 9 finally lays down the bar of suits.

29. A careful reading of Sections 3, 4 and 5 would make it clear that the three provisions relate to three categories of persons. Section 3 relates to a convicted person. Section 4 relates to a person who has been arrested in connection with an offence punishable with rigorous imprisonment for term of 1 year or upwards. Section 5 is far wider in amplitude than Sections 3 and 4 and it relates to any person, the taking of whose measurements or photographs might be expedient for the purposes of any investigation or proceeding under the Code of Criminal Procedure. In the case of the first two categories of persons, the authority to take measurements vests in a police officer but in the case of

Section 5, having regard to its much wider amplitude, the power vests in a Magistrate and not in any police officer.

30. It is to be noted that the expression "measurements" occurs not only in Section 5 but also in Sections 3 and 4. Thus, if the term "measurements" is to be read to include voice sample then on arresting a person in a case relating to an offence punishable with rigorous imprisonment for a term of 1 year or upwards (and voice sample would normally be required only in cases in which the punishment is one year or upward!) it would be open to the police officer (of any rank) to require the arrested person to give his/her voice sample on his own and without seeking any direction from the Magistrate under Section 5. Further, applying the same parameters, not only voice sample but many other medical tests, for instance, blood tests such as lipid profile, kidney function test, liver function test, thyroid function test etc., brain scanning etc. would equally qualify as "measurements" within the meaning of the Identification of Prisoners Act. In other words on arresting a person in a case relating to an offence punishable with rigorous imprisonment for a term of 1 year or upwards it would be possible for the police officer (of any rank) to obtain not only the voice sample but the full medical profile of the arrested person without seeking any direction from the magistrate under Section 5 of the Identification of Prisoners Act or taking recourse to the provisions of Section 53 or 53A of the Code of Criminal Procedure.

31. I find it impossible to extend the provisions of the Identification of Prisoners Act to that extent.

32. It may not be inappropriate here to point out that in exercise of the rule-making powers under Section 8 of the Identification of Prisoners Act some of the State Governments have framed rules. I have examined the rules framed by the States of Maharashtra, Madhya Pradesh, Orissa, Pondicherry and Jammu & Kashmir. From a perusal of those rules it would appear that all the State Governments understood "measurements" to mean the physical measurements of the body or parts of the body. The framing of the rules by the State Government would not be binding on this Court in interpreting a provision in the rules. But it needs to be borne in mind that unless the provision are incorporated in the Act in regard to the manner of taking voice sample and the person competent to take voice sample etc. there may be difficulty in carrying out the direction of the Court.

33. For arriving at her conclusion regarding the scope of Section 5 of the Identification of Prisoners Act, Desai J. has considered two High Court judgments. One is of the Bombay High Court in Central Bureau of Investigation, New Delhi v. Abdul Karim Ladsab Telgi and others[32] and the other by the Delhi High Court in Rakesh Bisht v. Central Bureau of Investigation [33] she has approved the Bombay High Court decision in Telgi's case and disapproved the Delhi High Court decision in Bisht's case. The Bombay decision is based on exactly the same reasoning as adopted by Desai J that the definition of "measurements" in Section 2(a) is wide enough to include voice sample and hence a Magistrate is competent to order a person to give his voice sample. The relevant passage in the decision is as under:-

> "Be that as it may, the expression "measurements" occurring in Section 5 has been defined in Section 2(a), which reads thus:

2. Definitions. - In that Act .....

(a) “measurements include finger-impressions and foot-print impressions”.

The said expression is an inclusive term, which also includes finger- impressions and foot-print impressions. Besides, the term measurement, as per the dictionary meaning is the act or an instance of measuring; an amount determined by measuring; detailed dimensions. With the development of Science and Technology, the voice sample can be analysed or measured on the basis of time, frequency, and intensity of the speech-sound waves so as to compare and identify the voice of the person who must have spoken or participated in recorded telephonic conversation. The expression “measurements” occurring in Section 5, to my mind, can be construed to encompass even the act undertaken for the purpose of identification of the voice in the tape-recorded conversation. Such construction will be purposive one without causing any violence to the said enactment, the purpose of which was to record or make note of the identity of specified persons.”

34. For the reasons discussed above, I am unable to accept the views taken in the Bombay decision and to my mind the decision in Telgi is not the correct enunciation of law.

35. The Delhi High Court decision in the case of Bisht pertains to the period prior to June 23, 2006, when the amendments made in the Code of Criminal Procedure by Act 25 of 2005 came into effect. It, therefore, did not advert to Sections 53 or 311A and considered the issue of taking voice sample of the accused compulsorily, primarily in light of Section 73 of the Indian Evidence Act, 1872. Though the decision does not refer to the provisions of the Criminal Procedure Code that came into force on June 23, 2006, in my view, it arrives at the correct conclusions.

