

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION NO.6083 OF 2018

ORDER:

This criminal petition is filed under Section 482 Cr.P.C to quash the proceedings against the petitioners dated 22.01.2016 passed by the Additional Judicial First Class Magistrate, Bapatla, Guntur District in CFR No.334 of 2016.

First petitioner herein is the alleged biological mother of one Immadabatnuni Veeranjaneeyulu (A-1), whereas, petitioners 2 & 3 are the alleged brothers of A-1. CFR No.334 of 2016 was filed to conduct DNA test against Accused No.1 and alleged biological mother of A-1; the first petitioner herein and two alleged brothers i.e. petitioners 2 & 3, to scientifically prove their blood relationship.

It is the case of prosecution that one Immadabatnuni Veeranjaneeyulu (A-1) s/o Venkata Kotaiah, belonging to Telaga Caste styled himself as one Kathi David Raju s/o Yedukondalu, who belongs to Yanadi i.e. ST Caste and obtained false caste certificate, as if he belongs to Scheduled Caste by impersonation of Kathi David Raju. The said Kathi David Raju is a drop-out at VI Class and he is a rickshaw puller, whereas, A-1 studied X Class privately in the name of Kathi David Raju. Further, A-1 secured employed under reservation category. It is stated that, Immadabatnuni Veeranjaneeyulu (A-1) by impersonation, obtained a false caste certificate, secured employment and presently he is working as A.A.E in V.T.P.S. Electricity Generation Corporation, Ibrahimpatnam, Vijayawada.

To establish that, Immadabatnuni Veeranjaneeyulu (A-1) is the son of the first petitioner and brother of petitioners 2 & 3, DNA examination was felt necessary and therefore, requested Additional Judicial First Class Magistrate, Bapatla, Guntur District to direct Immadabatnuni Veeranjaneeyulu (A-1) and the petitioners herein to undergo DNA test by collecting blood samples.

Immadabatnuni Veeranjaneeyulu (A-1) filed counter before the Court below denying the allegations made in the petition, *inter alia* contending that there is no necessity to cheat anybody else, muchless the government or any schedule tribe people and he asserted that he is none other than Kathi David Raju s/o Kathi Yedukondalu and his SSC certificate and transfer certificate also bears the caste of Immadabatnuni Veeranjaneeyulu (A-1) as Yanadi-ST caste. It is also contended in the counter filed before the court below that Immadabatnuni Veeranjaneeyulu (A-1) obtained caste certificate from Mandal Revenue Officer and the police registered false case against him for violation of SC, ST & BC Regulation of Issue of Community Certificates Act, 1993 and Rules 1997.

Immadabatnuni Veeranjaneeyulu (A-1) further stated in the counter, filed before the court below that, he hails from a respectable family in the society and government employee, suffered mental agony by the acts of prosecution agency and that the District Collector is competent authority, but not Inspector of Police, Bapatla with regard to genuineness of caste certificate and the Inspector of Police has no right to register the case against A-1 under Section 5 of A.P. (SC, ST & BC) Regulation of Issue of

Community Certificates Act, 1993 and prayed for dismissal of petition before the Additional Judicial First Class Magistrate, Bapatla, Guntur District.

Vide order dated 22.01.2016, petition was allowed by the Additional Judicial First Class Magistrate, Bapatla, Guntur District, directing the Station House Officer, Bapatla Town Police Station to conduct DNA test against Immadabatnuni Veeranjanyulu (A-1) and the petitioners herein. Aggrieved by the said order, the petitioners filed this criminal petition on various grounds.

The main ground urged in this petition is that, the Magistrate did not take into consideration the provisions of A.P. (SC, ST & BC) Regulation of Issue of Community Certificates Act, 1993 and that, as A-1 secured employment as Additional Assistant Engineer in V.T.P.S. Electricity Generation Corporation, Ibrahimpatnam, Vijayawada, where he is fighting against fake Diploma and Engineering Certificates obtained by the A.P. Genco staff at Ibrahimpatnam, Vijayawada through private study, without even appearing in the practical examination, while simultaneously working in A.P. Genco without even applying for any kind of leave. A-1 also filed W.P.No.3049 of 2012 and obtained orders against those fake certificates. Therefore, several employees and unions who bore grudge against Kathi David Raju, pressed into service respondents 2 & 3, fake associations which are proved fake, in view of proceedings of the District Registrar, Guntur vide G3/Society/RTI/3133/2016 dated 15.12.2016 and District

Registrar, Vijayawada vide his proceedings L.No.E2/RTI/1106-30/2017 dated 02.06.2017, thus, investigation itself is malafide. It is further contended that Kathi David Raju is not the son of first petitioner and brother of petitioners 2 & 3. But, still the Additional Judicial First Class Magistrate, Bapatla, Guntur District passed orders in CFR No.334 of 2016, dated 22.01.2016 directing the petitioners herein and Immadabatnuni Veeranjaneyulu (A-1) to undergo DNA test, which according to the petitioners is illegal and violative of fundamental rights of the citizen, guaranteed under the Constitution of India, as it would bastardize the child.

It is also contended that, while passing the order, the Magistrate did not serve any notice on the petitioners and passing the impugned order without giving an opportunity of hearing is once again violative of principles of natural justice. It is contended that the Magistrate did not apply his/her mind to the fact that caste cannot be determined by DNA test and that evidence must be allowed to be adduced to arrive at the conclusion regarding determination of one's birth for which leading of evidence is the best legal remedy, in view of the law declared in **Sunil Eknath Trambake v. Leelavati Sunil Trambake**¹. Therefore, directing these petitioners to undergo DNA test along with Immadabatnuni Veeranjaneyulu (A-1) is an illegality committed by the Magistrate and prayed to set-aside the order passed by the Magistrate.

During hearing, learned counsel for the petitioners Sri Metta Chandra Shekar Rao vehemently contended that, directing these petitioners to undergo DNA test along with Immadabatnuni

¹ AIR 2206 Bombay 140

Veeranjaneyulu (A-1) is a matter of serious concern, as that would amount to self-incrimination and violates fundamental right guaranteed under the Constitution of India. It is also contended that DNA test will not determine the caste of a person and at best, the District Collector under the provisions of A.P. (SC, ST & BC) Regulation of Issue of Community Certificates Act, 1993 and issuance of caste certificate by the District Collector is the only method to inquire into the caste of any person. Therefore, ordering these petitioners to undergo DNA test along with Immadabatnuni Veeranjaneyulu (A-1) is a serious illegality and violates fundamental right guaranteed under Article 20(3) of the Constitution of India.

Learned Public Prosecutor also contended that Immadabatnuni Veeranjaneyulu @ Kathi David Raju (A-1) filed Crl.P.No.886 of 2016 which was dismissed as withdrawn. A-1 also filed W.P.No.4935 of 2016, obtained an interim order and stay was vacated on 06.01.2017. Later, A-1 filed W.A.No.95 of 2017 and the same was dismissed as withdrawn on 20.01.2017. Again A-1 along with A-2 filed Crl.P.No.551 of 2017 to quash the proceedings in Crime No.3 of 2016 on the file of Bapatla Town Police Station, Guntur District, but no stay was granted. Further, A-1 also filed Crl.P.No.12458 of 2017 challenging the order in CFR No.334 of 2016 dated 22.01.2016 on the file of Additional Judicial First Class Magistrate, Bapatla, Guntur District. Vide order dated 04.06.2018 this Court held that, ordering to conduct DNA test is not violative of any of the rights of A-1, including his

fundamental rights and concluded that the prosecution is entitled to do so in the course of investigation and held that the Court below did not err in allowing the application and dismissed the criminal petition. Thus, though, A-1 disclosed certain facts with regard to filing of writ petition, criminal petition and information obtained under Right to Information Act, referred in paragraph 1 of this petition, filed the present criminal petition to quash the order on the grounds stated above. Suppression of facts, more particularly, non-disclosure of orders passed by this Court in earlier proceedings disentitled these petitioners to claim relief in the petition, prayed to affirm the order passed by the Court below, while dismissing the present criminal petition.

