



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

ORDERS RESERVED ON : 26.09.2018
ORDERS PRONOUNCED ON: 28.09.2018

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THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

CrIOP(MD)No.6279 of 2017 and
CrIIMP(MD)Nos.4216, 4974 of 2017 and 6644 of 2018

M.Muthukumar

... Petitioner

Vs

1.The Inspector of Police,
All Women Police Station,
Sivagangai.
[Crime No.4 of 2017]

2.R.Devi

[R-2 impleaded as per order dated 20.08.2018 made in CrIIMP(MD)
Nos.6066 of 2018 and 6279 of 2017] ...Respondents

PRAYER:- Petition filed under Section 482 of Criminal Procedure Code, to call for the records pertaining to the impugned order dated 21.04.2017 passed by the learned Judicial Magistrate No.1, Sivagangai in Crime No.4 of 2017 and set aside the same.

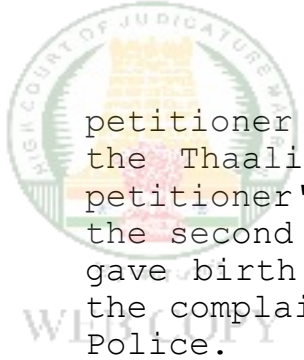
For Petitioner :Mr.D.Shanmugaraja Sethupathi
For Respondent -1:Mr.K.Suyambulinga Bharathi,
Government Advocate (crlside)
For Respondent -2:Mr.P.Krishnasamy

ORDER

This petition has been filed by the accused, aggrieved by the order passed by the learned Judicial Magistrate-I, Sivagangai, dated 21.04.2017, wherein the petitioner has been directed to subject himself to DNA test and for that purpose to give his blood sample.

2.The first respondent Police have registered an FIR in Crime No.4 of 2017 against the petitioner, based on a complaint given by the second respondent for the offence under Sections 417, 376 and 506(ii) of IPC.

3.The sum and substance of the allegation made by the second respondent is that the petitioner called her to his house on 22.09.2015 at about 7.00pm and when the second respondent went to the house of the petitioner, he forcibly tied Thaali in the second respondent's neck. When the second respondent protested, the



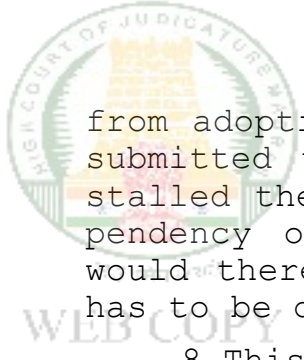
petitioner again asked her to come home next day in order to remove the Thaali and believing him, the second respondent went to the petitioner's house and at that point of time, the petitioner raped the second respondent. The second respondent became pregnant and she gave birth to a female child on 24.06.2016. It was on this ground, the complaint was given and the FIR was registered by the respondent Police.

4.The respondent Police during the course of investigation, filed an application before the Judicial Magistrate-I, Sivagangai, seeking for taking DNA test for the petitioner, the second respondent and also the child and for that purpose, wanted to direct the petitioner to give his blood sample. The Judicial Magistrate passed an order on the requisition made by the respondent Police.

5.The learned Counsel for the petitioner would submit that the learned Judicial Magistrate should have given an opportunity to the petitioner before directing the petitioner to subject himself to the DNA test. The learned Counsel for the petitioner further submitted that under Section 53 and 53A of the Code of Criminal Procedure, only a person, who has been arrested on a charge of committing of an offence of rape can be subjected to DNA test. In the present case, the petitioner obtained an anticipatory bail and he was not arrested and therefore the respondent Police do not have power to invoke Section 53 and 53A of the Code of Criminal Procedure. The learned Counsel would further submit that Article 20(3) of the Constitution of India gives protection to an accused person against self-incrimination and the order passed by the Court below will subject the petitioner to self-incrimination and therefore, the order passed by the Court below has to be set aside.