36. At this stage, I may also refer to the decision of this Court in State of Uttar Pradesh v. Ram Babu Misra[34] where the Court considered the issue whether the Magistrate had the authority to direct the accused to give his specimen writing during the course of investigation. The first thing to note in regard to this decision is that it was rendered long before the introduction of Section 311A in the Code of Criminal Procedure which now expressly empowers the Magistrate to order a person to give specimen signature or handwriting for the purposes of any investigation or any proceeding under the Code. In Ram Babu Misra the Court noted that signature and writing are excluded from the range of Section 5 of the Identification of Prisoners Act, though finger impression was included therein. In that decision the Court made a suggestion to make a suitable law to provide for the investiture of Magistrates with the power to issue directions to any person, including an accused person, to give specimen signatures and writings. The suggestions made by the Court materialized 25 years later when Section 311A was introduced in the Code of Criminal Procedure.

37. The decision in Ram Babu Misra was rendered by this Court on February 19, 1980 and on August 27, the same year, the Law Commission of India submitted its 87th Report which was aimed at a complete revamp of the Identification of Prisoners Act, 1920 and to update it by including the scientific advances in the aid of investigation. In Paragraph 3.16 of the Report it was observed as under:

> "3.16 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 ... 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." (emphasis added)

38. Further, in Paragraph 5.26 it was stated as under:

> "5.26 The scope of section 5 needs to be expanded in another respect. 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." (emphasis added)

39. I am not suggesting for a moment that the above extracts are in any way binding upon the Court but they do indicate the response of a judicial mind while reading the provisions of the Indian Prisoners Act normally, without any urge to give the expression 'measurements' any stretched meaning.

40. The Report then discussed where a provision for taking voice sample can be appropriately included; whether in the Identification of Prisoners Act or in the Evidence Act or in the Code of Criminal Procedure. It concluded that it would be appropriate to incorporate the provision by amending Section 5 of the Identification of Prisoners Act as follows:

> "(1) If a Magistrate is satisfied that, for the purpose of any investigation or proceeding under the Code of Criminal Procedure, 1973, it is expedient to direct any person –
>
> a) to allow his measurements or photograph to be taken, or
>
> b) to furnish a specimen of his signature or writing, or
>
> c) to furnish a specimen of his voice by uttering the specified words or making the specified sounds.

the Magistrate may make an order to that effect, recording his reasons for such an order.

(2) The person to whom the order relates –

a) shall be produced or shall attend at the time and place specified in the order, and

b) shall allow his measurements or photograph to be taken by a police officer, or furnish the specimen signature or writing or furnish a specimen of his voice, as the case may be in conformity with the orders of the Magistrate before a police officer.

3) No order directing any person to be photographed shall be made except by a metropolitan Magistrate or a Magistrate of the first class.

4) No order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.

5) Where a court has taken cognizance of an offence a Magistrate shall not under this section, give to the person accused of the offence any direction which could, under section 73 of the Indian Evidence Act 1872, be given by such Magistrate."

41. The Report as noted was submitted in 1980. The Code of Criminal Procedure was amended in 2005 when the Explanation was added to Section 53 and Sections 53A and 311A were inserted into the Code. Voice sample was not included either in the Explanation to Section 53 or Section 311A.

42. Should the Court still insist that voice sample is included in the definition of "measurements" under the Identification of Prisoners Act and in the Explanation to Section 53 of the Code of Criminal Procedure? I would answer in the negative.

43. In light of the above discussion, I respectfully differ from the judgment proposed by my sister Desai J. I would allow the appeal and set aside the order passed by the Magistrate and affirmed by the High Court.

44. Let copies of this judgment be sent to the Union Law Minister and the Attorney General and their attention be drawn to the issue involved in the case.

45. In view of the difference of opinion between us, let this case be listed for hearing before a bench of three Judges after obtaining the necessary direction from the Honourable the Chief Justice of India.

.....J. (Aftab Alam) New Delhi;

December 7, 2012

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[1] (2004) 7 SCC 338
[2] (1980) 2 SCC 242
[3] (1970) 1 SCC 653
[4] AIR 1960 All 157
[5] (2012) 2 SCC 489
[6] (1982) 1 SCC 561
[7] (2010) 7 SCC 263

[8] (2009) 2 SCC 409
[9] (1962) 3 SCR 10
[10] 2007 (1) JCC 482 and MANU/DE/0338/2007
[11] 2005 Crl. L.J. 2868
[12] 5th Edition at P. 516
[13] AIR 1955 SC 196
[14] 1971 Cr.L.J. 1405
[15] 1976 Cri.L.J. 1680
[16] (1979) 1 SCC 31
[17] (1973) 1 SCC 471
[18] 1954 SCR 1077
[19] 1965 2 SCR 457
[20] (1980) 1 SCC 264
[21] (1965) 2 SCR457
[22] (1977) 1 SCC 57
[23] (2006) 12 SCC 79
[24] (2011) 4 SCC 143
[25] (2011) 9 SCC 272
[26] [2003] 1 All SA 22 (SCA) (28th November 2002)
[27] AIR 1976 SC 1929
[28] AIR 1977 SC 435
[29] AIR 1980 SC 593
[30] [1962] 3 SCR 10
[31] (2010) 7 SCC 263
[32] 2005 Crl.L.J. 2868
[33] 2007 Cri. L.J. 1530 = MANU/DE/0338/2007
[34] (1980) 2 SCC 343
