Bhupinder Singh Vs. State

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SooperKanoon Citation : sooperkanoon.com/920948

Court : Delhi

Decided On : Sep-30-2011

Judge : Anil Kumar; Sanjiv Khanna, Jj.

Acts : Identification of Prisoners Act, 1920 - Sections 3, 4, 5; Code of Criminal Procedure (CrPC) - Section 311-A, 2(h); Evidence Act - Section 73

Appeal No. : CRIMINAL APPEAL NO. 1005/2008

Appellant : Bhupinder Singh

Respondent : State

Advocate for Def. : Mr. Pawan Sharma; Mr.Kushagra Arora; Mr.Harsh Prabhakar, Advs.

Advocate for Pet/Ap. : Mr. Ajay Verma; Mr. Gaurav Bhattacharya, Advs.

Judgement :

1. Expressing doubt with regard to the correctness of the decisions in Harpal Singh v. State (Criminal Appeal No.362/2008 decided on 25th May, 2010) and Satyawan v. State (Criminal Appeal No.34/2001 decided on 9th July, 2009) wherein the two Division Benches had ignored the part of the report of the handwriting expert on the ground that the investigating officer had taken specimen handwriting in violation of the provisions of the Identification of Prisoners Act, 1920 (for brevity „the 1920 Act), the Division Bench that was hearing the Criminal

Appeals No.1005/2008 [Bhupender Singh v. The State (Govt. of NCT of Delhi)] and No. 408/2007 [Drojan Singh v. The State (Govt. of NCT of Delhi)], referred the following question to be adjudicated by a larger Bench:

"Whether the sample finger prints given by the accused during investigation under section 4 of the Identification of Prisoners Act, 1920 without prior permission of the Magistrate under Section 5 of the Act will be admissible or not?"

Under these circumstances, the matter has been placed before us.

2. As the question, that has been referred, totally rests on the interpretation of the provisions of the 1920 Act, the facts need not be adumbrated in detail except stating that at the time of hearing the appeals, the Division Bench, while adverting to the concept of circumstantial issue, was required to deal with the reliance placed by the prosecution on sample finger prints as a part of circumstantial evidence.

3. At the very outset, we may refer with profit to the Statement of Objects and Reasons of the 1920 Act. It reads as follows:

"The object of this bill is to provide legal authority for taking of measurements, finger impressions, foot-prints and photographs of persons convicted of, or arrested in connection with, certain offences. The value of the scientific use of finger impressions and photographs as agents in the detection of crime and the identification of criminals is well known, and modern development in England and other European countries render it unnecessary to enlarge upon the need for the proposed legislation.

The existing system by which the police in India take finger impressions, photographs, etc., of criminals and suspected criminals is void of legal sanction, except as regards registered members of criminal tribes, in whose case provision exists for the taking of finger impressions in Section 9 of the Criminal Tribes Act, 1911 (III of 1911). The need for legalising the practice has long been recognized, but it was not thought expedient to take the matter up so long as no practical difficulties arose. Instances have recently been reported to the Government of

India where prisoners have refused to allow their finger prints or photographs to be taken. With a view to prevent such refusals in future it is considered necessary without further delay to place the taking of measurements, etc., which is a normal incident of police work in India as elsewhere, on a regular footing. No measurement, etc., of any person will be taken compulsorily unless that person has been arrested."

4. Section 2(a) defines "measurements" as follows:

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

5. Section 3 provides taking of measurements, etc., of convicted persons. It reads as follows:

"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, shall, if so required, allow his measurements and photograph to be taken by a police officer in the prescribed manner."

6. Section 4 stipulates taking of measurements, etc., of non-convicted persons.

It is as follows:

"4. Taking of measurement, 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."

7. Section 5 deals with the power of magistrate to order a person to be measured or photographed. The said provision 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."

