



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. MMO No. 596 of 2018

Reserved on : June 22, 2020

Decided on : June 23, 2020

Vinod Mittal

.....Petitioner

Versus

State of H.P. & another

.....Respondent

Coram:

The Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Whether approved for reporting? Yes.

For the petitioner : Mr. Satyen Vaidya Senior
Advocate with Mr. Vivek
Sharma, Advocate.

For the respondents : Mr. Desh Raj Thakur,
Additional Advocate General
with Mr. Narender Singh
Thakur, Deputy Advocate
General.

Justice Vivek Singh Thakur, Judge

Present petition has been preferred against impugned order dated 5.11.2018, passed by learned Special Judge (Forest), Shimla in Cr. Misc. Petition No. 901168/2018, titled State of H.P. vs. Vinod Mittal, in case FIR No. 7 of 2011, registered under Section 8 of Prevention of Corruption Act, 1988 (hereinafter referred to as "PC Act") in P.S. State Vigilance and Anti Corruption Bureau, Shimla, wherein petitioner/accused has been directed to undergo

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polygraph test and to give his voice sample to the Investigating Agency during investigation of case.

2. Impugned order has been passed by the Special Judge in an application preferred by Investigating Agency seeking permission to take voice sample and to conduct polygraph test of petitioner.

3 In response, petitioner had taken the plea that proposal of Investigating Agency to take specimen voice sample and conduct polygraph test is against the protection granted to petitioner under Article 20(3) of Constitution of India. In support, reliance was also put on pronouncements of the Supreme Court in cases **Ritesh Sinha vs. State of UP, reported in (2013)2 SCC 357; and Selvi vs. State of Karnataka (2010)7 SCC 263.**

4 Lastly, in the prayer of the reply filed by petitioner it was submitted on behalf of petitioner that in case the Court comes to the conclusion that specimen voice samples and polygraph test are legally permissible, the respondent (petitioner herein) is ready and willing to undergo the same to show his bonafide.

5 After considering the law cited and reply filed on behalf of petitioner, learned Special Judge concluded that

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the Court has power to direct the accused to undergo the polygraph test and give samples of voice where he does not object with further observation that in present case, petitioner has given consent in his reply for these tests, learned Special Judge has allowed prayer of Investigating Agency.

6 In this petition also, almost on similar grounds, which were raised before learned Special Judge, the impugned order has been assailed with further ground that learned Special Judge has wrongly construed the contents of reply to arrive at a conclusion that there was consent of petitioner to undergo the test proposed by Investigating Agency, whereas, the averments made in reply, could, by no means, be inferred as the unconditional consent for undertaking such tests. It is submitted on behalf of petitioner that readiness and willingness to undergo the test on behalf of petitioner, as averred in reply, was subject to legal permissibility of these tests and no provision in Code of Criminal Procedure (in short 'Cr.P.C.') provides for undertaking these tests. Therefore, these tests are not legally permissible and hence conditional consent of petitioner cannot be treated as a consent to undergo these

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tests. It is submitted that as per impugned order, apart from violation of protection granted under Article 20(3) of the Constitution is also intrusion in right to privacy granted to the petitioner under the Constitution, which is a part of fundamental right.

7 Shri Desh Raj Thakur, learned Additional Advocate General on behalf of State, submits that undoubtedly, protection granted under Article 20(3) of Constitution is a fundamental right provided under the Constitution, but, as laid down by the Apex Court in its pronouncement in cases **Gobind vs. State of Madhya Pradesh and another**, reported in **(1975)2 SCC 148; Modern Dental College and Research Centre and others, vs. State of Madhya Pradesh and others** reported in **(2016)7 SCC 353**; and **Santhini vs. Vijaya Venketesh**, reported in **(2018)1 SCC 1**, no fundamental right is absolute and individual right can be diluted for compelling public interest.

8 Referring **Rajendra Pralhadrao Wasnik vs. State of Maharashtra**, reported in **(2019)12 SCC 460**, it has been further contended that for scientific investigation, advantage of technological advancement in

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forensic science is permissible under law and petitioner himself has given undertaking for tests in case of permissibility of these tests and thus, now petitioner cannot take U-turn that he has not consented for undertaking these tests.

