

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-D-226-DB-2015 (O&M)
Date of Decision: 27.07.2023

Dewan Singh @ Ram Singh

..... Appellant

Versus

State of Haryana

..... Respondent

CORAM : HON'BLE MR. JUSTICE RAJ MOHAN SINGH
HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr.Arshit Goel, Legal Aid Counsel for the appellant.
Mr. Ashish Yadav, Addl.AG, Haryana.

HARPREET SINGH BRAR, J.

1. The present appeal has been preferred against the judgment of conviction and order of sentence dated 17.12.2014 passed by learned Additional Sessions Judge, Faridabad in case bearing FIR No. 135 dated 15.06.2014, under Sections 363, 366A, 376 IPC and under Section 4 of The Protection of Children from Sexual Offences Act, 2012 (POCSO Act), registered at Police Station NIT, Faridabad, whereby the present appellant/accused has been convicted and sentenced to undergo imprisonment as under:-

Offence under which accused/ appellant has been held guilty	Period of sentence	Fine Imposed (Rs.)	Sentence awarded in default of fine
Section 363 IPC	Rigorous imprisonment for seven years	10,000/-	Rigorous imprisonment for six months
Section 366-A IPC	Rigorous imprisonment for ten years	15,000/-	Rigorous imprisonment for one year
Section 376 IPC	Rigorous imprisonment for life	25,000/-	Rigorous imprisonment for one year
Section 4 POCSO Act	Imprisonment for life	25,000/-	Rigorous imprisonment for one year

All the sentences were ordered to run concurrently.

FACTUAL BACKGROUND

2. Brief facts of the prosecution case are that on 15.06.2014 at about 3.00 p.m., ASI Harvinder Singh, Police Post Sector 21D, Faridabad informed Lady Inspector Asha Rani, Women Cell, in-charge NIT, Faridabad that he had received an information from Police Control Room with regard to a rape having been committed upon a five year old girl. On receiving this information, Inspector Asha Rani along with SI Satyadev and Lady Constable Bimlesh reached B.K.Hospital for investigation and found ASI Harvinder Singh and Constable Pradeep Kumar present there along with a *ruqa* and MLR of the victim/prosecutrix. Legal Aid Counsel Ms. Bhanu Priya Sharma was also present there and, in her presence, an application was moved seeking opinion of the doctor regarding state of the victim/prosecutrix as to whether she was fit to make any statement. Doctor declared her unfit for making any statement. Then Inspector Asha Rani recorded the statement of mother of the victim/prosecutrix Smt.Kariman wife of Hazrat (complainant in the present case) to the effect that she and her husband was running a tea shop/*khokha* near Labour Chowk, Sector 21B, Faridabad. He also works as a labourer. She had one son and four daughters and that her daughter i.e. the prosecutrix is about five years old. On the fate-ful day i.e. 15.06.2014 at about 11.00 a.m. she was present at her tea shop/*khokha* and her husband had gone for labour work. Her daughter Ravina and the prosecutrix were playing in a park near their tea *khokha*. She had gone home to get food and when she came back after almost one hour, her daughter Ravina told that the prosecutrix was playing with a man who had

taken her away. Complainant searched for the prosecutrix and in this process met one Sunil along with whom she went about 100 meters ahead near the bushes, adjacent to the tubewell. They saw a person namely Ram Singh, resident of Nainital who was already known to them, lying over her daughter having removed his pants. They also noticed that blood was oozing out from the private parts of the prosecutrix. Said Ram Singh tried to flee but the complainant and Sunil caught hold of him and made a call at 100 number but he managed to escape. Thereafter, the complainant called her husband and they took the victim/prosecutrix to B.K.Hospital.

3. On the basis of aforesaid statement of the complainant, formal FIR (Ex.PA/1) was registered and the investigating machinery swung into motion. Accused was arrested and a suffered disclosure statement (Ex.PM). Prosecutrix was got medico-legally examined and her ossification test was also got conducted. Statement of complainant under Section 164 Cr.P.C. was got recorded by moving an application (Ex.PT) before learned Illaqa Magistrate. On completion of the investigation, challan against the accused/appellant was presented before Judicial Magistrate 1st Class, Faridabad, who committed the case to the Court of Session vide order dated 28.07.2014 after making due compliance of the provisions of Section 207 Cr.P.C.