8. On an x-ray of Section 4 of the Act, it is perceptible that if it is required by a police officer, a person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards, allow his measurement to be taken in the prescribed manner. The term "prescribed" means prescribed by the rules made under the Act. Section 5 authorises a Magistrate to direct any person to allow his measurements or photographs to be taken if he is satisfied that it is expedient for the purpose of an investigation or proceeding under the Code of Criminal Procedure. In Harpal Singh (supra), the Division Bench has held as follows:

"18. Unfortunately, for the prosecution, the charge against Neeraj has to fail for the simple reason Neeraj's specimen handwriting was obtained by the police when he was in their custody. No permission was taken from the Court concerned to obtain his specimen handwriting."

9. In Satyawan (supra), another Division Bench has held thus:

"27. We ignore the part of the report of the handwriting expert wherein he has opined that the specimen writings S-1 to S-8 of Satish matched the writing on the ransom note Ex.PW-3/A, for the reason, the investigating officer took the specimen writings in violation of the provisions of the Identification of Prisoners Act

1920 and also contrary to the law that specimen writing for purposes of expert opinion can be directed to be taken under orders of the Court where the trial is pending as held authoritatively in various judicial pronouncements being: AIR 1980 SC 791 State of U.P. vs. Rambabu Mishra and 1994 (5) SCC 152 Sukhwinder Singh & Ors. vs. State of Punjab."

10. It is worth noting that a Single Judge of this Court in Sunil Kumar @ Sonu Vs State of NCT of Delhi, Crl.A. No. 446 of 2005 decided on 25.3.2010, without taking note of the Division Bench decisions, has held thus:

"26. It is true that the specimen finger print impressions of the appellants were taken by the IO directly and not through the Magistrate as provided in Section 5 of Identification of Prisoners Act. But, that, to my mind was not necessary because Section 4 of Identification Prisoners Act specifically provides that 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 measurement to be taken in the prescribed manner. In view of the independent powers conferred upon a police officer under Section 4 of the Act, it was not obligatory for him to approach the Magistrate under Section 5 of the Act. He would have approached the Magistrate, had the appellants refused to give Specimen Finger Print Impressions to him. Therefore, no illegality attaches to the specimen finger print impressions taken by the Investigating Officer. The court needs to appreciate that the very nature and characteristic of material such as finger prints renders it intrinsically and inherently impossible for anyone to fabricate them. If there is an attempt to fabricate finger prints, that can certainly be exposed by the accused by offering to allow his finger prints to be taken so that the same could be compared through the process of the court. None of the appellants has come forward to the court with a request to take his finger print impressions in the court and get them compared with the chance finger prints lifted by PW-1 from Car No. DL 2C A 4116 on 21st December, 2000."

11. To appreciate the question raised, we shall refer to certain authorities in the field in the context of the 1920 Act.

12. In Shankaria v. State of Rajasthan, (1978) 3 SCC 435, a three-Judge Bench of the Apex Court was dealing with Sections 4 and 5 of the 1920 Act. In that context, their Lordships have held as follows:

"83. Mr.Gambhir next contends that in view of Section 5 of the Identification of Prisoners Act, it was incumbent on the police to obtain the specimen thumb-impressions of the appellant before a Magistrate, and since this was not done, the opinion rendered by the Finger Print Expert, Mr.Tankha, by using those illegally obtained specimen finger-impressions, must be ruled out of evidence.

84. The contention appears to be misconceived because in the State of Rajasthan, the Police were competent Under Section 4 of the Identification of Prisoners Act, to take the specimen finger-prints of the accused, and this they did, in the instant case, before the Superintendent of Police, Shri K. P. Srivastava. It was not necessary for them to obtain an order from the Magistrate for obtaining such specimen fingerprints."