9 It is also submitted by learned Additional Advocate General that by showing conditional readiness and willingness in order to establish his bonafide, consent in reply to application has been cleverly drafted in tactful manner so as to avoid adverse inference which could have been drawn during trial against petitioner under Section 106 of Indian Evidence Act for refusal. It is canvassed that for permissibility of test during investigation, if consented by a person, the consent given in reply is a valid consent which cannot be withdrawn at this stage.

10 Giving thoughtful consideration to submissions of learned counsel as well as pleadings of parties and also pronouncements of the Supreme Court, I am of the opinion that present petition must fail for reasons enumerated hereinafter.

11 Protection granted under Article 20(3) of Constitution is undisputed, which reads as under:-

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“20(3) No person accused of any offence shall be compelled to be a witness against himself.”

12 Three Judges Bench of the Supreme Court in ***Gobind vs. State of Madhya Pradesh and another***, reported in **(1975)2 SCC 148**, has held that individual autonomy, perhaps the central concern of any system of limited government, is protected in part-III under our Constitution by explicit constitutional guarantees. Subtler and far reaching means of invading privacy will make it possible to be heard in the street what is whispered in the closet and yet, too broad a definition of ‘privacy’ raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. But, of course, privacy primarily concerns the individual and therefore, it relates to and overlaps with the concept of liberty and most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of right and thus, privacy interest in autonomy must also be placed in the context of other rights and values. In this judgment, it is observed that rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those

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things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. It is also observed in this case that right to privacy in any event will necessarily have to go through a process of case-by-case development and no fundamental right is absolute.

13 The Apex Court in **Selvi and others vs. State of Karnataka**, reported in **(2010)7 SCC 263**, has concluded that protection of Article 20(3) is not only confined to stage of trial in respect to testimonial compulsion of the Courtroom but also extended to the compelled testimony previously obtained from him and thus, it is also applicable to the stage of investigation.

14 In **Selvi's case** referred supra, it is also observed that results of tests like Narcoanalysis, polygraph test (lie-detector test) and BEAP (Brain Electrical Activation Profile) test 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" which appears in Explanation to Section 53 of Cr.PC should be read so as to confine its meaning to include only those tests which involve the examination of

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physical evidence and it should also be noted that the Explanation to Section 53 Cr.PC does not enumerate certain other forms of medical examination which involve testimonial acts, such as psychiatric examination among others.

15 It is further observed in **Selvi's case** that even though aforesaid techniques have not been expressly enumerated in Cr.PC, there is no statutory prohibition against them either and it is a clear case of 'silence in the law' and furthermore, in circumstances, where an individual consents to undergo these tests, there is no dilution of Article 20(3) of Constitution and giving example of pronouncement of Rajasthan High Court in **Mahipal Maderna vs. State of Rajasthan**, reported in **1971 Cri.LJ 1405**, wherein at a stage existing prior to the enactment of an express provision for medical examination in Cr.PC, order requiring the production of a hair sample, was held to be within the ordinary understanding of "investigation". It is also reiterated that meaning and scope of term "investigation" includes measures that have not been enumerated in statutory provisions.

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16 It is further observed in aforesaid judgment that despite absence of statutory basis, it is tenable to hold that Criminal Courts should be allowed to direct the impugned test with subject's consent, keeping in mind that there is no statutory prohibition against them either. The consent of subject must be informed consent.

17 Considering the fact that tests like polygraph examination and BEAP test, form a means for "imparting personal knowledge about relevant facts", should also be treated as "personal testimony", and it is concluded by the Apex Court that results, obtained through the involuntary administration of either of the impugned tests, i.e. Narcoanalysis technique, polygraph examination and BEAP test, come within the scope of "testimonial compulsion" and thereby attracts the protective shield of Article 20(3) and therefore, if the fact of compulsion is proved, then the resulting statements are rendered inadmissible as evidence.

18 It is further observed that subjecting a person to the impugned techniques in an involuntary manner violates the prescribed boundaries of privacy and forcible interference with a person's mental processes is not

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provided for under any statute and it most certainly comes into conflict with the “right against self-incrimination”.