4. Accused was charge-sheeted on 08.08.2014 for the commission of offence punishable under Sections 363, 366A and 376 IPC as also under Section 4 of the POCSO Act, to which he did not plead guilty and claimed trial.

5. In order to prove its case, prosecution examined as many as 18 witnesses and closed their evidence.

6. Statement of accused under Section 313 Cr.P.C. was also

recorded and he pleaded that he was innocent and had been falsely implicated.

7. After hearing the arguments of both the parties and perusing the evidence on record, learned trial Court convicted and sentenced the accused/appellant as stated above.

CONTENTIONS

8. Learned counsel for the appellant contends that as per the history given in the medico-legal report of the victim/prosecutrix (Ex.PD) the alleged incident of sexual assault at 1.40 p.m. was by unknown person and later on the complainant has improved her version and named the appellant as accused. Learned counsel for the appellant further assailed the conviction of the appellant on the ground that the DNA profiling of the appellant was not conducted and in the FSL report(Ex.PX), the spermatozoa was not detected. As such, there is no evidence available on record to prove the complicity of the appellant in the alleged rape on the victim/prosecutrix.

9. Learned counsel for the appellant further contends that there are material discrepancies in the case of the prosecution which entitles him to the benefit of doubt. As per him, learned trial Court has convicted the appellant/accused on the basis of untrustworthy and uncorroborated pieces of evidence and the prosecution has miserably failed to prove its case specially since there is no medical evidence to corroborate the prosecution version.

10. Per contra, learned State counsel contends that the case of the prosecution is based upon eye witness account and the victim/prosecutrix was proved to be 4-5 years of age and an adverse inference should be drawn

against the accused/appellant in view of the presumption under Sections 29 and 30 of the POCSO Act. Learned State counsel further contends that in fact, the appellant was sent for medical examination and for giving blood sample for DNA profiling on 16.06.2014. A written request was sent by the in-charge, Crime Against Women Cell addressed to the Medical Officer (Ex.P-I/1) but the accused refused to give his blood sample. As such, an adverse inference should be drawn against him.

11. In rebuttal, learned counsel for the appellant contends that it is settled law that no person can be compelled to be a witness against himself and compelling an accused to give blood sample would amount to testimonial compulsion within the meaning of Article 20(3) of the Constitution of India.

OBSERVATION AND ANALYSIS

12. Having heard learned counsel for the parties and perusing the record with their able assistance, the following legal issues arise for consideration of this Court:-

- (i) Whether compelling an accused to give blood sample for DNA profiling would amount to violation of Article 20(3) of the Constitution of India?
- (ii) Whether the investigating agency is not bound to follow the drill of Section 53-A of the Cr.P.C.?
- (iii) Whether the failure of the accused to give blood sample for DNA profiling under Section 53-A of the Cr.P.C. would entail adverse inference?

Section 53-A of the Cr.P.C. was inserted by Act 25 of 2005 w.e.f.

23.06.2006. The same is reproduced hereunder:-

“S.53-A- Examination of person accused of rape by medical practitioner----(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the

commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

2. The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely;

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of Sub-Section (5) of that section.”

13. The DNA is unique to each individual which facilitates the investigating agency in the detection of crime having been committed and such scientific method is necessary for proving the guilt as well as innocence

of the accused, specially when the victim of such crime is a child of a tender age and in such cases, DNA profiling becomes all the more significant. The law in this regard has been developed to an extent of creating a balance between the rights of the accused under Article 21 of the Constitution vis-à-vis the right of the victim in particular and the right of the society in general. The first and foremost duty of the investigating agencies and the Courts of Law is to ascertain the truth which ensures fair play to all stakeholders.

14. A Constitution Bench consisting of 11 Judges in **State of Bombay v. Kathi Kalu Oghad and others, 1961 AIR (SC) 1808** has examined the same issue as to whether compelling an accused to furnish evidence against himself would amount to be a witness violating Article 20 (3) of the Constitution of India. The specific issue before the Constitution Bench was whether an accused giving his specimen handwriting or impression of his fingers, palm or foot would amount to furnishing evidence against himself. It was concluded that when the accused is not furnishing any statement within his personal knowledge, merely giving his specimen handwriting or impression of his fingers, palm or foot would not violate the mandate of Article 20(3) of the Constitution. It would amount to explaining of relevant facts within the meaning of Sections 9 and 11 of the Evidence Act. Thus, a distinction was drawn between the physical evidence and testimonial evidence. As such, there is no bar for directing the examination of an accused by a medical practitioner at the request of the police officer for the purpose of DNA profiling. Speaking through Justice S.B. Sinha, the following was held:-

“.....It has to be noticed however that Art. 20 (3) does not say that an accused person shall not be compelled to be a witness.