13. In Mohd. Aman v. State of Rajasthan, (1997) 10 SCC 44, it has been held thus:

"8. ....It is true that under Section 4 thereof police is competent to take finger prints of the accused but to dispel any suspicion as to its bonafides or to eliminate the possibility of fabrication of evidence it was eminently desirable that they were taken before or under the order of a Magistrate. The other related infirmity from which the prosecution case suffers is that the brass jug, production of which would have been the best evidence in proof of the claim of its seizure and subsequent examination by the Bureau, was not produced and exhibited during trial - for reasons best known to the prosecution and unknown to the court. For the foregoing discussion we are unable to sustain the convictions of Mohd. Aman."

On a perusal of the aforesaid paragraph, it is clear as crystal that under Section 4 of the 1920 Act, the police is competent to take finger prints of the accused and such evidence would not be inadmissible.

14. In State of Madhya Pradesh v. Devendra, (2009) 14 SCC 80, a three-Judge Bench of the Apex Court, analysing the anatomy of Sections 3, 4 and 5 of the 1920 Act, has held thus:

"10. Section 3 deals with taking of measurements of the convicted persons. The photographs and measurements and photographs can be taken by the police officer in the manner prescribed. Section 4 deals with taking of measurement, etc. of non-convicted persons. It is taken if the police officer so requires it and it has to be done in the prescribed manner.

11. So far as Section 5 is concerned, it deals with the power of the Magistrate to direct any person for measurements or photographs to be taken if he is satisfied that for the purpose of any investigation or proceedings under the court the same is necessary.

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14. Needless to say, the directions are subject to provisions of the Act, the Regulations and the Code. In case of conflict statute itself prevails. In case of complainant as well as witnesses, where the prosecution wants to protect the identity, the reasons, therefor, must be recorded. In case of rape victims, photographs should not be taken."

The aforesaid pronouncement clearly lays down that Sections 4 and 5 deal with different spheres. Section 4 of the 1920 Act deals with taking of measurements, etc., of non-convicted persons and that is taken if the police officer so requires it and it has to be done in the prescribed manner. As far as Section 5 is concerned, it deals with the power of Magistrate to direct any person to be measured or photographed if he is satisfied that for the purpose of an investigation or proceeding under the Court, the same is necessary. Thus, their Lordships have carved out two different compartments.

15. In Manikram v. State, (2009) 5 CTC 316, it has been held that there is no law which prohibits the investigating officer from lifting the finger prints of the accused for comparison during the course of investigation of the case. Section 5 of the

1920 Act and Section 311-A of the Code of Criminal Procedure, as inserted by Act 25 of 2005 with effect from 23.6.2006, speak only about the powers of the Judicial Magistrate when he is approached by the investigating officer for the purpose of issuance of a suitable direction to the accused to cooperate by giving his finger prints or signature or sample handwriting, as the case may be. Needless to empahsise, neither Section 5 nor Section 311-A put any embargo on the investigating officer for acting on his own for taking the finger prints, signature or handwriting of the accused during the course of investigation. It has been held in the said case that there is no mandatory provision under the 1920 Act to obtain the permission of the Magistrate.

16. In State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808 : (1962) 3 SCR 10, the contentions that were raised before the Apex Court, inter alia, were that Section 27 of the Indian Evidence Act, 1872 is violative of Article 14 of the Constitution and the impressions of the palms and finger prints taken from the appellant therein after his arrest which were compared with the impression on the glass panes and phials were not admissible evidence in view of the provisions contained in Article 20(3) of the Constitution. Be it noted, in the said case, though the provisions of Sections 5 and 6 of the 1920 Act were not attacked on the ground of being ultra vires of Article 20(3) of the Constitution, yet it was urged in the context of the said Article that the measurements collected would be inadmissible. Their Lordships, dealing with the issues, held thus:

"16. In view of these considerations, we have come to the following conclusions :-

(1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

(2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not 'compulsion'. (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.

(7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."

