

**HIGH COURT OF JUDICATURE FOR RAJASTHAN  
BENCH AT JAIPUR**

S.B. Criminal Miscellaneous (Petition) No. 4474/2021

Omkar Sapre

----Petitioner

Versus

State Of Rajasthan, Through Its Public Prosecutor.

----Respondent

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For Petitioner(s) : Mr. Amar Kumar & Mr. Manish Parmar  
on behalf of Mr. V.R. Bajwa, Sr. Adv.

For Respondent(s) : Mr. Rajendra Yadav, AAG  
Mr. Arvind Kumar, P.P.

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**HON'BLE MR. JUSTICE FARJAND ALI****Order**

**RESERVED ON** ::: **27.02.2023**

**PRONOUNCED ON** ::: **20.03.2023**

**Reportable****BY THE COURT:-**

By way of filing the instant miscellaneous petition under Section 482 Cr.P.C., challenge has been made to the order dated 16.07.2021 passed by the Additional Chief Metropolitan Magistrate No.2, Jaipur Metropolitan-I, Jaipur in FIR No.229/2021 registered at the Police Station CPS, ACB, Jaipur for the offences punishable under Sections 7A & 8 of the Prevention of Corruption (Amendment) Act, 2018 and Section 120-B of the IPC whereby the application filed by the investigating agency asking for voice



sample of the petitioner has been entertained by observing that the Court had jurisdiction to hear and decide such an application and it has been further observed that since the accused has denied from giving voice sample, therefore, the trial Court would be at liberty to draw an adverse inference from the said denial.

Bereft of elaborate details, the brief facts giving rise to the instant miscellaneous petition are that during investigation of the aforementioned case, the investigating agency moved an application to the Chief Metropolitan Magistrate, Jaipur Metropolitan-I for collection of voice sample of the accused. The learned Chief Metropolitan Magistrate, Jaipur had forwarded the application to the learned Additional Chief Metropolitan Magistrate-II, Jaipur Metropolitan-I to undertake the legal proceedings. Thereupon, the learned Court below summoned the accused from judicial custody and asked him to provide his voice sample for which legal objections were raised on behalf of the accused regarding competence of the Court. After hearing the counsel for the parties, the learned Court below deemed it appropriate to accede to the prayer made by the Investigating Agency and on the basis of the objections raised by the accused, the learned trial Court deemed it as denial from giving voice sample. While observing that the accused petitioner denied from giving the voice sample, the learned trial Court observed that in absence of the consent given by the accused, taking of voice sample was not possible. At the same time, it is observed that since the accused has denied from providing voice sample, therefore, the accused



shall be held responsible, if the trial Court would take adverse inference against him during trial.

Shri V.R. Bajwa, learned senior advocate, assisted by Mr. Amar Kumar, submitted that since the matter pertains to Prevention of Corruption (Amendment) Act, 2018 (hereinafter referred to as 'the Act of 2018'/'Special Act') and for this purpose, the Special Courts have been constituted and the cases are triable only by the Special Judges by virtue of Section 4 of the Act of 2018, therefore, the Judicial Magistrate was not empowered to deal with the application and to make observations in this regard. He submitted that the information of lodging of the FIR along with a copy thereof under Section 157 Cr.P.C. was sent to the Special Court. After the arrest of accused, they were produced before the Special Court and police custody/judicial custody remands were obtained. In such circumstances, it was not appropriate for the investigating agency to move the application for taking voice sample before the Chief Metropolitan Magistrate rather it ought to have been submitted before the Special Court having jurisdiction to entertain such matters or conduct trial of such cases. It is submitted that a Special Court made under the provision of Section 3 of the Act of 2018 is squarely and adequately empowered to not only conduct the trial of any offences punishable under the Act of 2018 but also to deal with all the issues which crop up at the stage of investigation. Section 5 of the Act of 2018 categorically lays down the procedure to be adopted and powers of such Special Courts. The provision mandates that though the Special Judge is a Sessions Judge or an Additional



Sessions Judge but he/she/they would enjoy the powers of a Magistrate as the trial which would be eventually be conducted would be a warrant trial by a Special Court. The Judge of the Special Court would take cognizance of the offence with or without the accused being committed to him for trial. As per Section 5(3) of the Act of 2018, the provisions of Code of Criminal Procedure would apply to all the proceedings before the Special Judge in the situations which have been specifically covered under sub-sections (1) and (2) of Section 5 of the Special Act as well as in the situations which are not inconsistent with the Special Act. He, thus, submitted that in such circumstances, all the applications including an application seeking voice sample could only be filed before the Special Court by the investigating agency for its necessary disposal.