6.The learned Government Advocate would submit that an accused in a rape case has to subject himself to DNA test in the course of investigation and the Hon'ble Supreme Court has already held that the protection under Article 20(3) of the Constitution of India will not be available to such an accused person. The learned Government Advocate also brought to the notice of this Court Section 53 and Section 53A of the Code of Criminal Procedure and submitted that the Police have sufficient powers to seek for a direction from the Court to make an accused person undergo a DNA test in a case of rape. The learned Government Advocate also brought to the notice of this Court that the Police have already filed a final report and the same has taken cognizance by the Court below and the case is pending trial. Therefore, the present petition filed by the petitioner challenging the order passed by the learned Judicial Magistrate -I, Sivagangai in the course of investigation, has become infructuous and there is nothing to be decided in this Criminal Original Petition.

7.The learned Counsel for the second respondent / wife apart



from adopting the arguments of the learned Government Advocate also submitted that the petitioner has committed a grave crime and has stalled the entire proceedings before the Court below by citing the pendency of this Criminal Original Petition. The learned Counsel would therefore submit that the present criminal original petition has to be dismissed as devoid of merits.

8.This Court has carefully considered the submissions made on either side.

9.This Court could have dismissed this Criminal Original Petition on the simple ground that the respondent Police have already filed a final report before the concerned Court and therefore, nothing survives in this Criminal Original Petition, which was filed challenging the order passed during the Course of investigation. However, it was brought to the notice of this Court that concerned Court has directed the petitioner to subject himself to DNA test and the petitioner has resisted the same and the pendency of this Criminal Original Petition has been shown as the reason to keep the case pending before the Court below.

10.The first ground raised by the learned Counsel for the petitioner is that Section 53 and 53A of the Code of Criminal Procedure can be put into operation, only when a person is arrested on the charge of committing an offence of a rape and since the petitioner has obtained an anticipatory bail, the said provision cannot be applied to the petitioner. This Court is not in agreement of this submission. A person released on bail is still considered to be detained in the constructive custody of the Court through his surety. He is notionally in the custody of the Court and hence continues to be a person arrested. In spite of the fact that the accused person has been released on bail, he continues to be a person arrested on charge of commission of an offence and, therefore, his medical examination can be carried out. In other words, the release of an arrested person on bail or a person who has obtained anticipatory bail and surrenders before the Court, cannot take away the reality of the situation and he does not cease to be an arrested person or an accused person for the purpose of Section 53 and 53A of the Code of Criminal Procedure.

11.Useful reference can be made to the judgments in *Thaniel Victor Vs State* reported in 1991 CRI.L.J.2416 and in *Anil Anatrao Lokhande Vs The State of Maharashtra*, reported in 1981 CRI.LJ.125.

(a) The relevant portions of the judgment in *Thaniel Victor Vs State* reported in 1991 CRI.L.J.2416 is extracted here under:

7. Mr. S. Shanmugavelayutham, learned counsel appearing for the petitioner, contended that the request made by the Investigating Officer, was not maintainable in law and would not be covered under the



provision of S. 53, Cr.P.C. According to the learned counsel, S. 53, Cr.P.C. contemplated subjecting of arrested persons alone for medical examination at the request of the police officer of a particular rank. On facts, since the petitioner had been enlarged on bail in the event of arrest as early as on 13-1-1989, without any condition like reporting before the respondent or Court, the provision of S. 53, Cr.P.C. will have no application, and more so, when the petitioner cannot be deemed to be a person arrested by the police in connection with the offence. He would also contend that a person released on bail in the event of arrest never gets arrested and, therefore, seeking to invoke the provision of S. 53, Cr.P.C. will not be tenable. He further contended that S. 53, Cr.P.C. did not prescribe any procedure to send a person released either on bail or on bail in the event of arrest, to a Medical Practitioner for examination at the request of the police. He also submitted that the petitioner cannot be deprived of his constitutional right except in accordance with procedure relating to due process of law.