The Additional Judicial First Class Magistrate, Bapatla, Guntur District allowed CFR No.334 of 2016 on 22.01.2016 directing these petitioners and Immadabatnuni Veeranjanyulu (A-1) to undergo DNA test. Aggrieved by the said order, these petitioners filed the present criminal petition on various grounds.

The main grounds urged in this petition is that, the Magistrate did not take into consideration the provisions of A.P. (SC, ST & BC) Regulation of Issue of Community Certificates Act, 1993 and that the petitioner is working as Additional Assistant Engineer in V.T.P.S. Electricity Generation Corporation, Ibrahimpatnam, Vijayawada and fighting against fake Diploma and Engineering Certificates obtained by AP GENCO staff at Ibrahimpatnam, Vijayawada through private study, without even appearing in the practical examination, while simultaneously

working in A.P. GENCO without even applying for leave. A-1 also filed W.P.No.3049 of 2012 and obtained orders against those fake certificates. Therefore, several employees and unions who bore grudge against Kathi David Raju, pressed into service, the respondents 2 & 3, which are proved to be fake associations in view of the proceedings of the District Registrar, Guntur vide G3/Society/RTI/3133/2016 dated 15.12.2016 and District Registrar, Vijayawada vide proceedings L.No.E2/RTI/1106-30/2017 dated 02.06.2017. It is also submitted that Kathi David Raju is not the son of the first petitioner and brother of petitioners 2 & 3, but, still the Magistrate vide order dated 22.01.2016 allowed CFR No.334 of 2016 directing the petitioners herein and Immadabatnuni Veeranjanyulu (A-1) to undergo DNA test is illegal and violative of fundamental rights of the citizen guaranteed under the Constitution of India, as it would bastardize the child.

It is also contended that, while passing the impugned order, the Magistrate did not serve any notice on the petitioners and passing the impugned order without affording any opportunity of hearing is violative of principles of natural justice. Further, the Magistrate did not apply her mind to the fact that, caste cannot be determined by DNA test and that evidence must be allowed to be adduced to arrive at the conclusion regarding determination of one's birth for which leading of evidence is the best legal remedy, in view of the law declared in **Sunil Eknath Trambake v. Leelavati Sunil Trambake**². Therefore, directing these petitioners to undergo DNA test along with Immadabatnuni Veeranjanyulu

² AIR 2006 Bombay 140

(A-1) is an illegality committed by the Magistrate, prayed to set-aside the proceedings against the petitioners, dated 22.01.2016 passed by the Additional Judicial First Class Magistrate, Bapatla, Guntur District in CFR No.334 of 2016.

During hearing, Sri Metta Chandra Shekara Rao, learned counsel for the petitioners vehemently contended that, directing these petitioners to undergo DNA test along with Immadabatnuni Veeranjanyulu (A-1) is a matter of serious concern, as it would amount to self-incrimination and violates fundamental right guaranteed under the Constitution of India. It is also contended that DNA test will not determine caste of a person and at best, the District Collector under the provisions of A.P. (SC, ST & BC) Regulation of Issue of Community Certificates Act, 1993, alone is competent to enquire into the caste and issue caste certificate. Therefore, ordering these petitioners to undergo DNA test along with Immadabatnuni Veeranjanyulu (A-1) in CFR No.334 of 2016 is a serious illegality and violative of the privacy of an individual and prayed to set-aside the order passed by the Court below.

It is also contended that, what cannot be done directly, cannot also be done indirectly and the order passed by the Magistrate amounts to permitting the police to do something against the petitioners, which cannot be permitted under law and placed reliance on the judgment in **Smt. Ujjam Bai v. State of Uttar Pradesh**³ and on the strength of the principle laid down in the above judgment, learned counsel contended that the order passed by the Magistrate is arbitrary and illegal, as it permits the

³ 1962 AIR 1621

petitioners to do an illegal act by indirect means which cannot be permitted to be done directly and prayed to set-aside the order passed by the Court below.

Learned Public Prosecutor for the State of Andhra Pradesh contended that Sections 53, 53-A & 54 of Cr.P.C permits the Investigating Agency to collect evidence, including blood samples after obtaining permission from the Magistrate, since Immadabatnuni Veeranjanyulu (A-1), by impersonation, appeared for S.S.C examination in the name of Kathi David Raju. It is alleged that, Kathi David Raju s/o Yedukondalu, who is a drop out at VI standard, is now eking-out his livelihood as a rickshaw puller, whereas, Immadabatnuni Veeranjanyulu (A-1) s/o Venkata Kotaiah and the son of first petitioner and brother of petitioners 2 & 3.

No doubt, the District Collector is the competent authority to conduct an enquiry under the provisions of A.P. (SC, ST & BC) Regulation of Issue of Community Certificates Act, 1993. But, the District Collector cannot decide the impersonation of A-1 in obtaining the caste certificate as Scheduled Tribe to secure employment. That too, when the police registered crime and they are investigating into the matter, in such process of collection of evidence, police filed petition under Sections 53 & 53-A Cr.P.C before the Magistrate seeking leave of the Court below to direct A-1 and the petitioners herein to undergo DNA test to determine whether A-1 was the son born to the first petitioner and brother of petitioners 2 & 3. Therefore, to find whether the petitioner

impersonated the original person by name Kathi David Raju s/o Yedukondalu, the issue is to be resolved by determining paternity of A-1, who was born to the first petitioner herein. Therefore, such direction issued by the Magistrate is not violative of fundamental right guaranteed under Article 21 and, so also Article 20(3) of the Constitution of India and refuted the contentions of the learned counsel for the petitioners by relying on various judgments of the Apex Court and other Courts in **State of Bombay v. Kathi Kalu Oghad**⁴, **Selvi v. State of Karnataka**⁵, **Ritesh Sinha v. State of Uttar Pradesh**⁶, **Krishan Kumar Malik v. State of Haryana**⁷, **Sudhir Chaudhary v. State (NCT of Delhi)**⁸, **Naveen Krishna Bothireddy v. State of Telangana and another**⁹ and in view of the law declared by the Apex Court and various other Courts, in the judgments referred supra, the order passed by the Magistrate is not hit by Article 20(3) or Article 21 of the Constitution of India.

