

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

Criminal Revision Case No.2010 of 2014

Between:

Kokkirigadda Devaraj.

.... Petitioner/Accused

AND

State of Andhra Pradesh,

Rep. by Public Prosecutor, High Court at Hyderabad

and another.

.... Respondents

DATE OF JUDGMENT PRONOUNCED: **29.10.2018**

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

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1. Whether Reporters of Local Newspapers
may be allowed to see the judgment? Yes / No
 2. Whether the copies of judgment may be
marked to Law Reporters / Journals? Yes / No
 3. Whether His Lordship wish to
see the fair copy of the Judgment? Yes / No

U. DURGA PRASAD RAO, J

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! Counsel for Petitioner : Sri M.P.V.N.V. Sastry

^ Counsel for Respondent No.1 : Public Prosecutor (AP)

^ Counsel for Respondent No.2 : None appeared

< Gist:

> Head Note:

? Cases referred:

- 1) 2009 CrI.L.J.4144
- 2) 2015 CrI.L.J.3028
- 3) AIR 1979 SC 1791 = MANU/SC/0216/1979
- 4) (2010) 7SCC 263 = MANU/SC/0325/2010
- 5) ILR 2004 KAR 2637 = MANU/KA/0149/2004
- 6) 1991 CrI.L.J.2416 = MANU/TN/0149/1990
- 7) 1977 CrI LJ 1797
- 8) 2004 CrI.L.J.4003
- 9) MANU/SC/0260/2003

HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

Criminal Revision Case No.2010 of 2014

ORDER:

In this Criminal Revision Case, the petitioner/accused challenges the order dated 08.09.2014 in CrI.M.P.No.52/2013 in S.C.No.327 of 2012 passed by the learned Additional Assistant Sessions Judge, Eluru, West Godavari District, allowing the petition filed by the prosecution under Section 53(A) r/w 45 of Indian Evidence Act praying the Court to send the *defacto* complainant, her 18 months old baby and the accused to RFSL, Hyderabad for DNA test to prove the case of the prosecution.

2 a) The prosecution case is that the *defacto* complainant and accused are the residents of Boyagudem h/o Chintalapudi village and neighbours to each other. Since 5 years prior to the complaint the accused went around *defacto* complainant on the guise of love and made proposal to that effect and having believed him, she also accepted his love and the accused promised that he would marry her after getting job. The further case of the prosecution is when the parents of *defacto* complainant put the marriage proposal to the parents of the accused, they agreed for the marriage. They agreed to perform their marriage after their son got job. Hence, both the families did not object for their close moving. In that process, the accused advanced with the *defacto* complainant and had sexual intercourse with her for which she consented due to the promise made by him to marry her. However, after the accused got job in ICICI

Bank at Vijayawada he refused to marry her inspite of knowing that she became pregnant. He advised her to go for abortion. Hence, she lodged the complaint. By the time of filing charge sheet, *defacto* complainant was pregnant and later she gave birth to a male child. Hence, the trial Court framed charges under Sections 417, 376 and 506 IPC against accused.

b) During the course of trial, prosecution filed CrI.M.P.No.52/2013 to refer the son born to her and the accused for DNA examination to prove the paternity.

c) Respondent filed counter and opposed the petition contending that there was inconsistency in the evidence of prosecutrix (PW1) and medical evidence regarding her conceiving pregnancy and actual date of delivery and therefore no purpose will be served in allowing the petition.

d) The trial Court having observed that while the contention of accused was that he had nothing to do with the offence and the complainant's case was that her son was born through accused, it was apposite to direct the accused to undergo DNA examination to decide the paternity of 18 months old baby of the *defacto* complainant, allowed the petition.

Hence, the instant Criminal Revision Case by accused.

3) Heard arguments of Sri M.P.V.N.V.Sastry, learned counsel for petitioner and learned Additional Public Prosecutor for 1st respondent. Though notice to 2nd respondent/*defacto* complainant was served but there is no representation on her behalf.

4) Fulminating the impugned order, learned counsel for petitioner vehemently contended that the evidence on record adduced before the trial Court establish the innocence of the accused and therefore, the attempt on the part of prosecution to refer the accused and baby of the complainant for DNA test is only to fill up the lacuna in the prosecution case. It is further contended that in an offence under Section 376 IPC, the DNA test will not have any value addition to the case.

5) Learned Addl. Public Prosecutor argued that the petitioner under the guise of love and promise to marry, had repeated sexual intercourse with the victim but after getting job, refused to marry her and thus cheated her and due to deceptive inducement the prosecutrix believed him and surrendered herself to him and thereby she became pregnant and gave birth to a male child, who is now aged about 5 years and therefore, if DNA test is conducted to the accused and the minor boy, the paternity will be decided and thereby the cheating committed by accused against the victim will also be established and considering the same the trial Court allowed the petition. He thus prayed to dismiss the CrI.R.C.

- 6) The point for consideration is:

“Whether there are merits in this Crl.R.C. to allow?”

- 7) **POINT**: The facts of the case are already narrated supra.

- 8) DNA test has become a part of criminal and civil justice system.