8. Mr. G. Krishnamurthy, learned Additional Public Prosecutor, appearing on behalf of the respondent, contended that S. 46, Cr.P.C., which deals with the manner of making arrests, certainly takes within its fold submission to the custody by word or action by the person sought to be arrested. According to him, if the person sought to be arrested submits to the custody by word or action, actual touch by the police officer or confining the body of the arrestee will not be necessary to constitute arrest. He further contended that if a person were to be arrested, on a charge of committing an offence, S. 53, Cr.P.C. would become operative and the release of the petitioner on bail at a subsequent stage cannot extinguish the right of the Investigating Agency to have the accused medically examined. He would strenuously contend that a person released on bail in the event of arrest under S. 438, Cr.P.C. must be deemed to be under the custody of the Court and, therefore, there would be no difficulty whatsoever in the Court directing the examination of the petitioner by a Medical Practitioner at the request of the Investigating Agency. On this aspect, he referred to the observations of the Supreme Court in Gurbaksh Singh v. State of Punjab, wherein it was held that an order of anticipatory bail does not in any way directly or indirectly take away from the police their right to investigate into charges made or to be made against the person released on bail. He relied on certain further observations made in the same judgment,



which will be referred to in the relevant Context, while considering the catena of cases cited by him and the learned counsel for the petitioner.

17. The next question to be considered is whether S. 53, Cr.P.C. will take within its fold persons who have either been released on bail after arrest or others who have been released on bail in the event of arrest. On facts, since the petitioner had been released on bail in the event of arrest, it has to be decided whether he could be stated to be a person arrested on a charge of committing an offence, as contemplated under S. 53 of the Code.

18. In Balchand Jain v. State of Madhya Pradesh, AIR 1977 SC 366 : (1977 Cri LJ 225) the apex Court, while considering S. 438, Cr.P.C. vis-a-vis its consistency with the Defence and Internal Security of India Rules, 1971, observed as follows:

"We do not find in this section the words 'anticipatory bail', but that is clearly the subject with which the section deals. In fact 'anticipatory bail' is a misnomer. It is not as if bail is presently granted by the Court in anticipation of arrest. When the Court grants 'anticipatory bail', what it does is to make an order that in the event of arrest, a person shall be released on bail. Manifestly there is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting 'anticipatory bail' becomes operative." In the same pronouncement of the Supreme Court, Fazl Ali, J. has observed thus :

"We might, however, mention here that the term 'anticipatory bail' is really a misnomer, because what the section contemplates is not anticipatory bail, but merely an order releasing an accused on bail in the event of arrest. It is manifest that there can be no question of a person being released on bail if he has not been arrested or placed in police custody. Section 438 of the Code expressly prescribes that any order passed under that section would be effective only after the accused has been arrested. The object which is sought to be achieved by S. 438 of the Code is that the moment a person is arrested, if he has already obtained an order from the Sessions Judge or the High Court, he would be released immediately without having to undergo the rigors of jail even for a few days which would necessarily be taken up if he has to apply for bail



after arrest."

19. Similarly, the Supreme Court in *Gurbaksh Singh v. State of Punjab*, while considering S. 438 of the Code, observed as follows :

"In fact, two of the usual conditions incorporated in a direction issued under S. 438(1) are those recommended in sub-section (2)(i) and (ii) which require the applicant to co-operate with the police and to assure that he shall not tamper with the witness during and after the investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery under S. 27 of the Evidence Act, person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of S. 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in *State of U.P. v. Deoman Upadhyaya*, to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the police. The broad foundation of this rule is stated to be that S. 46 of the Cr.P.C. does not contemplate any formality before a person can be said to be taken in custody; submission to the custody by word or action by a person is sufficient."

The Supreme Court, in the aforementioned case, took the view that the order of anticipatory bail could not and did not in any way directly or indirectly take away from the police their right to investigate into charges made or to be made against the person released on bail.

20. In *Pokar Ram v. State of Rajasthan*, while considering the scope of S. 438, Cr.P.C., the Supreme Court made the following observations (at page 1176; 1985 Cri LJ) :

"Unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is



issued, he shall be released on bail. A direction under S. 438 is intended to confer conditional immunity from the touch as envisaged by S. 46(1) of confinement."

21. The observations in the decisions cited above, squarely fit in with the purpose contemplated under S. 53, Cr.P.C., which as stated earlier had been enacted to facilitate effective investigation. In view of the authoritative pronouncement of law by the Supreme Court, the release of an arrested person on bail, does not appear to make any difference, since he does not cease to be an arrested person or an accused person for the purpose of S. 53 of the Code, if the examination contemplated therein is found to be necessary by the Court for the purpose of proper investigation or an effective trial.