19 Lastly, in ***Selvi’s case supra***, the Apex Court has concluded as under:

“262 In our considered opinion, the compulsory administration of the impugned techniques violates the ‘right against self-incrimination’. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of [Article 20\(3\)](#) extends to the investigative stage in criminal cases and when read with [Section 161\(2\)](#) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. [Article 20\(3\)](#) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. [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 categorised as material evidence.

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263 We are also of the view that forcing an individual to undergo any of the impugned techniques violates the standard of 'substantive due process' which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose since the test results could also expose a person to adverse consequences of a non-penal nature. The impugned techniques cannot be read into the statutory provisions which enable medical examination during investigation in criminal cases, i.e. the Explanation to Sections 53, 53-A and 54 of the Code of Criminal Procedure, 1973. Such an expansive interpretation is not feasible in light of the rule of 'ejusdem generis' and the considerations which govern the interpretation of statutes in relation to scientific advancements. We have also elaborated how the compulsory administration of any of these techniques is an unjustified intrusion into the mental privacy of an individual. It would also amount to 'cruel, inhuman or degrading treatment' with regard to the language of evolving international human rights norms. Furthermore, placing reliance on the results gathered from these techniques comes into conflict with the 'right to fair trial'. Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the 'right against self-incrimination'.

264. In light of these conclusions, we hold that no individual should be forcibly subjected to any of the

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techniques in question, whether in the context of investigation in criminal cases or otherwise. Doing so would amount to an unwarranted intrusion into personal liberty. However, we do leave room for the voluntary administration of the impugned techniques in the context of criminal justice, provided that certain safeguards are in place. Even when the subject has given consent to undergo any of these tests, the test results by themselves cannot be admitted as evidence because the subject does not exercise conscious control over the responses during the administration of the test. However, any information or material that is subsequently discovered with the help of voluntarily administered test results can be admitted, in accordance with [Section 27](#) of the Evidence Act, 1872.

265 The National Human Rights Commission had published 'Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused' in 2000. These guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the 'Narcoanalysis technique' and the 'Brain Electrical Activation Profile' test. The text of these guidelines has been reproduced below:

- (i) No Lie Detector Tests should be administered except on the basis of consent of the accused. An option should be given to the accused whether he wishes to avail such test.

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(ii) If the accused volunteers for a Lie Detector Test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.

(iii) The consent should be recorded before a Judicial Magistrate.

(iv) During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.

(v) At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a 'confessional' statement to the Magistrate but will have the status of a statement made to the police.

(vi) The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.

(vii) The actual recording of the Lie Detector Test shall be done by an independent agency (such as a

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hospital) and conducted in the presence of a lawyer.

(viii) A full medical and factual narration of the manner of the

information received must be taken on record.”

20 The Apex Court in ***Modern Dental College and Research Centre and others vs. State of Madhya Pradesh and others***, reported in **(2016)7 SCC 353**, has observed that it is now almost accepted that there are no absolute constitutional rights and all such rights are related. In ***K.S.Puttaswamy and another vs. Union of India and others***, reported in **(2017)10 SCC 1**, it has been observed that privacy exists as a verifiable fact in all civilized societies and right to privacy is also part of fundamental right guaranteed under the Constitution, but like other rights, which form a part of the fundamental freedom protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right, but a right which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights and an invasion of privacy must be

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bonafide on the basis of law which stipulates a procedure which is fair, just and reasonable.

21 In ***Ritesh Sinha vs. State of UP***, reported in **(2019)8 SCC 1**, a Constitutional Bench of Supreme Court, referring its pronouncements in cases ***Gobind vs. State of Madhya Pradesh and another***, reported in **(1975)2 SCC 148**; ***Modern Dental College and Research Centre and others vs. State of Madhya Pradesh and others***, reported in **(2016)7 SCC 353**; and ***K.S. Puttaswamy and another vs. Union of India and others***, reported in **(2017)10 SCC 1**, has held that fundamental right to privacy cannot be construed as absolute, but it must bow down to compelling public interest, and, thus, it held that a judicial order compelling a person to give a sample of his voice and, therefore, conferring a power on a Magistrate by a process of judicial interpretation and in exercise of jurisdiction vested in the Supreme Court, under Article 142 of Constitution, the Bench has ordered that until explicit provisions are engrafted in Cr.P.C. by the Parliament, a Judicial Magistrate must be conceded the power to order a person to give a

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sample of his voice for the purpose of investigation of a crime.