Learned Public Prosecutor for the State of Andhra Pradesh also contended that, Immadabatnuni Veeranjanyulu @ Kathi David Raju (A-1) filed Crl.P.No.886 of 2016 which was dismissed as withdrawn. A-1 also filed W.P.No.4935 of 2016, obtained an interim order and stay was vacated on 06.01.2017. Later, A-1 filed W.A.No.95 of 2017 and the same was dismissed as withdrawn on 20.01.2017. Again A-1 along with A-2 filed Crl.P.No.551 of 2017 to quash the proceedings in Crime No.3 of 2016 on the file of Bapatla

⁴ AIR 1961 SC 1808

⁵ (2010) 7 SCC 263

⁶ (2013) 2 SCC 357

⁷ (2011) 7 SCC 130

⁸ CRIMINAL APPEAL Nos. 700-701 OF 2016 [Arising out of SLP (Crl) Nos.3009-3010 of 2015] dated 29.07.2016

⁹ 2017 Cri LJ 3548

Town Police Station, Guntur District, but no stay was granted. Further, A-1 also filed Crl.P.No.12458 of 2017 challenging the order in CFR No.334 of 2016 dated 22.01.2016 on the file of Additional Judicial First Class Magistrate, Bapatla, Guntur District. Vide order dated 04.06.2018 this Court observed that, ordering DNA test is not violative of any of the rights of A-1, including his fundamental rights and concluded that the prosecution is entitled to do so in the course of investigation and held that the Court below did not err in allowing the application and dismissed the criminal petition. Thus, the petitioners though disclosed certain facts with regard to writ petition and information obtained under Right to Information Act, referred in the contents of the petition, filed the present criminal petition to quash the order on the grounds stated above. Suppression of various facts, more particularly, non-disclosure of orders passed by this Court in earlier proceedings disintitled these petitioners to claim relief in the petition and thereby, prayed to affirm the order passed by the Court below, while dismissing the criminal petition filed by the petitioners herein.

Considering rival contentions, perusing the material available on record, the point that arose for consideration is:

“Whether the first petitioner and petitioners 2 & 3 who are not claiming to be the mother and brothers of A-1 respectively, be compelled to undergo DNA test to determine the paternity of Immadabatnuni Veeranjanyulu (A-1), who is

claiming to be Kathi David Raju, belonging to Scheduled Tribe?”

P O I N T:

The real dispute is with regard to paternity of Immadabatnuni Veeranjanyulu (A-1), claiming to be son of Yedukondalu, styling himself as Kathi David Raju. One Kathi David Raju s/o Yedukondalu, is a drop out of VI Standard, admittedly belongs to Scheduled Tribe i.e. Yanadi Community. But, the consistent case of the prosecution from the beginning is that Immadabatnuni Veeranjanyulu (A-1) is the son of the first petitioner – Immadabathuni Nagendramma and Venkata Kotaiah. While Venkata Kotaiah is no more; the only parent of A-1 survived is the first petitioner, while petitioners 2 & 3 are the brothers of A-1. To determine whether A-1 is the son of first petitioner and brother of petitioners 2 & 3 and not the son of Yedukondalu, the Investigating Agency sought permission of the Magistrate to conduct DNA test and direct the petitioners, A-1 to give blood samples for DNA examination to disprove that he is not the son of Yedukondalu, who belongs to Scheduled Tribe i.e Yanadi Community.

The petition is filed only during investigation and according to Section 53 Cr.P.C, when a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a

registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

Explanation thereto made clear that, 'examination' shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case.

However, Sections 53-A & 54 Cr.P.C are not relevant for the present issue in controversy.

Subsection (1) of Section 53 Cr.P.C permits examination of person who is arrested on a charge of committing an offence for affording evidence as to the commission of an offence by a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector.

Thus, it means, the registered medical practitioner may also conduct such examination, as explained above. Therefore, any person includes the scientific expert to the government to conduct DNA test when explanation (a) of Section 53(2) permits examination of blood samples, including DNA profiling is permitted, the Investigating Agency, if, feels that DNA profiling is

necessary to decide the real controversy between the parties and to prove the complicity of A-1 in the present case, filed an application before the Magistrate seeking direction against these petitioners and A-1, who is claiming to be the son of Yedukondalu, belonging to Scheduled Tribe Caste.

According to the prosecution case, A-1 laid foundation from the beginning. Kathi David Raju s/o Yedukondalu was only a drop out at VI standard and now he is eking his livelihood as rickshaw puller. Whereas, A-1 prosecuted his education i.e. X Class by private study and appeared for the alleged examination in the name of Kathi David Raju, who was a school drop out, belonging to Scheduled Tribe. Thereafter, A-1 allegedly secured employment and now working as Additional Assistant Engineer in V.T.P.S. Electricity Generation Corporation, Ibrahimpatnam, Vijayawada. When A-1 laid foundation from the beginning, it is difficult for anyone to find out that A-1 is not Kathi David Raju and he is not the son of Yedukondalu, and he is the natural son born to the first petitioner and brother of petitioners 2 & 3. Since, father of Kathi David Raju by name Yedukondalu is no more, it is impossible to examine Kathi Yedukondalu to prove that A-1 was the son of Kathi Yedukondalu. But, the only alternative evidence available as on today to the Investigating Agency is to direct these petitioners and Immadabatnuni Veeranjanyulu (A-1) to undergo DNA examination. Therefore, due to development of scientific investigation, the prosecution sought to prove that Immadabatnuni

Veeranjaneyulu (A-1) was not the son of Yedukonalu, but son born to the first petitioner.

Section 45 of the Indian Evidence Act, deals with Opinions of experts, when the Court has to form an opinion upon a point of foreign law or of science or art, or as identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant facts.

At the same time, Section 46 of the Indian Evidence Act deals with facts bearing upon opinions of experts, facts not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Similarly, Section 50 of the Indian Evidence Act deals with Opinion or relationship, when relevant and according to it, when the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, or any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact, provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869) or in prosecutions under Sections 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860). Therefore, the evidence of an expert is relevant and opinion expressed by an expert as to the relationship by one person to another is admissible in evidence.

Section 293 Cr.P.C permits the Court to receive reports of certain government specific experts. Clause (4) of the same section authorizes few Government scientific experts to receive the reports as conclusive evidence in a trial or enquiry.

Therefore, the report of a scientific expert who conducts DNA examination is admissible to prove the relationship of A-1 with the petitioners, in view of Section 50 of the Indian Evidence Act and such report can be received as evidence under Section 293 Cr.P.C without calling for the examination of scientific expert who conducted such test.

Filing of a petition and seeking a direction from the Magistrate is not necessary under Section 53(1) Cr.P.C. But, if an application is filed under the provisions of the Identification of Prisoners Act, 1920, which mandates permission from the Magistrate to conduct such examination of an accused, but not under Cr.P.C, in view of the plain language used in Section 53(1) Cr.P.C. But, obviously, for unknown reasons, the prosecution approached the Magistrate and sought a direction against A-1 and the petitioners to undergo DNA test.

Due to an impact of the modern scientific and technological revolution on different aspects of our social and cultural activities, there is a shift from the age-old traditional ideas based on subjectivism in our major intellectual exercises. This type of shift has put a serious challenge to our conventional adversarial value-based system of justice.

DNA technology, as a latest tool of forensic science, is the by-product of modern genetic science. The said science established the belief that the pattern of chemical signals i.e. the genetic structure which may be discovered with the DNA molecule in the cells of each individual, is unique and different in every individual. As such, the chemical structure of the DNA in the cells of each individual is the sole determining factor to identify one separately from another except the genetically identical twins. The discovery of modern genetic science can be used in identification of criminals in criminal cases by analysing various objects recovered on the crime spot like any body fluid, hair root, saliva, fibres etc. which are associated with the crime and accurately linked to the perpetrator of the crime. Actually, this technology is utilised as a new form of circumstantial evidence, which is placed on a higher footing than the direct and ocular evidence because of its objectivity, scientific accuracy, infallibility and impartial character. Moreover, this new technology is also extensively applied in civil cases in order to determine paternity or maternity disputes, baby-exchanging cases, succession cases, maintenance proceedings and matrimonial disputes etc.