22. At this stage, useful reference can be made to the following observations of the Supreme Court in *Niranjan Singh v. P. Rajaram Kharote*, : "Here the respondents were accused of offences but were not in custody, argues the petitioner. So no bail, since this basic condition being in jail is not fulfilled. This submission has been rightly rejected by the Court's below. We agree that, in our view, an out law cannot ask for the benefit of law and he who flees justice cannot claim justice. But here the position is different. The accused were absconding but had appeared and surrendered before the Sessions Judge. Judicial jurisdiction arises only when persons are already in today and seek the process of the Court to enlarged. We agree that no person accused of an offence can move the Court for bail under S. 439, Criminal P. C., unless he is in custody.

When is a person in custody, within the meaning of S. 439, Criminal Procedure Code ? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the Court having been remanded by judicial order, or having offered himself to Court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor presidential profusion is needed to come to the realistic conclusion that he who is under the control of the Court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties some times heard



in court that the police have taken a man into informal custody and other like terminological dubiotics are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose."

25. The Bombay High Court also took the view that it will not be correct to say that only because the accused had been released on bail he ceased to be in custody and, therefore, powers under section 53 of the Code could not be exercised. The release on bail does not change the reality and from that fact alone, it cannot be said that he is not a person arrested for an offence. A person released on bail is still considered to be detained in the constructive custody of the Court through his surety. He has to appear before the Court whenever required or directed. Therefore, to that extent, his liberty is objected to restraint. He is nationally in the custody of the Court and Hence continues to be a person arrested. Even in spite of the fact that the accused had been released on bail, he continues to be a person arrested on a charge of commission of an offence and, therefore, his medical examination can be carried out under S. 53 of the Code. Thus, a person who is released on bail in the event of arrest, also cannot challenge this concept in view of the observations of the Supreme Court in Balchand Jain v. State of M.P., AIR 1977 SC 366 : (1977 Cri LJ 225) and Gurbaksh Singh v. State of Punjab, extracted earlier.

26. In State (Delhi Administration) v. Pali Ram, the Supreme Court was concerned with the power of the Court to direct the accused to give his specimen handwriting and the Supreme Court upheld such powers. Therefore, it is open to the Court which is seized of the matter to issue direction for carrying out further investigation under sections 53 and 54 of the Code.

27. Modern community living requires modern scientific methods of crime direction, (detection ?) lest the public go unprotected. The right of an individual will have to be considered in the background of the interests of the Society. Section 53 at this stage of this case related to further investigation under the protective eye of law.



28. The examination of a person under S. 53 Cr.P.C. would take in the fold the potency test as well. In *Jameshed v. State of Uttar Pradesh*, 1976 Cr1 LJ 1680, the Allahabad High Court held that the Examination of the accused contemplated under S. 53 of the Code included taking blood from the accused Examination of a person, under S. 53 of the Code cannot only mean what is visible on the body and if necessary would include examination of an internal organ for the purpose contemplated the said Section.

29. The law laid down by several Court is in conformity with the view I have taken and hence the order of the Judicial Magistrate, Tenkasi, in Cr1.M.P.No. 3367 of 1989 on his file, directing the Petitioner to appear in Court for the purpose of medical examination under S. 53 of the Code, confirmed by the Principal District and Sessions Judge, Tirunelveli, in Cr1.R.C. No. 86 of 1989, is in consonance with law and needs no interference. The Petitioner must obey the summons issued by the Judicial Magistrate, Tenkasi, and present himself in person before the said court for being forwarded for examination by a Medical Practitioner as contemplated under S. 53 Cr.P.C., Cr1.M.P. No. 1711 of 1990 is therefore dismissed.