In criminal cases, DNA test is mainly conducted on the body parts of person like bones, hair strands, nail clips, skin tissues, blood samples, semen, saliva etc., to identify a person. In civil cases, particularly in matrimonial related issues, this test is being employed to decide the paternity of a person.

- 9) The Apex Court has succinctly narrated the purpose and process of DNA. In *Pantangi Balaram Venkata Ganesh and others vs. State of A.P. and others*¹, it was observed thus:

“Para-46. Submission of Mr. Sachar that the report of DNA should not be relied upon, cannot be accepted. What is DNA? It means:

(Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on. Using this genetic fingerprinting identification of an individual is done like in the traditional method of identifying fingerprints of offenders. The identification is hundred percent precise, experts opine.

There cannot be any doubt whatsoever that there is a need of quality control. Precautions are required to be taken to

¹ 2009 Cr.L.J.4144

ensure preparation of high-molecular-weight DNA complete digestion of the samples with appropriate enzymes, and perfect transfer and hybridization of the blot to obtain distinct bands with appropriate control. xx xx xx

Para-47 xx xx xx

If the DNA fingerprint of a person matches with that of a sample, it means that the sample has come from that person only. The probability of two persons except identical twins having the same DNA fingerprint is around 1 in 30 billion world population.”

10a) Recognizing the importance of DNA profiling in a criminal case, Explanation to Section 53 was suitably amended by Cr.P.C. Amendment Act, 2005 (Act 25/2005) w.e.f. 23.06.2006. The amended Section 53 reads thus:

“53. Examination of accused by medical practitioner at the request of police officer.

(1) 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 for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

Explanation.-In this section and in sections 53A and 54,-

(a) "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;

(b) "registered medical practitioner" means a medical practitioner who possesses any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register."

So, by virtue of the amendment, the term 'examination' imbibes in itself DNA profiling also among other tests. Since Section 53 appears in the Chapter-V of Cr.P.C. under the heading "Arrest of Persons" and since phraseology such as "*when a person is arrested on a charge of committing an offence*", "*examination of his person will afford evidence as to the commission of an offence*" etc., is employed, one can understand that the examination of such arrested person takes place during the course of investigation.

11) Then, we have judicial pronouncements to the effect that though a person is not in custody and he is on bail, still concerned Court on the request of the Investigating Officer can direct the accused to undergo the test mentioned in Section 53 to facilitate the investigation.

12a) In *Kodi Satish Naidu vs. The State of A.P.*² the facts are that the accused on the promise of marrying the complainant continued physical contacts with her and she became pregnant. When she requested him to marry, he refused and avoided her. Hence on her complaint, Cr.No.122 of 2011 was registered by the police under Sections 376, 417 and 506 IPC and also under section 3(1)(x)(xii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act. The accused obtained anticipatory bail and later surrendered before the police and enlarged on bail. On the request of Investigating Officer, the Magistrate directed the accused to give blood sample for conducting DNA test for establishing his paternity with the child of complainant. The said order was challenged before the Sessions Judge but the same was confirmed. Hence, the accused preferred criminal petition before the High Court. It was contended on behalf of accused that he was not in judicial custody as he was already enlarged on bail and therefore Section 53 Cr.P.C. has no application. He further contended that directing him to undergo DNA test would amount to self-incrimination and violative of Article 20(3) of the Constitution of India. A learned Judge of this Court repelled the first contention quoting the judgment reported in *Ram Lal Narang vs. State (Delhi Administration)*³ wherein it was held thus:

"Though Section 53 Cr.P.C., refers only to examination of the accused by medical practitioner at the request of a police officer, there is no reason why the Court should not have a wider power for the purpose of doing justice in criminal cases

² 2015 Cr.L.J.3028

³ AIR 1979 SC 1791 = MANU/SC/0216/1979

by issuing a direction to the police officer to collect blood sample from the accused and conduct DNA test for the purpose of further investigation under Section 173(8) of the Code."

b) Then, with regard to second contention, the learned Judge citing the decision of Apex Court in ***Smt. Selvi and others vs. State of Karnataka***⁴ held that direction for DNA profiling will not amount to infringing Article 20(3) of the Constitution.

13) In ***H.M. Prakash @ Dali vs. The State of Karnataka***⁵ the High Court of Karnataka expressed similar opinion stating that though the accused is not in custody and enlarged on bail, still an order can be passed under Section 53 Cr.P.C. It was held thus:

"Para-28. Merely because the accused is released on bail, he does not cease to be the "arrested person" or "person in custody" and that therefore, the power conferred on the Court/investigating officer under Section 53 of the Code can be exercised. Until the accused is tried, proved not guilty and acquitted of the charges levelled against him, he is the accused and under custody of the Court. 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 as and when required or directed. He is notionally in the custody of the Court and hence, continues to be a person arrested."