DNA, or deoxyribonucleic acid, is the hereditary material in humans and almost all other organisms. Nearly every cell in a person's body has the same DNA. Most DNA is located in the cell nucleus (where it is called nuclear DNA), but a small amount of DNA can also be found in the mitochondria (where it is called mitochondrial DNA or mtDNA). The information in DNA is stored

as a code made up of four chemical bases: adenine (A), guanine (G), cytosine (C), and thymine (T). Human DNA consists of about 3 billion bases, and more than 99 percent of those bases are the same in all people. The order, or sequence, of these bases determines the information available for building and maintaining an organism, similar to the way in which letters of the alphabet appear in a certain order to form words and sentences. DNA bases pair up with each other, A with T and C with G, to form units called base pairs. Each base is also attached to a sugar molecule and a phosphate molecule. Together, a base, sugar, and phosphate are called a nucleotide. Nucleotides are arranged in two long strands that form a spiral called a double helix. The structure of the double helix is somewhat like a ladder, with the base pairs forming the ladder's rungs and the sugar and phosphate molecules forming the vertical sidepieces of the ladder. An important property of DNA is that it can replicate, or make copies of itself. Each strand of DNA in the double helix can serve as a pattern for duplicating the sequence of bases. This is critical when cells divide because each new cell needs to have an exact copy of the DNA present in the old cell.

Mr.Justice R.K.Abichandani, Judge, High Court of Gujarat Sola, Ahmedabad, has written an article on "New biology and criminal investigation". Extracts from the article are as under:

".....Technological advances have made it more reliable, efficient and acceptable. DNA evidence can help to bring home the guilt, acquit the innocent, or exonerate those wrongly convicted. Forensic DNA Technology has revolutionized the modes of investigation of violent

crimes as a result of its awesome ability to convict a perpetrator or exonerate a convicted offender. In sexual assault and homicidal cases, the DNA evidence has become a powerful crime fighting tool. The DNA evidence in the form of saliva, blood, skin tissue, hair and semen is often recovered from crime-scenes and is a crucial tool for investigation of violent crimes. Testing methods currently used for analyzing the DNA evidence are considered to be very reliable. Polymerase Chain Reaction (PCR) is the most common form of DNA analysis, because of its capability to amplify very small quantities of DNA. DNA testing can lead to three types of results, namely, inclusion, i.e. when the DNA profile of a known individual (a victim or suspect) matches the DNA profile from the crime-scene evidence; exclusion i.e. when the DNA profile from an individual (a victim or suspect) does not match the DNA profile from the crime-scene evidence; and inconclusive where the DNA testing did not produce information that would allow an individual to be either included or exonerated as the source of the biological evidence. The real investigative power of DNA technology is realized in the context of the cases where a suspect has not yet been identified. (See 'Understanding DNA Evidence: A Guide for Victim Service Providers, By Kathrun M.Turman O.V.C. Bulletin, April 2001, U.S. Department of Justice).

THEORY OF CRIMINALISTICS/FORENSICS:

The division of matter and the exchange of material between two objects (Locard Exchange Theory), are scientific principles that relate to the generation of evidence. These concepts of divisibility of matter and transfer of material emerge from the fundamental nature of matter and they assume significance by way of evidence when division and transfer occur in conjunction with a criminal event. The theory that makes concepts of identification, classification and individualization is one attributed Edmund Locard in the early 20th century. As per this theory, when two objects come in contact, traces from one will be transferred to the other, and in both directions. These traces may not be always detectable without scientific aid, but they are always present. This is known as Locard Transfer Theory, which is a linchpin of all forensic examination. The other concepts namely, identification,

association through class, individualizing characteristics and re-construction are integral to the practice of forensic science and are processes that are used to answer various investigative questions. The transfer of matter requires its prior division. After the crime is committed, the process of recognition of evidence follows during investigation for discovering the evidence. However, even if such evidence is never detected, the matter is still divided and transferred. It is only when answering investigative questions about a crime that the processes of association through class and individualizing characteristics and of re-construction are employed. [Norah Rudin and Keith Inman, 'An Introduction of Forensic DNA Analysis 2nd Edition']. The process of identification answers the case investigation question of 'What is it? The process of individualization answers the question of 'Who is it?'. Classification of a physical item is done on the basis of class characteristics. For example, an analyst can identify a human hair on the basis of its microscopic characteristics that distinguish it from animal hair. Individualization relies on the acquisition of traits that are so rare that it would be unreasonable to think of them being duplicated by chance alone (ibid).

DNA Analysis as Evidence DNA is the fundamental building block of a person's entire genetic make-up. DNA is found in all human cells and is the same in every cell of the same person. Genetic identity is unique. Hence, a person's DNA profile can determine his identity.[See Maria Corazon A. De Ungria, Ph.D., Forensic DNA Analysis in Criminal and Civil Cases, 1

CONTINUING LEGAL EDUC. L.J. 57 (2001).] DNA analysis is a procedure in which DNA extracted from a biological sample obtained from an individual is examined. The DNA is processed to generate a pattern, or a DNA profile, for the individual from whom the sample is taken. This DNA profile is unique for each person, except for identical twins. (See The UP-NSRI DNA Analysis Laboratory, A Primer on DNA-based Paternity Testing (2001).

Everyone is born with a distinct genetic blueprint called DNA (deoxyribonucleic acid). It is exclusive to an individual (except in the rare occurrence of identical twins that share a single, fertilized egg). DNA never changes throughout life. DNA is part of every cell in the human body, change DNA of an individual's blood remain in his or her skin cells, hair follicles, muscles, semen, samples from buccal swabs, saliva, or other body parts.

Due to the development of theory of chromosomes and due to use of scientific investigation in criminal justice delivery system, the Investigating Agency adopted modern techniques to establish a particular fact. The word 'criminalistic' is one sub-division of forensic sciences. Criminalistics is one subdivision of forensic sciences. The terms criminalistics and forensic sciences are often confused and used interchangeably. Forensic sciences encompass a variety of scientific disciplines such as medicine, toxicology, anthropology, entomology, engineering, odontology, and of course, criminalistics. It is very difficult to provide an exact definition of criminalistics, or the extent of its application, as it varies from one

location or country to another. However, the American Board of Criminalistics defines criminalistics as "that profession and scientific discipline directed to the recognition, identification, individualization, and evaluation of physical evidence by application of the physical and natural sciences to law-sciences matters." The California Association of Criminalistics provides a slightly different definition: "that professional occupation concerned with the scientific analysis and examination of physical evidence, its interpretation, and its presentation in court." These definitions are very similar to the ones used for forensic sciences, as both disciplines have as a goal to provide scientific analysis of evidence for the legal system.

Thus, in view of the accuracy of DNA tests to determine the paternity or relationship, it is relevant under Section 50 of the Evidence Act, DNA examination of these petitioners and A-1 is helpful to the prosecution. Therefore, examination of blood samples of these petitioners and A-1 is necessary to resolve the issue in the present case and such test can be conducted by various DNA profiling methods such as, Restriction Fragment Length Polymorphism Analysis Method (RFLP Method), Polymerize Chain Reaction (PCR) Method, Short Tandem Repeats (STR) Method, Amplified Fragment Length Polymorphization (AMPFLP) Method, Y-Chromosome Method, Mitochondrial Method.

Therefore, the purpose of DNA examination is only to prove that A-1 is the son of the first petitioner and brother of petitioners 2 & 3 to determine the complicity of A-1 in the main case.