It says that such a person shall not be, compelled to be a witness against himself. The question that arises therefore is: Is an accused person furnishing evidence against himself, when he gives his specimen handwriting, or impressions of his fingers, palm or foot. The answer to this must, in our opinion, be in the negative.

.....the evidence of specimen handwriting or the impressions of the accused person's fingers, palm or foot, will incriminate him, only if on comparison of these with certain other handwritings or certain other impressions., identity between the two sets is established. By themselves, these impressions or the handwritings do not incriminate the accused person, or even tend to do so. That is why it must be held that by giving these impressions or specimen handwriting, the accused person does not furnish evidence against himself, so when an accused person is compelled to give a specimen handwriting or impressions of his finger, palm or foot, it may be said that he has been compelled to be a witness ; it cannot however be said that he has been compelled to be a witness against himself.”(emphasis supplied)

15. The exception to the above law is created by the Hon’ble Supreme Court in **Gautam Kundu vs. State of West Bengal, 1993(2) RCR (Criminal) 497**. A two Judge Bench, speaking through Justice S. Mohan, considered the case of subjecting a person to DNA profiling to dispel the presumption arising under Section 112 of the Evidence Act to ascertain paternity. In the final analysis, the Hon’ble Supreme Court laid down the ratio that no individual can be compelled to give sample of his blood for DNA analysis.

16. The above decision in the case of **Gautam Kundu (supra)** was examined by a three Judge Bench of the Hon’ble Supreme Court in **Sharda**

v. Dharampal 2003(4) SCC 493 and it was concluded that passing of an order directing a person to give his blood sample for DNA analysis would not be in violation of personal liberty enshrined in Article 21 of the Constitution and the pronouncement in **Gautam Kundu (supra)** is not an authority for the proposition that the Court cannot direct the blood test to be conducted under any circumstances

17. A three Judge Bench of the Hon'ble Supreme Court in **Smt. Selvi v. State of Karnataka, 2010(7) SCC 263** examined the apparent distinction between the testimonial evidence and physical evidence and laid down the ratio that giving specimen signature, handwriting sample or bodily substances such as blood, semen, sputum, sweat, hair can be characterized as physical evidence and giving of such specimens would not attract the proscription under Article 20(3) of the Constitution. Speaking through the then Chief Justice K.G. Balakrishnan, it was observed as under:-

“148. On the other hand, the counsel for the appellants have contended that the Parliament was well aware of the impugned techniques at the time of the 2005 amendment and consciously chose not to include them in the amended Explanation to Sections 53, 53-A and 54 of the CrPC. It was reasoned that this choice recognised the distinction between testimonial acts and physical evidence. While bodily substances such as blood, semen, sputum, sweat, hair and fingernail clippings can be readily characterised as physical evidence, the same cannot be said for the techniques in question. This argument was supported by invoking the rule of ‘ejusdem generis’ which is used in the interpretation of statutes. This rule entails that the meaning of general words which follow specific words in a statutory provision should be

construed in light of the commonality between those specific words. In the present case, the substances enumerated are all examples of physical evidence. Hence the words 'and such other tests' which appear in the Explanation to Sections 53, 53-A and 54 of the Criminal Procedure Code should be construed to include the examination of physical evidence but not that of testimonial acts.

149. We are inclined towards the view that the results of the impugned tests should be treated as testimonial acts for the purpose of invoking the right against self-incrimination. Therefore, it would be prudent to state that the phrase 'and such other tests' [which appears in the Explanation to Sections 53, 53-A and 54 of the CrPC] should be read so as to confine its meaning to include only those tests which involve the examination of physical evidence. In pursuance of this line of reasoning, we agree with the appellant's contention about the applicability of the rule of 'ejusdem generis'. It should also be noted that the Explanation to Sections 53, 53-A and 54 of the CrPC does not enumerate certain other forms of medical examination that involve testimonial acts, such as psychiatric examination among others. This demonstrates that the amendment to this provision was informed by a rational distinction between the examination of physical substances and testimonial acts."(emphasis supplied)

Further, in para 203, it was categorically held that compelled extraction of blood samples in the course of medical examination does not amount to conduct that shocks the conscience and reasonably necessary force may be used as mandated by law. Hence, it meets the threshold of

procedure established by law.