The High Court further held when Section 53 conferred power on the Investigating Officer, to hold DNA test, such a power equally vests with the Court or Magistrate who tries the case. It observed thus:

⁴ (2010) 7SCC 263 = MANU/SC/0325/2010

⁵ ILR 2004 KAR 2637 = MANU/KA/0149/2004

Para-29. Now coming to the fourth and last contention of the petitioner, though Section 53 of the Code discloses that the medical examination will have to be conducted at the instance of a police officer not below the rank of sub-inspector, that does not prohibit other superior officers or the Court concerned from exercising said power if it is necessary for rendering justice in criminal case. If medical examination of an accused can be done at the instance of the police officer not below the rank of sub-inspector, then such a power should be deemed to be impliedly possessed by a Magistrate or Court trying the offence. There is no warrant for curtailing the scope of the Section 53 of Cr.P.C. The primary duty of the Court is to ascertain the truth. Thus, it is not correct to say that Court or Magistrate cannot direct or order the accused for medical examination as contemplated under Section 53 & 54 of the Code." (Emphasis supplied)

14) In *Thaniel Victor vs. State*⁶ the High Court of Madras relying upon the decision of Andhra Pradesh High Court in *Ananth Kumar v. State of Andhra Pradesh*⁷ has held that release of an arrested person on bail cannot take away the reality of the situation and such person does not cease to be an arrested person or an accused person for the purpose of Sections 53 and 54 of the Code.

15) So, from the above jurimetrics, it is clear that during the stage of investigation not only the Investigating Officer but also the Court concerned can take recourse under Section 53 Cr.P.C. to refer the accused for 'examination'. It is further clear that though the accused is not in the custody but on bail, still Section 53 applies.

⁶ 1991 Cr.L.J.2416 = MANU/TN/0149/1990

⁷ 1977 CrL LJ 1797

16) The pertinent question at this stage is, whether the aid of Section 53 Cr.P.C. can be had by the Court, during the stage of trial as in the instant case.

17) It should be noted that in a given case, during investigation, the Investigating Officer might not have subjected the accused to DNA test or requested the Court to pass an order to that effect for proving the paternity or for proving some other fact. In such an event, whether the prosecution is refrained from making a request to the trial Court to order for DNA test during trial. There is no specific provision in Cr.P.C. facilitating the trial Court to direct the accused to undergo DNA test during trial. While Section 53 Cr.P.C. relates to the stage of investigation, Section 311-A Cr.P.C postulates different tests. Hence, the point is whether the prosecution is helpless and trial Court is powerless. In my considered view, the purpose of procedural codes and Courts is to make a quest for truth and advance the cause of real justice. When the Courts, by virtue of above precedential jurisprudence draw power under Section 53 Cr.P.C. during investigation, equally they draw such power during the trial stage also. In my considered view, merely because the police have not taken steps to conduct the 'examination' as mentioned in Section 53 Cr.P.C. during investigation stage, that should not be the end of the matter and on the other hand, the prosecution can make a request for such examination during trial stage as well.

18) My view gets fortified by the decision of a Division Bench of High Court of Orissa reported in *Thogorani @ K.Damayanti vs. State of Orissa and others*⁸. The police filed charge sheet for the offence under Sections 376, 417, 506 r/w 34 IPC and Section 3 of the S.Cs & S.Ts (POA) Act. The case was committed and pending for trial in S.C.No.20 of 2002 before the learned Addl. Sessions Judge, Paralakhemundi. At that stage a petition was filed before the trial Court for ordering DNA test for proving paternity of the issues born to the defacto complainant through the accused. The trial Judge by his order dated 24.07.2003 directed the Investigating Officer to get ossification test of the complainant and also take steps for DNA test after determining the blood group of the victim lady, her two children and accused. Though the Investigating Officer conducted ossification test, he did not conduct DNA test or blood grouping test. This inaction of the Investigating Officer was deprecated by the High Court of Orissa in the writ petition filed by the victim. Referring Sections 53 and 173 Cr.P.C., it held thus:

“Para-14. In this view of the matter, though Section 53 Cr.P.C. refers only to examination of the accused by medical practitioner at the request of a police officer, there is no reason why the Court should not have a wider power for the purpose of doing justice in criminal cases by issuing a direction to the police officer to collect blood sample from the accused and conduct DNA test for the purpose of further investigation under Section 173(8) of the Code.

⁸ 2004 Cr.L.J.4003

The High Court ultimately directed the Investigating Officer to collect blood samples and conduct DNA test. It also referred the judgment of Apex Court in *Sharda v. Dharam Pal*⁹ and observed that in the event of refusal of Opposite Party No. 3 (accused) to give his blood sample for conducting DNA test, an adverse inference can be drawn by the trial Court. Therefore, there can be no demur that the power under Section 53 r/w 173(8) Cr.P.C. can be used by the Court even during the stage of trial. That being the legal position, the order of the trial Court does not suffer from any infirmity to warrant interference by this Court.

19) Accordingly, this Criminal Revision Case is dismissed by confirming the order in CrI.M.P.No.52/2013 in S.C.No.327 of 2012 passed by the Additional Assistant Sessions Judge, Eluru, West Godavari District, with the observation that in case the petitioner/accused does not cooperate with the trial Court for undergoing DNA test, the trial Court can draw an adverse inference against him during the course of its judgment.

As a sequel, miscellaneous application pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 29.10.2018
Scs/Murthy

⁹ MANU/SC/0260/2003