(b) The relevant portions of the judgment in *Anil Anatrao Lokhande Vs The State of Maharastra*, reported in 1981 CRI.LJ.125 are extracted hereunder:

4. Shri Adhik Shirodkar, the learned Counsel appearing for the petitioner contended before us that the provisions of Section 53 of the Code of Criminal Procedure are violative of the fundamental right guaranteed under. Article 20(3) of the Constitution of India as it amounts to testimonial compulsion. He then contended that there is no provision in the Code of Criminal Procedure which enables the Courts or Police to take a sample of the blood of the accused for determining the blood group. He also contended that, the words and expressions used in Section 53 will have to be given a restricted meaning and the said provision can include in its import only physical external examination and cannot include taking of blood sample for determination of blood group. He also contended that under Section 53 of the Code, power is conferred upon the investigating officer while investigation is in progress and therefore once a charge-sheet is filed the court has not power to issue any such direction. In support of his contention Shri Shirodkar was relying upon a decision of Calcutta High Court in (1978) 82 Cal WN 970, *Gobinda Ram Singhania v. State of West Bengal* as well as a decision of this court in *State of Maharashtra*



v. Dnyanoba Bhikoba Dagade, 1979 Cri LJ 277. A contention was also raised that since the accused is released on bail he is not a person arrested within the meaning of Section 53 of the Code.

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5. On the other hand Shri Kamat the learned Public Prosecutor appearing on behalf of the State contended before us that Section 53 of the Code of Criminal Procedure cannot be read in isolation. According to him in view of the authoritative pronouncements of the Supreme Court in State of Bombay v. Kathi Kalu Oghad, , it cannot be said that Section 53 of the Code is violative of provisions of Article 20(3) of the Constitution of India. Shri Kamat also contended that there is no testimonial compulsion in the process of taking sample of the blood by a qualified and Registered Medical Practitioner and in no case it could be said that by this process the accused is forced to tender evidence against himself not by this process accused is being compelled to be a witness against himself. As regards the interpretation of Section 53 of the Code, the learned Public Prosecutor submitted that under the said section the Police has got enough powers to send the accused to a qualified medical practitioner for the purposes of taking sample of his blood for determining his blood group. The examination of the 'person' of the arrested as contemplated by Section 53 of the Code impliedly includes in its import taking of sample of blood for the purpose of grouping. Such a power has been conferred upon the authorities concerned by Section 53 of the Code and therefore it cannot be said that the said provision is any way violative of Article 21 of the Constitution of India. He also contended that if such a power under Section 53 is given to a police officer a court should have a wider power for the purposes of doing justice hence the order passed by the learned Additional Sessions Judge is perfectly legal and valid. In support of his contentions Shri Kamat is relying upon the decision of Allahabad High Court in Jamshed v. State of Uttar Pradesh reported in 1976 Cri LJ 1680 (All), of the Supreme Court in , State of Bombay v. Kathi Kalu Oghad, a decision of the Andhra Pradesh High Court in Ananth Kumar Naik v. State of Andhra Pradesh, 1977 Cri LJ 1797, a decision of Rajasthan High Court in Mahipal Maderna v. State of Rajasthan, 1971 Cri LJ 1405 and the decision of the Supreme Court in Ram Lal Narang v. State (Delhi Admn),

12. It is also not correct to say that in no case Magistrate can issue a direction, ordering the accused to submit to medical examination as contemplated by Section 53 of the Code. In this context it cannot be forgotten that a power is conferred upon the Magistrate to arrest a person who commits offence in his presence under Section 44 of the



Code. Such an arrest could be for any offence. After arrest it is open to the Magistrate subject to the provisions as to bail contained in the Code, to commit the offender to custody. Can it be suggested that in such a case recourse could not be taken to the provision of Section 53 of the Code? Suppose a person is granted an anticipatory bail, then can it be said that he cannot be directed to submit to medical examination under Section 53 of the Code as a condition of bail itself or otherwise. Under the Code of Criminal Procedure, if it is in the interest of justice the court has power to record additional evidence. The High Court is granted inherent powers under Section 482 of the Code to make such orders as may be necessary to secure the ends of justice. While dealing with a case where death sentence is awarded, under Section 367(1) of the Code if the High Court feels that further inquiry, including the medical examination of the accused is necessary for determining the guilt or innocence of the accused then can it be held that High Court has no such power or jurisdiction? S. 53 of the Code only lays down a condition that medical examination will have to be done at the instance of a police officer not below the rank of sub-inspector. It does not debar other superior officers or the Court concerned from exercising said power if it is necessary for doing justice in a criminal case.