17. In State of Uttar Pradesh v. Ram Babu Misra, (1980) 2 SCC 343, on which certain Division Benches have placed reliance, the investigating officer moved the learned Chief Judicial Magistrate to direct the accused to give a specimen writing for the purpose of comparison with certain disputed writings. Their Lordships referred to Section 73 of the Indian Evidence Act, 1872 and Section 5 of the 1920 Act and held thus:

"6. There are two things to be noticed here. First, signature and writing are excluded from the range of Section 5 of the Identification of Prisoners Act and, second, 'finger impressions' are included in both Section 73 of the Evidence Act and Section 5 of the Identification of Prisoners Act. A possible view is that it was thought that Section 73 of the Evidence Act would not take in the stage of

investigation and so Section 5 of the Identification of Prisoners Act made special provision for that stage and even while making such provision, signature and writings were deliberately excluded. As we said, this is a possible view but not one on which we desire to rest our conclusion. Our conclusion rests on the language of Section 73 of the Evidence Act."

18. If the aforesaid decision is appositely understood, it would mean that Section 73 of the Evidence Act does not enable the Magistrate to give directions to the accused to give a specimen signature when the case is still under investigation. It is because Section 73 of the Evidence Act, 1872 fundamentally contemplates pendency of some proceedings before the Court. That apart, as has been held by their Lordships, signatures and writings are excluded from the range of Section 5 of the 1920 Act. Thus, it is clear as crystal that the decision rendered in Ram Babu Misra (supra) is not a precedent on Section 5 of the 1920 Act. More so, their Lordships have rested the conclusion by interpreting Section 73 of the Finance Act. In State v. M. Krishna Mohan & Anr., (2007) 14 SCC 667, the Apex Court has opined that the specimen fingerprints and handwritings can be taken from an accused.

19. In this context, we may also refer to the concept of investigation as defined in Section 2(h) of the Cr.P.C. which clearly stipulates that investigation includes all the proceedings under the Code for collection of evidence conducted by a police officer or by any person other than a Magistrate who is authorized by the Magistrate in this behalf. In Directorate of Enforcement v. Deepak Mahajan & Anr., AIR 1994 SC 1775, it has been opined that the term „investigation as defined in Cr.P.C. has an inclusive definition. In fact, investigation includes all efforts of a police officer for collection of evidence, namely, proceeding to the spot, ascertaining facts and circumstances, discovery and arrest of the suspected offender, collection of evidence relating to commission of offence which may consist of examination of various persons including the accused and taking of their statements in writing and the search of places or seizure of things which are considered essential for investigation and to be produced at the trial. It is worth noting that in Pooran Mal v. The Director of Inspection (Investigation), New Delhi, (1974) 1 SCC 345, it has been held that evidence obtained on an illegal search

cannot be excluded. In State of Karnataka v. Yarappa Reddy, AIR 2000 SC 185, it has also been held that criminal justice should not be allowed to become casualty for the wrongs committed by the investigating officers.

20. In Inspector of Police & Ors. v. N.M.T. Joy Immaculate, (2004) 5 SCC 729, it has been clearly laid down that the admissibility of evidence or a piece of evidence has to be judged having regard to the provisions of the Evidence Act. In State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600, their Lordships opined that even if evidence is illegally obtained, it is admissible.

21. We may hasten to add that we have referred to the aforesaid authorities only for the purpose that the concept of investigation has a different connotation and how the material collected during investigation is to be appreciated remains within the domain of the trial Court. In the case at hand, on the basis of the authorities we have referred to hereinabove, it is clearly discernible that there is a difference in the language employed in Sections 4 and 5 of the 1920 Act. That has been explained by their Lordships in Shankaria (supra), Mohd. Aman (supra), Devendra (supra) and M. Krishna Mohan (supra).

22. Thus understood, in our considered opinion, the view expressed in the decisions in Harpal Singh (supra) and Satyawan (supra) is not the correct view. Therefore, the decisions rendered therein are hereby overruled. The view expressed in the case of Sunil Kumar (supra) by the learned Single Judge lays down the law in correct perspective.

23. The reference is answered accordingly. Matter be placed before the appropriate Division Bench for hearing of the appeal.