18. The Hon'ble Supreme Court has further held that DNA report being scientifically accurate, is exact science for the purpose of determining the guilt of the accused. Reference in this regard can be made to **Santosh Kumar vs. State the CBI, 2010 (3) SCC (Cri) 1469** and **Kanti Devi and another vs. Posh Ram, 2001(3) RCR(Civil) 587**.

19. A three Judge Bench of the Hon'ble Supreme Court in **Ritesh Sinha v. State of Uttar Pradesh and another, 2019 (8) SCC 1**, examined the issue whether compelling a person to give a sample of his voice violates the right enshrined in Article 20(3) of the Constitution. Speaking through Justice Ranjan Gogoi, the following was observed:-

“11. Medical examination of an accused for the purposes of effective investigation of a criminal charge has received a wider meaning by the amendment to the Explanation to Section 53 Cr.P.C., 1973 made by Act No.25 of 2005 with effect from 23rd June, 2006. Similarly, Section 53A has been inserted by the same Amending Act (No.25 of 2005) to provide for examination of a person accused of rape. Likewise, by insertion of Section 311A by the same Amending Act (No.25 of 2005) a Magistrate has been empowered to order any person, including an accused person, to give specimen signatures or handwriting for the purposes of any investigation or proceeding under the Cr.P.C.

*24. Would a judicial order compelling a person to give a sample of his voice violate the fundamental right to privacy under Article 20(3) of the Constitution, is the next question. The issue is interesting and debatable but not having been argued before us it will suffice to note that in view of the opinion rendered by this Court in **Modern Dental College and Research Centre and others v. State of Madhya Pradesh and others, 2016(3) S.C.T. 35 : (2016) 7 SCC 353**, **Gobind v. State of Madhya Pradesh and another, (1975) 2 SCC 148** and the Nine*

Judge's Bench of this Court in K.S. Puttaswamy and another v. Union of India and others, 2018(1) RCR (Civil) 398 : (2017) 10 SCC 1 the fundamental right to privacy cannot be construed as absolute and but must bow down to compelling public interest. We refrain from any further discussion and consider it appropriate not to record any further observation on an issue not specifically raised before us.

25. *In the light of the above discussions, we unhesitatingly take the view that until explicit provisions are engrafted in the Code of Criminal Procedure by Parliament, a Judicial Magistrate must be conceded the power to order a person to give a sample of his voice for the purpose of investigation of a crime. Such power has to be conferred on a Magistrate by a process of judicial interpretation and in exercise of jurisdiction vested in this Court under Article 142 of the Constitution of India. We order accordingly and consequently dispose the appeals in terms of the above.”*

20. Similarly under Sections 73 and 311-A of the Cr.P.C. a Magistrate has been empowered to direct any person including an accused to give specimen of his handwriting for the purpose of investigation and inquiry. The DNA testing, its importance in crime detection and its evidentiary value during the trial revolve around the core issue of identification of the accused of rape and homicide and it also helps in establishing the identity of the victims of violent and ghastly crimes. The Hon'ble Supreme Court in **Santosh Kumar Singh vs. State through CBI (supra)** has relied upon the report of the DNA test for establishing the offence of rape by the accused. The dead bodies of the victims were also identified on the basis of their DNA profiling. The accused was convicted with the aid of this

scientific technique and relied upon by the Hon'ble Supreme Court in **Surendra Koli vs. State of U.P. and others, 2011(4) SCC 80.**

21. Recently, a three Judge Bench of the Hon'ble Supreme Court has highlighted the importance of the DNA profiling in **Rajendra Pralhadrao Wasnik v. State of Maharashtra 2019 (12) SCC 460.**

Speaking through Justice Madan B. Lokur, it was held that:-

“51. There can be no doubt that there have been remarkable technological advancements in forensic science and in scientific investigations. These must be made full use of and the somewhat archaic methods of investigations must be given up. In Krishna Kumar Malik v. State of Haryana this Court referred to Section 53-A of the Cr.P.C. and observed that after the enactment of this provision with effect from 23rd June, 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.