14. So far as the contention based on Article 20(3) is concerned in our opinion there is no substance in the said contention. As held by the Supreme Court in *State of Bombay v. Kathi Kalu Oghad*, mere taking of blood for determination of the blood group will not amount to testimonial compulsion within the meaning of Article 20(3) of the Constitution of India. It is not necessary to deal with the said contention in detail in view of the decision of the Supreme Court in *State of Bombay v. Kathi Kalu Oghad*. This court had also an occasion to consider somewhat similar question in *State v. Balwant*. (1961) 63 Bom LR 87. In that case provisions of Section 129-A of the Bombay Prohibition Act were challenged as being violative of the protection guaranteed by Article 20(3) of the Constitution of India. Negating this contention this Court held that the said provisions do not violate the protection guaranteed by Article 20(3) of the Constitution. In no case it could be said that only because a power is conferred upon the police officer under Section 53 of the Code of Criminal Procedure, to get examined the person of the accused by a competent person for ascertaining facts which may afford evidence that by itself is tantamount to compelling the accused to become a witness against himself. Merely by this power s. 53, Cr.P.C. is not compelled to be a witness against himself. The Supreme Court in *State of Bombay v. Kathi Kalu Oghad*, has explained the true meaning of expression 'to be a



witness' as used in the said Article 20(3) of the Constitution of India. As observed in the said decision, by using the said expression, the makers of the Constitution could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. Even otherwise mere examination of the person and taking of blood sample in itself is not an incriminating circumstances, and therefore it cannot be said that by mere taking sample of blood a person is compelled to be a witness against himself.

17. It cannot be forgotten that 'examination of the person' of the accused is contemplated as an aid to the investigation of the crime in order to ascertain facts which may afford evidence as to the commission of the offence under investigation. We do not find any intrinsic evidence or compulsion in the section itself or otherwise to restrict the meaning of expression used in this section to the examination of the skin or what is visible on the body itself. Many times it becomes necessary to make examination of some organs inside the body for the purposes of collecting evidence as to the commission of the offence.

18. In a given case for the purpose of collecting evidence it might become necessary to determine blood group of the accused. In case where the bloodstained clothes are seized from the person of the accused and the prosecution wants to connect the said evidence with the crime itself, then obviously it becomes necessary to determine the blood group of the accused and in that sense it could safely be said that taking of ample of the blood is necessary for affording evidence as to the commission of the offence. This might help even the defence to prove the innocence of the accused. In a case where the identity of the accused is the main question for consideration and decision and a bunch of hair are found at the place of occurrence, then the Investigating Officer can utilize that piece of evidence for the purpose of establishing identity of the participant in the crime. In the cases wherein identification of the accused is in issue, the body of the accused with identifying marks on it is a relevant piece of evidence for the purpose of identification of the culprit. In some cases for this purpose collection of specimen of hair of the accused may also become necessary. On the same analogy taking the sample of blood might become necessary in order to ascertain the facts which might afford such evidence.

27. The provisions of Sections 53 and 54 are incorporated in new Code on the recommendations of the Law Commission. Section 53 was intended to remove the lacuna in the old Code by reason of which it was not possible to subject an



arrested person to medical examination without his consent. The new section makes this possible. It was also thought expedient to have such a provision for facilitating effective investigation. Section 53 imposes an obligation upon the arrested person to subject to medical examination at the instance of the police to help the investigation. Section 54 in its turn confers upon the arrested person a right to have himself medically examined to establish his innocence or to show that he was subjected to torture or pain etc., in the police custody. Since there was no provision in the old Code in that behalf provisions of Sections 53 and 54 are incorporated in the new Code. If the contention raised by the learned counsel before us that the examination of the person will include only superficial external examination of the skin and body is accepted then the very purpose behind the Sections 53 and 54 will be frustrated. Therefore in our opinion Andhra Pradesh as well as Allahabad High Courts were right in taking a view that the expression 'examination of the person' as used in Section 53 will also include in its import taking of blood sample of the accused for determining his blood group in order to establish his guilt or innocence.

28. Similarly, it will not be correct to say that only because the accused person is released on bail he ceases to be in the custody and therefore powers under S. 53 of the Code of Criminal Procedure cannot be exercised. Only because the bail is granted, the reality is not changed and from that fact alone it cannot be said that he is not a 'person arrested for an offence. A person released on bail is still considered to be detained in the constructive custody of the court through his surety. He has to appear before the court whenever required or directed. Therefore to that extent his liberty is subject to restraint. He is notionally in the custody of the court, and hence continues to be a person arrested. Even in spite of the fact that the accused is released on bail he is still a person arrested on a charge of committing an offence and therefore his medical examination can be carried out under Section 53 of the Code.