The contention of the learned counsel for the petitioners Sri Metta Chandra Shekara Rao is that, direction issued by the Magistrate against these petitioners to give blood samples for DNA examination is in violation of self-incrimination under Article 20(3) and also violation of Fundamental Right under Article 21 of the Constitution of India.

One of the contention urged before this Court by the learned counsel for the petitioners is that, the caste of A-1 cannot be determined by directing him and the petitioners herein to undergo DNA test and it can be decided only by the Collector under the provisions of A.P. (SC, ST & BC) Regulation of Issue of Community Certificates Act, 1993, but it cannot be determined where A-1 conspiring with these petitioners and others, obtained a caste certificate, as if, he belongs to ST Community (Yanadi). But, the purpose of conducting examination is only to establish the fact that A-1 is the son of the first petitioner and brothers of petitioners 2 & 3, to establish that, he does not belong to Yanadi community and he is not the son of Kathi Yedukondalu and he is not the person by name Kathi David Raju. Though, it is not a relevant fact, but still, it is admissible in evidence in view of Section 293 Cr.P.C and the provisions of Indian Evidence Act referred in the earlier paragraphs. Therefore, to determine the caste of A-1, prosecution

is required to prove his paternity, who allegedly belong to Telaga caste originally. Therefore, DNA examination is necessary to establish the factum that A-1 is not the son of Kathi Yedukondalu and son of first petitioner by directing these petitioners and A-1 to undergo DNA examination. Therefore, the contention of the learned counsel for the petitioners is devoid of merits, since it is a question of impersonation and criminal liability of such person to who impersonated cannot be determined by the Collector under the provisions of A.P. (SC, ST & BC) Regulation of Issue of Community Certificates Act, 1993.

The other contention raised by the learned counsel for the petitioners is that, issue of direction by the Magistrate against these petitioners to give blood samples for DNA examination along with A-1 is violative of fundamental right guaranteed under the constitution of India i.e. Articles 20(3) & 21.

No doubt, in view of the directions issued by the Additional Judicial First Class Magistrate, Bapatla, Guntur District in CFR No.334 of 2016, the petitioners have to suffer pain due to extraction of blood from their body for DNA examination. But, it is minimal and it would not cause any damage to the body of any of these petitioners.

Article 20(3) of the Constitution of India guaranteed protection against self-incrimination, which is extracted hereunder:

20. Protection in respect of conviction for offences

- (1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence
- (2) No person shall be prosecuted and punished for the same offence more than once
- (3) No person accused of any offence shall be compelled to be a witness against himself

‘Taking advantage of Clause (3) Article 20 of the Constitution of India, learned counsel for the petitioners contended that, these petitioners cannot be compelled to be a witness by giving blood samples for DNA examination. But, this article has no application, as these petitioners are not entitled to claim such immunity for the reason that the petitioners are not the accused, but only Immadabatnuni Veeranjanyulu is Accused No.1 and consequently, these petitioners are not entitled to claim such protection under Article 20(3) of the Constitution of India.

In **State of Bombay v. Kathi Kalu Oghad** (referred supra), the Constitutional Bench of the Supreme Court came 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 'garnishing 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 were 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 Art. 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. The appeals will now be listed for hearing on merits in accordance with the above principles.

And the principle laid down in **State of Bombay v. Kathi Kalu Oghad** (referred supra) was followed in **Ali Sheik v. Akbar Babar**¹⁰.

In view of the law declared by the Courts consistently in various judgments referred supra, the petitioners who are not arrayed as accused are not entitled to claim protection under Article 20(3) of the Constitution of India. Even if they are accused, in view of the provisions of Indian Evidence Act and Cr.P.C, the Investigating Agency can compel the petitioners to give blood samples, in view of the language used in Section 53(1) Cr.P.C. Therefore, the contention that the direction issued by the Magistrate to these petitioners violates the fundamental right guaranteed under Article 20(3) of the Constitution of India is

¹⁰ 1976 Cri.L.J. 759 (J&K)

without any substance and it is contrary to the settled law declared by the Apex Court in various judgments referred supra. Consequently, this contention is rejected.

The other contention raised by the learned counsel for the petitioner is that, the petitioners are entitled to claim protection under Article 20(3) of the Constitution of India, since, taking blood samples would cause pain to the petitioners and thereby, it is violative of Article 21 of the Constitution of India. But, this contention cannot be accepted, for the simple reason that blood would be collected in little quantity and that would not infringe the life and liberty of these petitioners.

In **R v. S.A.B**¹¹, the challenge to the constitutionality of the DNA warrant provisions Sections 487.04 to 487.09 of Criminal Code, R.S.C.1985, C-46 was rejected by the Supreme Court of Canada. The Supreme Court of Canada upheld the constitutionality of DNA warrant legislature and discussed the issue of weight to be attached to the evidence of DNA expert.

In **Selvi v. State of Karnataka** (referred supra), the Supreme Court considered the admissibility of scientific evidence at great length and the responsibility on the court. Reference has been made to the pronouncement of the US Supreme Court in **Daubert v. Merrell Dow Pharmaceuticals Inc**¹². In this case, the Supreme Court of US dealing with testimony of experts, observed that the standard of 'general acceptance of the particular field'

¹¹ (2003) 2 S.C.R. 678

¹² 509 US 579 (1993)

changed the rules with regard to the admissibility of scientific evidence for several decades. In para 26 of **Selvi** case, the Supreme Court of India has quoted from the majority opinion in **Daubert's** case on the matter in which the trial court should evaluate scientific evidence; the relevance as well as reliability of the scientific technique in question.

In the dissenting opinion in **Paul H. Breithaupt v. Morris Abram**¹³, the legality of the involuntary testing was rejected by the Court, and it was observed as follows:

“.. there is nothing ‘brutal’ or ‘offensive’ in the taking of a blood sample when done as in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right and certainly the test administered here would not be considered offensive by even the most delicate. Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of ‘decency and fairness’ that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process. The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors. Likewise, we note that a majority of our States have either enacted statutes in some form authorizing tests of this nature or permit findings so obtained to be admitted in evidence. We therefore conclude that a blood test taken by a skilled technician is not such ‘conduct that shocks the conscience’ [Rochin v. California, 342 US 165, 172 (1952)], nor such a method of obtaining evidence that it offends a ‘sense of justice’ [Brown v. Mississippi, 297 US 278, 285 (1936)]...”

Since there clearly was no consent to the blood test, it is the nature of the invasion of the body that should be determinative of the due process question here presented. The Court’s opinion suggests that an invasion is “brutal” or “offensive” only if the police use force to overcome a suspect’s resistance. By its recital of the

¹³ 352 US 432 (1957)

facts in Rochin-the references to a “considerable struggle” and the fact that the stomach pump was “forcibly used” – the Court finds Rochin distinguishable from this case. I cannot accept an analysis that would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights. Apart from the irrelevant factor of physical resistance, the techniques used in this case and in Rochin are comparable. In each, the operation was performed by a doctor in a hospital. In each there was an extraction of body fluids. Neither operation normally causes any lasting ill effects. The Court denominates a blood test as a scientific method for detecting crime and cites the frequency of such tests in our everyday life. The stomach pump too is a common and accepted way of making tests and relieving distress. But it does not follow from the fact that a technique is a product of science or is in common, consensual use for other purposes that it can be used to extract evidence from a criminal defendant without his consent. Would the taking of spinal fluid from an unconscious person be condoned because such tests are commonly made and might be used as a scientific aid to law enforcement? Only personal reaction to the stomach pump and the blood test can distinguish them. To base the restriction which the Due Process Clause imposes on state criminal procedures upon such reactions is to build on shifting sands. We should, in my opinion, hold that due process means at least that law-enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth”

(Emphasis supplied)

The same principles were followed by the Supreme Court in **Selvi v. State of Karnataka** (referred supra) and concluded that issuing directions or compelling the witnesses would not amount to violation of fundamental right guaranteed under Article 21 of the Constitution of India.