Per contra, learned Public Prosecutor vehemently and fervently opposed the submissions made on behalf of the accused-petitioner. It was contended that the law in this regard is no more *res-integra* in view of the judgment passed by the larger bench of Hon'ble the Supreme Court in the matter of **Ritesh Sinha Vs. State of U.P.** reported in **(2019) 8 SCC 1** wherein Hon'ble the Supreme Court had propounded that during the course of investigation, the Magistrate is empowered to allow taking of voice sample of the accused in his presence. He further submitted that voice sample can be taken only after getting consent of the concerned person; if accused denies from cooperation, there remains no question of adjudication by the Magistrate, therefore, the order dated 16.07.2021 passed by the learned Additional Chief



Metropolitan Magistrate does not require any interference by this Court.

The matter was heard at several occasions and arguments were finally concluded on 27.02.2023. Written arguments were also submitted on behalf of the respective parties.

Heard and considered the oral as well as the written submissions made by learned counsel for the parties. Perused the order impugned and the other material available on record.

Indisputably, the law with regard to taking voice sample is settled in light of the judgment passed by Hon'ble the Supreme Court in the case of **Ritesh Sinha** (supra). As per Section 4 of the Act of 2018, the Special Judge appointed under Section 3 shall try the cases pertaining to offences specified in sub-section (1) of Section 3 of the Act of 2018. A Special Judge may also try any offence other than an offence specified under Section 3 with which the accused may, under the Code of Criminal Procedure, be charged at the same trial. The provision envisaged under Section 4 of the Act of 2018 is very much clear with regard to the language and it is stated therein, without any ambiguity, that the trial of the cases specified in sub-Section (1) of Section 3 of the Act of 2018 shall be conducted by the Special Judge only. The trial commences after framing of charges and denial of accused to accept the charge. When the application with regard to drawing of voice sample was moved, even the charge sheet had not been filed, therefore, there was no question of trying the accused. The aforementioned application in this case was filed during the course of investigation which was much prior to commencement of the



trial. The competence of the Magistrate in taking voice sample before him during investigation has been recognized by Hon'ble the Supreme Court in the case of **Ritesh Sinha** (supra). Assuming for a moment that all the applications in this case, even the ones filed prior to commencement of trial, should be dealt with and adjudicated only by the Special Court, even then taking voice sample is not an issue to be adjudicated. It is trite law that a person cannot be compelled to give his voice sample for the purpose of voice spectrographic test, blood test, polygraph test, brain mapping or lie detector test, thus, the task has been stripped down to just collection of sample before the judge, if the accused agrees. With a view to give sanctity to collection of sample, Hon'ble the Apex Court, in the case of **Ritesh Sinha** (supra), has observed that the voice sample may be taken before a Magistrate. After collection of sample by the expert or the member of agency, the Magistrate only verifies the fact of collection of sample and does nothing beyond it. Thus, the plea raised on behalf of the defence that since the case is exclusively triable by a Special Court, therefore, all the applications even prior to commencement of the trial, ought to have been moved and decided by the Special Court only is not tenable because the Magistrate in like matters is not supposed to adjudicate a legal issue/controversy rather he is only supposed to vouchsafe the manner of collection of sample by the experts. If the concerned person is not inclined to give his voice sample before the Magistrate, then the Magistrate cannot compel him to do so. Thus, in this view of the matter, the objection raised by the learned





senior counsel regarding the competence of the Magistrate to deal with such an application and deciding the same vide order dated 16.07.2021 is not sustainable and is liable to be rejected.

As far as the observation made by the learned Magistrate regarding unfavourable reckoning is concerned, wherein he has stated that the accused shall be responsible if any adverse inference would be taken by the trial Court during trial upon his refusal to provide voice sample, it is felt that the learned Magistrate has exceeded his jurisdiction and it was beyond his competence to make a declaration regarding drawing of an adverse inference against the accused.