12. The next ground raised by the learned Counsel for the petitioner is that by directing the petitioner to subject himself to DNA test, the same amounts to self-incrimination and is violative of Article 20(3) of the Constitution of India. This ground raised by the learned Counsel for the petitioner is also not sustainable in view of the judgment of the Hon'ble Supreme Court in *Krishnan Kumar Malik Vs. State of Haryana* reported in (2011) SCC 130. The relevant portion of the judgment is extracted hereunder.



brought to our notice by learned counsel for the Respondent-State, it has become necessary for the prosecution to go in for DNA test in such type of CrI. A. @S.L.P. (CrI.) No.8021 of 2009 cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in the Cr.P.C. prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a fool proof case, but they did not do so, thus they must face the consequences."

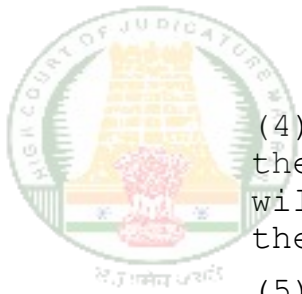
13. It will also be useful to extract the judgment of this Court in *Saranya Vs. State*, by the Inspector of Police reported in 2016 (6) CTC 503 and the relevant portion of the judgment is extracted hereunder:

35. All the reported judgments that were cited across the Bar relate to matrimonial disputes between spouses and no precedent was cited by either side on facts similar to this case. The question whether drawing of blood sample, hair, nail, etc, from the person of the accused would amount to testimonial compulsion is no more *res integra* in the light of the pronouncement of the 11 Judge Bench judgment of the Supreme Court in *State of Bombay v. Kathi Kalu Oghad* [AIR 1961 SC 1808]. In *Selvi and others v. State of Karnataka* (*supra*), the Supreme Court, after relying upon *Kathi Kalu Oghad* has held that DNA profiling of the accused will not amount to testimonial compulsion. Section 53 Cr.P.C. has been suitably amended and Section 53-A has been introduced in the Code with effect from 23.06.2006 to take care of the need to draw blood samples from the accused.

38. Mr. Kumarasamy, learned counsel, placed strong reliance on the judgment of the Supreme Court in *Goutam Kundu* case (*supra*) wherein, the following propositions have been laid down: "26. From the above discussion it emerges:- (1) that courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong *prima facie* case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.



(4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis."

39. The learned counsel relied on para 26 (4) and (5) in support of his submission. Much water appears to have flown after Goutam Kundu's case and the Supreme Court in Bhabani Prasad Jena v. Orissa State Commission for Women [(2010) 8 SCC 633], propounded the test of "eminent need" in the following words:

"22. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test.

23. *There is no conflict in the two decisions of this Court, namely, Goutam Kundu v. State of West Bengal and Sharda v. Dharmpal. In Goutam Kundu it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and the court must carefully examine as to what would be the consequence of ordering the blood test. In Sharda while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA test can be given by the court only if a strong prima facie case is made out for such a course.*"

40. It is obvious that the Supreme Court was conscious of its earlier decision in Goutam Kundu's case and has expanded the scope of DNA profiling by propounding the "eminent need" test. In Sharda v. Dharmpal (supra), the Supreme Court went one step ahead and held that if the



party does not subject himself/herself to DNA profiling, an adverse inference can be drawn under Section 114 of the Evidence Act. At the risk of repetition, the emphasis in all these judgments is that, such an adverse inference can be drawn only against a party to the lis. In this case, if "X" does not submit herself to DNA profiling, an adverse inference can be drawn only against her under Section 114 of the Evidence Act, but, that can, in no way help the Court to decide on the culpability or otherwise of Manikandan [A1]. Had Manikandan [A1] resisted the DNA petition, then an adverse inference can be drawn against him that he has fathered "Y". In this case, Manikandan [A1] has agreed, but "X" is resisting. We can take a leaf out of the judgment of the Supreme Court in Bhabani Prasad's case and import the "eminent need" test into a criminal proceeding, where the dire need is to arrive at the truth, as a criminal case is not a private lis between two individuals, but is concerned with bringing an offender to justice by unearthing the truth.