Right against Self-Incrimination - Article 20 of the Constitution provides that "no person shall be compelled to be a witness against himself." Respondent's contention that obtaining samples from him for DNA testing violates his right against self-incrimination. However, Madras High Court in **Shankar @**

Palanisamy versus State by Inspector of Police¹⁴, has categorically stated that subjecting the accused to DNA test does not violate Article 20(3) of the Constitution.

In **P.V. Valsan s/o Kannan Nambiar v. Station House Officer** [CrI. Misc. No.1629/2008, decided on 16.6.2008), the Kerala High Court has observed, "the right of police to draw the samples from an accused person for the purpose of DNA profiling is accepted by law. There is no question of any infringement of the right of privacy or right against self- incrimination. It is by now trite that in course of investigation, the DNA test can be conducted." The privilege of Article 20(3) is applicable only to testimonial evidence. Obtaining DNA samples from an accused in a criminal case or from the respondent in a paternity and sexual exploitation case, contrary to the belief of respondent in this action, will not violate his right against self-incrimination. This privilege applies only to evidence i.e testimony in essence taken under duress. The Courts have ruled that the right against self-incrimination is just a prohibition on the use of physical or moral compulsion to extort testimonial evidence from a respondent, not an exclusion of evidence taken from his body when it may be material and thus, the court can compel a person male or female to submit for DNA test since the gist of the privilege is the restriction on testimonial compulsion. Moreover, after incorporation of Section 53-A in Cr.P.C., DNA test of accused is must in cases of rape. The observation to this effect has been made

¹⁴ CrI.OP.No.18771/2006 dated 22.07.2009

by the Supreme Court in **Krishan Kumar Malik v. State of Haryana**¹⁵, in following words:-

"Now after the incorporation of Section 53-A in Criminal Procedure Code with effect from 23.06.2006, it has become necessary for the prosecution to go in for DNA test in such type of cases facilitating the prosecution to prove its case against the accused."

Right to Life - Article 21. Besides Article 20(3), the DNA test has also been challenged on grounds of violation of Article 21 of the Constitution in as much it restrains personal liberty and encroaches upon right to privacy which has been recognized as fundamental right within the ambit of Article 21. However, in light of the views of Supreme Court in **Selvi v. State of Karnataka** (supra) and judgment of Delhi High Court in **Rohit Shekhar v. Shri Narayan Dutt Tiwari and another case**¹⁶, it is clear that in paternity disputes, DNA test can be directed.

In **Veeran v. Veera Varmalle**¹⁷, father was directed to undergo DNA test and it was observed that it cannot be said to be affecting his fundamental right and is not violative of his right to personal liberty enshrined under Article 21 of the Constitution. However, the Supreme Court has observed in **Bhabani Prasad Jena etc. v. Convener Secretary Orissa State Commission for Women**¹⁸, that, when there is apparent conflict between right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the Courts

¹⁵ 2011(7) SCC 130

¹⁶ 2011(4) RCR (CrL.) 307

¹⁷ AIR 2009 Madras 69

¹⁸ 2010(8) SCC 633

must exercise its discretion only after balancing the interest of the parties and on due consideration whether for a just decision in the matter, DNA is eminently needed.

Learned counsel for the petitioner placed reliance on **State of Bombay v. Kathi Kalu Oghad** (referred supra), **Naveen Krishna Bothireddy v. State of Telangana and another** (referred supra), and **Bhabani Prasad Jena etc. v. Convener Secretary Orissa State Commission for Women** (referred supra).

In **Naveen Krishna Bothireddy v. State of Telangana and another** (referred supra), this Court after analyzing the entire law, held that, ordering DNA examination and directing the petitioners to give blood samples is not violative of Articles 20(3) & 21 of the Constitution of India. Further, this Court referred to review the entire law on this aspect.

In **Veeran v. Veera Varmalle** (referred supra), the Madras High Court held that, paternity testing requires a painless sample from both the child and possible father. Even without a sample from the mother, DNA paternity tests results are upto 99.9999% accurate-that's one-in-a million odds your results are correct and it is not violative of Article 21 of the Constitution of India.

In **Rohit Shekhar v. Shri Narayan Dutt Tiwari and another case** (referred supra), the Apex Court had an occasion to decide similar question of conducting DNA and finally concluded that conducting DNA test it is not violative of Articles 20(3) & 21 of

the Constitution of India. Even otherwise, Article 21 is subject to certain exceptions. A bare look at the language used in Article 21 is that protection of life or personal liberty is a fundamental right guaranteed under Constitution of India, except the procedure established by law.

In such case, the petitioners are not entitled to claim any immunity from undergoing DNA examination by taking advantage of the fundamental right guaranteed under Constitution of India. The contention of the petitioners that the order passed by the Magistrate would infringe the fundamental right guaranteed under the Constitution of India is without any substance and this question needs no further consideration, in view of the law declared by the Apex Court in **Selvi v. State of Karnataka** (referred supra).

Sections 53 & 54 Cr.P.C, are effective tools to facilitate effective investigation for authorizing the examination of the arrested person by a medical practitioner, if, from the nature of the alleged offence or the circumstance under which it was alleged to have been committed, there is a reasonable ground for believing that such examination of the person will afford evidence. The person who has been arrested and later enlarged on bail, may also be examined medically under this section. Such examination is not hit by Article 20(3) of the Constitution of India. (vide **Ananth Kumar Naik v. State of Andhra Pradesh**¹⁹).

¹⁹ 1977 Cr.LJ 1797

Coming to the other aspect of human rights of these petitioners, since taking blood samples is not violative of fundamental right guaranteed under Constitution of India, the question of life and liberty as per international covenants of human rights is not violative. At the same time, the infringement of privacy does not arise, as the DNA test creates the same amount of insecurity to the persons.

The Complexity of privacy and DNA collection/ testing depend upon, the personal and sensitive nature of DNA, the use of DNA raises many privacy concerns. The concerns fall into three basic areas: first, if a person has given consent to have his or her DNA used for a specific purpose, must the DNA be destroyed or can it be used for other purposes as well. If a person must give consent for a specific purpose, what happens if the person is no longer able to give consent. Finally, if the testing of one person's DNA yields information that is likely, or probable, or certain to impact another person, does that person have a right to know the information discovered. There are variations on these questions -- as for example does DNA is permitted to be taken without consent (to test for a crime, perhaps), does that lack of need for consent permit all uses of DNA that others want. The complexity of these questions demonstrates that in the situation of DNA collection and testing privacy cannot be protected simply through consent from an individual. Therefore, it is the duty of the labs to take care to use protective measures in misusing DNA test.

The use of DNA has raised a number of concerns about increased police powers and the unquestioning adoption of a conservative crime control agenda in the administration of criminal justice system. International human rights law provides that everyone has a right to a fair and public hearing by the independent and impartial tribunal. It is essential to a fair trial that the suspects have the opportunity to challenge the reliability of the scientific testing. In order to use DNA profiling, it is necessary to obtain certain types of body material. The sample may be obtained by chance. In a case where the sample is obtained without coercion (for example, by taking a hair follicle from the defendant's clothing) the sample is lawfully obtained both in India and many other countries. According to this view, DNA testing as such is an interference with the right to integrity of the body, resulting from prior interference, caused by the taking of body materials against the suspect's will.