If the law provides right of defense to an accused and he/she/they take(s) any legitimate objection on the basis of such a right which can be raised before a Court, he/she/they can do so. Law gives a discretion to the accused; which can either be exercised to consent to collection of voice sample or to deny to the same and when such discretion is exercised by the accused by declining to provide voice sample, then, in such circumstances, it cannot be held as a necessary consequence thereof that his/her/their denial may lead him/her/them to a situation where an adverse inference can be drawn against his/her/their interest at a subsequent stage of proceedings.

Law does not give authority to a judicial/metropolitan Magistrate to adjudicate an issue or make any declaration affecting the rights of the parties to the trial or pass such orders in respect of the cases which are exclusively triable by a special court. The maxim '*generalia specialibus non derogant*' would apply



in this aspect; as per which the special law shall prevail over the general law. In this light of the matter, it is clear that a metropolitan/judicial Magistrate is not empowered to pass any order which is the subject of trial of a special court constituted under the Prevention of Corruption Act. In the process of collection of voice sample, the Magistrate only acts as an invigilator or an observer before whom the expert or any officer of the agency collects voice sample as per the standard procedure. It is done just with a view to create a doubt-free atmosphere and to avoid any possibility of manipulation or arbitrary function by the police officers since the doctrine of proving the fact beyond reasonable doubt is applicable in criminal jurisprudence. The Magistrate ensures that the procedure followed for collection of sample was fair. This is imperative only to the extent of improvement of the sanctity of the collection process as it rules out the possibilities of unfair practice. It is similar to the role that a Magistrate plays in an identification parade of a person or a property. It is a mere verification or certification by a judicial officer regarding adoption of just and fair process in collection of samples. The Magistrate witnesses the procedure in a manner similar to that of a 'motbir witness' who corroborates or attests to the veracity of a memo prepared by an officer.

As in an identification parade held by the Magistrate, a witness comes and either identifies the culprit or property in his/her/their presence or fails to do so; the Magistrate, in this course, only certifies the procedure and corroborates the fact.







The effect of denial of the accused to give voice sample for testing would be seen and considered by the Special Court at appropriate stage of trial and at that time, he/she/they shall also consider the objections/grounds raised on behalf of the accused-petitioner.

If the accused would have consented to provide his voice sample for testing in the present matter, the collection process would have been done by the officers in the presence of the Magistrate and then, the Magistrate would have certified that the samples were collected before him while adopting due process. When the accused denied to give sample, the Magistrate ought to have noted down the fact of denial and nothing beyond that.

In the process of holding voice sample collection proceeding, the Magistrate doesn't act as an adjudicatory authority rather he acts as a responsible judicial officer to keep surveillance over the process with a view to safeguard the interest of the parties and to ensure fair play.

In the considered view of this Court, the accused had a legal right to raise objection regarding competence of the Magistrate to take voice sample before him, along with other objections which were statutorily provided to him, therefore, by doing so, it cannot be held that his denial from providing voice sample may lead him to a situation where an adverse inference regarding voice match may be taken by the learned trial Court during the course of trial. In simpler words, the Magistrate cannot pass an order regarding future course of action that may or may not be adopted by the trial court during the course of trial, therefore, to the extent of





such observation made by the learned magistrate, the petition succeeds and the observations regarding adverse inference are liable to be struck off. It would be the exclusive domain of the trial court to infer/adjudicate the issue regarding denial by the accused from providing voice sample during investigation and the same shall be done at the time of final disposal of the trial.

Accordingly, in view of the discussion made herein above, the instant miscellaneous petition is partly allowed and the order dated 16.07.2021 passed by the Additional Chief Metropolitan Magistrate No.2, Jaipur Metropolitan-I, Jaipur in FIR No.229/2021 registered at the Police Station CPS, ACB, Jaipur is quashed and set aside to the extent of the observations made by the learned Magistrate regarding drawing of an adverse inference against the accused-petitioner as a consequence of his denial from providing voice sample for testing. The prayer made regarding the competence of the Magistrate to entertain an application moved by the investigating agency for obtaining voice sample of the accused-petitioner is not tenable and the order dated 16.07.2021 stands affirmed to the extent that the learned Magistrate was an able and competent authority to entertain the application filed by the agency.

Any pending applications, including the stay application, also stand disposed of.

**(FARJAND ALI),J**

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