52. The necessity of taking advantage of the advancement in scientific investigation was the subject matter of discussion in State of Gujarat v. Kishanbhai. In that case, this Court lamented the failure of the investigating agency to take advantage of scientific investigations. It was said:

“12.7.5. There has now been a great advancement in scientific investigation on the instant aspect of the matter. The investigating agency ought to have sought DNA profiling of the blood samples, which would have given a clear picture whether or not the blood of the victim [deleted] was, in fact on the clothes of the respondent-accused Kishanbhai. This scientific investigation would have unquestionably determined whether or not the respondent-accused was linked with the crime. Additionally, DNA profiling of the blood found on the knife used in the commission of the crime

(which the respondent-accused Kishanbhai had allegedly stolen from Dineshbhai Karsanbhai Thakore, PW 6), would have incontrovertibly determined, whether or not the said knife had been used for severing the legs of the victim [deleted], to remove her anklets.

12.7.6. In spite of so much advancement in the field of forensic science, the investigating agency seriously erred in not carrying out an effective investigation to genuinely determine the culpability of the respondent-accused Kishanbhai.” (Emphasis supplied by us).

53. More recently, in Mukesh and Anr. v. State (NCT of Delhi)³⁵ there is a brief reference to Section 53-A and Section 164-A of the Cr.P.C. What is important in this brief reference is the acknowledgment that DNA evidence is being increasingly relied upon by courts. It was observed in paragraphs 216 and 217 as follows:

“216. In our country also like several other developed and developing countries, DNA evidence is being increasingly relied upon by courts. After the amendment in the Criminal Procedure Code by the insertion of Section 53A by Act 25 of 2005, DNA profiling has now become a party of the statutory scheme. Section 53A relates to the examination of a person accused of rape by a medical practitioner.” “217. Similarly, under Section 164A inserted by Act 25 of 2005, for medical examination of the victim of rape, the description of material taken from the person of the woman for DNA profiling is must.” (Emphasis supplied by us).

55. In Mukesh a separate opinion was delivered by Justice Banumathi and in paragraph 455 of the Report it was held that DNA profiling is an extremely accurate way of comparing specimens and such testing can make a virtually positive identification. It was stated:

“455. DNA profiling is an extremely accurate way to compare a suspect’s DNA with crime scene specimens, victim’s DNA on the blood-stained

clothes of the accused or other articles recovered, DNA testing can make a virtually positive identification when the two samples match. A DNA finger print is identical for every part of the body, whether it is the blood, saliva, brain, kidney or foot on any part of the body. It cannot be changed; it will be identical no matter what is done to a body. Even relatively minute quantities of blood, saliva or semen at a crime scene or on clothes can yield sufficient material for analysis. The Experts opine that the identification is almost hundred per cent precise. Using this i.e. chemical structure of genetic information by generating DNA profile of the individual, identification of an individual is done like in the traditional method of identifying finger prints of offenders.” (Emphasis supplied by us).

56. In the context of importance of scientific and technological advances having been made, we may recall the observation of this Court in Selvi v. State of Karnataka in paragraph 220 of the Report that “The matching of DNA samples is emerging as a vital tool for linking suspects to specific criminal acts.”

22. A Division Bench of the Bombay High Court has examined the issue whether police officer under Section 53 of the Cr.P.C. is empowered to get the accused examined by a medical practitioner and draw a blood sample. In **Anil Aantrao Lokhande v. The State of Maharashtra** 1981 CriLJ 125, speaking through Justice Dharmadhikari, the following was observed:-

“30. It is quite clear from these observations that it was not necessary for the learned Judge to decide the questions now raised before us in the said case, though it is no doubt true that the learned Judge has expressed a doubt as to whether the medical examination mentioned in Section 53 would include extraction of blood of person arrested. It is further clear from the bare reading of the said judgment that the various aspects of the matter including the decision of the Supreme Court in,