53. On a reading of Sections 91 and 311 Cr.P.C. on the touchstone of the principle laid down in Fatehsinh Mohansinh Chauhan's case, Savitri's case and Sakiri Vasu's case, the power of a criminal Court to send a witness for DNA profiling can be traced to Section 91 and the second limb of Section 311 Cr.P.C.

54. The word thing employed in Section 91, Cr.P.C., has a very wide meaning and would take within its fold, blood samples, hair, nail, etc. of a person. Though the literal and strict construction of Section 91 Cr.P.C. may not admit of such an interpretation, yet the Code is only a procedural law and procedure is only a hand maid of justice and not its master. It may be apt to quote the following lines from the Constitution Bench judgment of the Supreme Court in Willie (William) Slaney v. State of Madhya Pradesh [AIR 1956 SC 116]:

"The Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities."

55. From a conspectus of the aforesaid discussion, this Court is of the view that the source of power for a criminal Court to subject a witness and her child to DNA analysis flows from Section 91 read with the second limb of Section 311 Cr.P.C. and Section 45 of the Evidence Act.

57. In the case at hand, it is not the paternity of the child that is in issue. The issue before this Court is whether Manikandan [A1] has committed an offence under the POCSO Act. The issue of legitimacy



would only be incidentally involved. One has to see the picture on a larger canvas and if so seen, there can be no doubt that the harm that would befall the administration of criminal justice is far greater, if witnesses like "X" and her child cannot be subjected to DNA profiling. The harm that would befall if such a power is not recognised in the trial Court will be far greater, because it will be easier for people to prey upon minor girls from downtrodden communities like predators and force them to turn turtle in the witness box. There is, therefore, an eminent need to subject "X" and her child to DNA profiling in order to arrive at the truth.

14. It is sufficiently clear from the above judgments that DNA profiling of an accused person will not amount to testimonial compulsion. That has been held so by the Hon'ble Supreme Court in the year 1961 itself in *State of Bombay Vs Kathi Kalu Oghad*, reported in AIR 1961 SC 1808 and which was subsequently, followed in *Selvi and others Vs. State of Karnataka* reported in 2010(7) SCC 263. It is for this purpose, Section 53 of CrPC has been suitably amended and Section 53A has been introduced in the Code of Criminal Procedure with effect from 23.06.2006 to take care of the need to draw blood samples from the accused. Therefore it will be too late in the day for the petitioner to raise a ground of self-incrimination.

15. The reliance placed by the learned Counsel for the petitioner in the judgment of the Supreme Court in *Goutam Kundu Vs State of West Bengal and another*, reported in AIR 1993 SC 2295, is also not sustainable in view of the fact that the subsequent judgments of the Supreme Court have virtually watered down the said judgment and expanding the scope of DNA profiling by propounding "eminent need" test. Therefore, the reliance placed by the learned Counsel for the petitioner in the judgment of the Supreme Court *Goutam Kundu's* case is unsustainable.

16. Now that the case is pending before the Court below, the Court below also has the right to direct the petitioner to undergo DNA test.

17. In view of the above discussion, this Court finds absolutely no merits in this case and accordingly, the criminal original petition is dismissed.

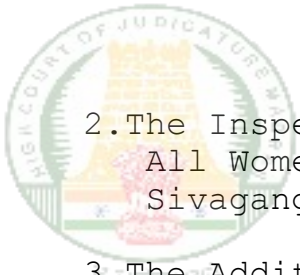
Sd/

Assistant Registrar (CO)

/True copy/

Sub Assistant Registrar (CS-I)

To



2.The Inspector of Police,
All Women Police Station,
Sivagangai.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1cc to Mr.P.KRISHNA SAMY, Advocate, SR.No.87999

+1cc to Mr.D.SHANMUGARAJA SETHUPATHI, Advocate, SR.No. 87447

Cr1OP(MD)No.6279 of 2017
28.09.2018

DSK

KK/RP/SAR-1/17.10.2018/18P-6C