22 In **Rajendra Pralhadrao Wasnik vs. State of Maharashtra**, reported in **(2019)12 SCC 460**, the Supreme Court has observed that there can be no doubt that there have been remarkable technological advancements in forensic science and in scientific investigation, which must be used fully and for giving up somewhat archaic method of investigation and there is necessity of taking advantage of advancement in scientific investigation.

23 Vide pronouncements of the Apex Court in **Ritesh Sinha's case**, the Court has been conferred with power to direct a person to give a sample of his voice for the purpose of investigation of a crime. Therefore, issue in this regard is no longer *res-integra* and thus petition on this issue fails.

24 So far as issue with regard to direction to undergo polygraph test is concerned, there is no specific provision empowering the Court to do so. However, as held in **Selvi's case**, the meaning and scope of term, "investigation" includes measures that had not been

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enumerated in the statutory provisions, and directions which come within the ordinary understanding of “investigation” can be given by Court during investigation and where there is silence in the law with no statutory prohibition against the issuance of such direction, the Court can issue the direction to a person to undergo test, which is not expressly enumerated in Cr.P.C. and in circumstances, where an individual consents to undergo these tests, there is no dilution of Article 20(3) of Constitution.

25 As observed in **Rajender Pralhadrao Wasnik’s case**, referred supra, it is expected from Investigating Agency to adopt latest advanced scientific technologies and methods of investigation to arrive at right conclusion.

26 With consent of the subject also, only that test can be conducted which is otherwise permissible and no impermissible test can be validated even on the basis of consent of the subject. “Consent” shall never be a tool for validating an act of the Investigating Agency which is not permissible at all. Tests may be of three kinds: ‘permissible with or without consent’, ‘permissible with consent only’

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and 'impermissible altogether'. From ratio of law laid down in **Selvi's** case, it is evident that 'polygraph test' falls in second category, which is permissible but subject to consent of the subject-person.

27 Therefore, I am the considered view that it is not legally impermissible to Court to issue direction to a person to undergo Narco Analysis, polygraph and BEAP test, but, such direction shall be subject to consent of said person and the person has a right to elect to consent or refuse to undergo such test and nothing contrary to the aforesaid verdict of Court or any other material has been placed before me to establish that it is impermissible to the Court to issue direction to a person to undergo polygraph test during investigation, rather, in view of pronouncements of Apex Court, it is permissible for the Court to issue such direction, which shall be subject to consent of a person.

28 It is also noticeable that in the year 2000, the National Human Rights Commission has also issued guidelines for Administration of Polygraph Test on accused, which also indicates that conducting of polygraph test on an accused is permissible but subject to riders discussed

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supra and provided in guidelines. It is also settled that testimonial evidence so obtained by conducting polygraph test is having an evidentiary value like a statement recorded by/made to the police.

29 In present case, petitioner has specifically pleaded in reply to application, filed by prosecution before the Special Judge, that in case polygraph test and voice sample are legally permissible, he is ready and willing to undergo the same to show his bonafide. Therefore, there is expressed consent of petitioner on record. Hence, I find no infirmity, illegality or perversity in impugned order passed by learned Special Judge particularly when he has also directed the Investigating Officer to comply with observations of Supreme Court in ***Sudhir Chaudhary and others vs. State (NCT of Delhi)***, reported in **(2016)8 SCC 307**, during taking voice sample and also to observe the guidelines issued by National Human Rights Commission in the year 2000, for Administration of Polygraph Test on accused with access of a lawyer with further clarification that statement of petitioner recorded during polygraph test shall be in nature of statement made to police. Besides, Investigating Agency has also been

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directed to prepare a full medical and factual narration of the manner of information received.

Accordingly, petition is dismissed in aforesaid terms with direction to petitioner to give the voice sample and to give the polygraph test on date(s) and at the place as determined by Investigating Officer/Agency.

(Vivek Singh Thakur)
Judge

June 23, 2020 (ms)