In **Gautam Kundu v. State of West Bengal**²⁰, a woman and a child filed case for maintenance under section 125 Cr.P.C. The father claimed himself not to be father of child and prayed for blood test. In this case, the plea of father was rejected by Magistrate as well as by the High Court on the grounds that during the continuance of marriage if a child is born, then it is a conclusive proof of legitimacy. The Supreme Court also held that the application for blood test cannot be accepted. It was also said that no person could be compelled to give a sample of blood for

²⁰ 1993 (3) SCC 418)

DNA testing against his or her will and on or refusal to give sample, no adverse inference can be drawn.

In **Sajeera v P.K. Salim**²¹, the paternity of a child was challenged in the maintenance case. The father contended that there was no need of DNA test but agreed to conduct of the test on the expense of the petitioner. In this case the Kerala High Court observed that, “though by blood test it cannot be positively established the paternity of child, it can certainly exclude individual as the father of child. It is true that without the consent of the person, blood test cannot be conducted and there is no law in India enabling the court to compel any person to undergo for blood test.

In **Syed Mohd. Ghouse v. Noorunnisa Begum**²², this Court relied on the judgments in the **Gautam Kundu** case (referred supra) and held that court cannot compel a person to undergo a DNA test it is however relevant in the case of **Swati Lodha v. State of Rajasthan**, much earlier, the Rajasthan High Court observed that taking of blood test is not violative of Article 20(3) of the Constitution of India and when the accused refuses to give sample blood for determining paternity, refusal amounts to corroboration.

In **Kanti Devi v. Poshi Ram**²³, the court gave priority to social parentage over biological parentage and rejected DNA evidence by observing that though the result of DNA test is said to

²¹ 2000 CrLJ 1208

²² AIR 2001 (Crl.) Law Journal 2028

²³ AIR 2001 SC 2226

be scientifically accurate; It is not enough to escape from conclusiveness of Section 112 of Indian Evidence Act of 1872.

Again in case of **Sharda v. Dharam Pal**²⁴, the Supreme Court took a very positive view regarding the importance as well as admissibility of DNA evidence in matrimonial cases. In this case, the Supreme Court held that a Matrimonial court has the power to order a person to undergo medical test and this would not amount to violation of Article 21 of the Constitution. In case of refusal to undergo test, the court would be entitled to draw an adverse inference against him. The Delhi High Court has also adopted the same view in **Mrs. Kanchan Bedi v. Gurpreet Singh**²⁵, where the parentage of infant was in question and the application filed by the mother was opposed by the father for conducting DNA test. The court held that, "It appears for me to be difficult to resist that the law as it presently stands, does not contemplate any impediment or violation of rights in directing persons to submit themselves for DNA test, especially where the parentage of a child is in controversy for the grant of maintenance. However, the judgment of Supreme Court in **Selvi v. State of Karnataka** (supra) and judgment of Delhi High Court in **Rohit Shekhar v. Shri Narayan Dutt Tiwari and another case** (referred supra), it is clear that in paternity disputes, DNA test can be directed and it would not violate the right of privacy or fundamental right guaranteed under Article 20(3) or Article 21 of the Constitution of India.

²⁴ AIR 2003 SC 3450

²⁵ (2003) DMC 458

United Nations High Commissioner for Refugees prepared a note on DNA testing. Though the case is not on the basis of refugee context, but, the same can be applied even to the present facts of the case, where the petitioners are not the accused, they are directed to undergo DNA test by giving blood samples.

V. Summary of key guidance on DNA testing to establish family relationships in the refugee context

a) A rights and dignity-based approach to DNA testing in the context of establishing family relationships

16. In light of its intrusive nature and risks of infringing an individual's right to privacy, it is reiterated that every step should be taken to ensure that DNA testing to verify claimed family relationships is conducted only as a last resort. At the same time, where there are strong indications of intent to commit fraud on the part of the individuals claiming the existence of family relationships, and DNA testing is considered the only reliable means to prove or disprove fraud, resort to it would help secure important objectives of securing the integrity of the programmes concerned.

17. Clear criteria should be established by States in regard to the circumstances in which DNA testing is considered as necessary for the purpose of establishing family relations, including in the context of admission for family reunification.

18. A rights and dignity-sensitive approach means that DNA testing to establish family relationships should be strictly regulated to ensure that safeguards guaranteeing non-discrimination and the individuals' right to privacy are provided.

19. Explicit and informed consent is necessary from the persons concerned before the test is administered. In the case of minors who are capable of forming their own views, they should also be able to participate in the decision making process, express their views and give their consent.¹⁵ Parents of minors should give their consent prior

to the testing of the child, while, in the case of unaccompanied or separated children, the guardian's consent is required. As appropriate, parents who are separated from their children should be assisted to communicate with each other and make the decision jointly. DNA testing on children should only be done based on "best interests considerations".¹⁶

20. DNA testing should be performed by qualified personnel who should be sensitized to rules of confidentiality.

21. DNA testing to establish family relationships should be preceded by pre-test counseling which should be ensured by the authority requiring the test. Such pre-test counseling should provide all relevant information to the individuals concerned so that an informed choice can be made. The technicalities of the test, the reasons for it as well as implications of refusing to undergo it should be explained. The individuals concerned should also be counseled on the possibility of unexpected results. This would help avert potential protection risks which may arise due to emotional trauma faced when the results are unexpected.¹⁷

22. As part of the pre-test counseling explained in this note, principal applicants or others concerned should be urged to disclose relationships which, although culturally treated the same way as blood relationships, are, to their knowledge, not so. The option available to such family members to join the principals in the context of family reunification or resettlement in their own right should be explained. They should have a clear understanding that where the claimed relationship is disproved through DNA testing, unless there are strong and clear extenuating circumstances, the application is almost certain to fail.¹⁸

23. Pre-test counseling should be performed by qualified personnel and should take place on a confidential basis. The individuals concerned should be given time to consider the option.

24. The authority requiring the test should ensure that disclosure of negative results is undertaken with great sensitivity for the emotional and psychological wellbeing of persons concerned. Consideration should be given to how the information is to be disclosed, to whom, and in what order of priority. The situation of the individuals should be monitored closely and post-test counseling should be provided to avert potential protection risks. In case of a negative result, it should be possible for a second test to be performed so as to ensure utmost reliability of the results. In cases where DNA testing involving persons of concern has been conducted with UNHCR's knowledge, cooperation or support and the results of the tests are relevant to the propriety or integrity of UNHCR operations, protocols should be established for the provision to UNHCR of those results in the appropriate formal manner.

25. Disclosure of the results of DNA testing should strictly respect rules of confidentiality. In regard to the entity or personnel performing the test, it should

reveal the outcome of the test only to the authority which has requested it. In regard to disclosure to interested parties, the results should be conveyed by the authority requiring the test only to the persons subjected to the test, or, in case of children, their parents or guardians

who have given consent on their behalf. Beyond that, disclosure can only be done with the consent of the subjects of the test, and, in the case of children, their parents or guardians as the case may be.

26. For purposes of data protection, and in the context of verifying family relationships, no data should be collected from the DNA sample except that which is necessary for proving the family relationship. The information should not be used for any other purpose (for instance medical tests or criminal investigations) than the verification of family relationships.

27. All materials associated with the test should normally be destroyed once a decision has been made. If they are to be stored, the subjects of the test should be informed of the reasons, where this will take place, and their consent must be obtained.

b) Family unity of refugees and DNA testing

28. DNA testing can be intrusive and potentially have serious negative consequences. On the other hand, it can be the only alternative to meet important operational objectives. Its use to establish family links in the refugee context should be resorted to carefully and judiciously as set out in this note. Documentary proof, registration records, interviews with the individuals concerned and other forms of verification of the claimed family relationship should normally be relied on first. The benefit of the doubt should be given where the evidence is overall corroborative of presumed relationships and there are no serious doubts.

29. Even if DNA tests disprove any blood links, this should not be conclusive of fraudulent intent, as there may be other reasons why the individual concerned claims a particular relationship.

30. UNHCR promotes a liberal and wide definition of "family" to enable refugees to maintain the unity of their families as they are accustomed to in their country of origin. Regard should be given to social and cultural norms of the society from which the refugees originate, as well as emotional dependency and long term acceptance of the claimed relationships when considering family reunification of refugee families.

31. Where DNA testing is undertaken to establish a parent/child relationship, UNHCR recommends that consideration be given to the administration of the test on only one parent, normally the mother. If the mother/child relationship is established, a proven marriage¹⁹ between the mother and her spouse should suffice to establish the father/child relationship without the necessity of the purported father having to undergo a DNA test.

c) Other considerations

32. DNA testing should not delay the often already lengthy family reunification process. The cost of a DNA test should be borne by the State requiring the test. Costs associated with DNA testing requested by refugees could be waived on humanitarian grounds, or, at least, the relevant government could consider reimbursing the costs.

By applying the guidelines of United Nations High Commissioner for Refugees, issuing directions to give blood samples is not violative of human rights guaranteed by international covenants of human rights.

Learned counsel for the petitioners contended that, when caste cannot be determined based on the blood samples, what cannot be done directly, cannot also be done indirectly and directing them to undergo DNA test and examination would amount to determination of paternity of the child, which cannot be permitted under law directly. Learned counsel for the petitioners placed reliance on the judgment of Supreme Court in **Smt. Ujjam Bai v. State of Uttar Pradesh** (referred supra), wherein, in paragraph 182 of the Judgment, it was held as follows:

“One more point needs to be dealt with. It was said that a quasi-judicial tribunal being an instrumentality of the State its action is State action and so it will be under the same disabilities as the State to do a thing which it is incompetent or impermissible for the State to do. 'It is also said that what a State cannot do directly it cannot do indirectly. In so far as the incompetency of the State arises out of a constitutional prohibition or lack of legal authority due to any reason whatsoever, it will attach itself to the action of the quasijudicial tribunal purporting to act as the instrumentality_ of the State. Where, in such a case, any fundamental right of a person is violated by the action of the quasi-judicial tribunal that person is entitled to treat the action as arbitrary or a nullity and come up to this court under Art. 32 because the, action would be one which is not authorised by law. But while an erroneous action of the State in exercise of its administrative functions can be challenged directly under Art. 32 if it affects a person's

fundamental right on the ground that it is not authorised by law the action of the tribunal pursuant to an erroneous order will not be open to challenge for the reason that its action arises out of the exercise of a judicial power and is thus authorised by law, State action though it be. When, Under the provisions of a law, the State exercises judicial power, as for instance, by entertaining an appeal or revision or assessing or levying a tax it acts as a quasi-judicial tribunal and its decision even though erroneous will not be a nullity and cannot be ignored. It can be corrected only under Art. 226 or Art. 227 by the High Court or under Art. 136 by this Court inasmuch as the State would then be acting as a quasi-judicial tribunal.

To summarise, my conclusions are these

1. The question of enforcement of a fundamental right will arise if a tax is assessed under a law which is (a) void under Art. 13 or (b) is ultra vires the Constitution or (c) where it is subordinate legislation, it is ultra vires the law under which it is made or inconsistent with any other law in force.

2. A similar question will also arise if the tax is assessed and/or levied by an authority

(a) other than the one empowered to do so under the taxing law or (b) in violation of the procedure prescribed by the law or (c) in colourable exercise of the powers conferred by the law.

3. No fundamental right is breached and consequently no question of enforcing a fundamental right arises where a tax is assessed and levied bona fide, by a competent authority under a valid law by following the procedure laid down by that law, even though it be based upon an erroneous construction of the law except when by reason of the construction placed upon the law a tax is assessed and levied which is beyond the competence of the legislature or is violative of the provisions of Part III or of any other provisions of the Constitution.

4. A mere misconstruction of a provision of law does not render the decision of a quasi-judicial tribunal void (as being beyond its jurisdiction). It is a good and valid decision in law until and unless it is corrected in the appropriate manner. So long as that decision stands, despite its being erroneous, it must be regarded as one authorised by law and where, under such a decision a person is held liable to pay a tax that person cannot treat the decision as a nullity and contend that what is demanded of him is something which is not authorised by law. The position would be the same even though upon a proper construction, the law under which the decision was given did not authorise such a levy."

(emphasis supplied)

This principle is not in dispute, but it has no relevance to the present facts of the case, for the reason that, the first petitioner is the alleged biological mother of A-1 and petitioners 2 & 3 are the natural brothers of A-1. When A-1 is claiming to be son of Kathi Yedukondalu, who is the father of Kathi David Raju, a drop out at VI Standard, the only possible test is DNA test, directing the petitioners i.e. biological mother (first petitioner) and brothers (petitioners 2 & 3) and A-1 to undergo DNA test, as scientific evidence would help in criminal investigation.

Therefore, the contention of the learned counsel for the petitioners that permitting the investigating agency indirectly to do something which cannot be done directly is without any substance.

Learned Public Prosecutor contended Immadabatnuni Veeranjanyulu @ Kathi David Raju (A-1) filed Crl.P.No.886 of 2016 which was dismissed as withdrawn. A-1 also filed W.P.No.4935 of 2016, obtained an interim order and stay was vacated on 06.01.2017. Later, A-1 filed W.A.No.95 of 2017 and the same was dismissed as withdrawn on 20.01.2017. Again A-1 along with A-2 filed Crl.P.No.551 of 2017 to quash the proceedings in Crime No.3 of 2016 on the file of Bapatla Town Police Station, Guntur District, but no stay was granted. Further, A-1 also filed Crl.P.No.12458 of 2017 challenging the order in CFR No.334 of 2016 dated 22.01.2016 on the file of Additional Judicial First Class Magistrate, Bapatla, Guntur District. Further, it is

contended that A-1 approached this Court by suppressing the above facts.

But, that is not a ground to dismiss the petition, since the petitioners are contending that they are not related to A-1, who is claiming to be the son of Kathi Yedukondalu. Therefore, it is not a ground to reject the prayer in this petition.

In view of my foregoing discussion, the order under challenge did not infringe the fundamental right guaranteed under Article 20(3) and Article 21 of the Constitution of India and on the other hand, Sections 53, 53-A & 54 of Cr.P.C permits the Investigating Agency to collect evidence, including blood samples, for conducting DNA test. Further, the law laid down by the Apex Court in the long line of perspective judgments referred supra is consistent on this issue. Therefore, the order under challenge cannot be quashed.

In the result, the criminal petition is dismissed.

Consequently, miscellaneous applications pending if any, shall also stand dismissed.

JUSTICE M. SATYANARAYANA MURTHY

Date: 02.08.2018

SP