Ram Lal Narang v. State (Delhi Admn.) and the decisions of the Allahabad High Court in 1976 Cri LJ 1680, Jamshed v. State of U.P. and of Andhra Pradesh High Court in 1977 Cri LJ 1797, Ananth Kumar Naik v. State of A.P. were not brought to the notice of the learned Judge. Once it is held that Section 53 of the Code of Criminal Procedure does confer a right upon the investigating machinery to get the arrested persons medically examined by the medical practitioner and the expression used in Section 53 includes in its import the taking of sample of the blood for analysis, then obviously the said provision is not violative of the guarantee incorporated in Article 21 of the Constitution of India. In that case even if it is assumed that the person is deprived of his life or personal liberty by this process, it cannot be disputed that he is deprived of the same in accordance with the procedure established by law. Somewhat similar question was considered by this court in State v. Seshappa, while deciding the validity of Section 129(A) of the Bombay Prohibition Act in the context of Article 21 of the Constitution of India, The provision made in Section 53 of the Code is intended to help the investigation of the crime on the scientific lines so as to enable collection of evidence to prove the guilt or innocence of the person. In our opinion the modern community living requires such modern scientific methods of crime detection, lest the public go unprotected.”

23. A two Judge Bench Hon'ble Supreme Court in the matter of **State of Uttar Pradesh v. Sunil, 2017(2) RCR(Criminal) 925**, speaking through Justice Pinaki Chandra Ghose, held as follows:-

“.....any person can be directed to give his foot-prints for corroboration of evidence but the same cannot be considered as violation of the protection guaranteed under Article 20 (3) of the Constitution of India. It may, however, be noted that non-compliance of such direction of the Court may lead to

adverse inference, nevertheless, the same cannot be entertained as the sole basis of conviction.

..... even though acts such as compulsorily obtaining specimen signatures and handwriting samples are testimonial in nature, they are not incriminating by themselves if they are used for the purpose of identification or corroboration with facts or materials that the investigators are already acquainted with.”

24. The right to fair investigation and fair trial is not only restricted to the accused. It extends to the victim and the society as well. Nowadays all the attention is given to the accused to ensure fair play and fair investigation resulting in fair trial while little concern is shown to the victim and the society. The onerous duty to maintain a middle ground to secure the fair trial and fair investigation to the accused without sacrificing the interest of the victim and the society is cast upon the Courts. Mr. Justice Cardozo of the Supreme Court of United States explained in **Snyder v. Commonwealth of Massachusetts 1934(291) U.S. 97** that-

“Justice, though due to the accused, is due to the accuser also. The concept of fairness cannot be strained till it is narrowed to a filament. We are to keep our balance true.”

25. A two Judge Bench of the Hon’ble Supreme Court in **Nirmal Singh Kahlon v. State of Punjab and others 2009(1) SCC 441**, speaking through Justice S.B.Sinha, held as follows:-

“ An accused is entitled to a fair investigation. Fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India. But the State has a larger obligation i.e. to maintain law and order, public

order and preservation of peace and harmony in the society. A victim of a crime, thus, is equally entitled to a fair investigation.”

26. A two Judge Bench of the Hon’ble Supreme Court in **Pooja Pal vs. UOI and others, 2016(1) RCR(Criminal) 880**, has discussed the fundamental right under Article 21 of the Constitution in the context of the goal of “speedy trial” being tampered by “fair trial.” Speaking through Justice Amitava Roy, the following was held:-

“76. A “speedy trial”, albeit the essence of the fundamental right to life entrenched in the Article 21 of the Constitution of India has a companion in concept in “fair trial”, both being in alienable constituents of an adjudicative process, to culminate in a judicial decision by a court of law as the final arbiter. There is indeed a qualitative difference between right to speedy trial and fair trial so much so that denial of the former by itself would not be prejudicial to the accused, when pitted against the imperative of fair trial. As fundamentally, justice not only has to be done but also must appear to have been done, the residuary jurisdiction of a court to direct further investigation or reinvestigation by any impartial agency, probe by the state police notwithstanding, has to be essentially invoked if the statutory agency already in-charge of the investigation appears to have been ineffective or is presumed or inferred to be not being able to discharge its functions fairly, meaningfully and fructuously. As the cause of justice has to reign supreme, a court of law cannot reduce itself to be a resigned and a helpless spectator and with the foreseen consequences apparently unjust, in the face of a faulty investigation, meekly complete the formalities to record a foregone conclusion. Justice then would become a casualty. Though a court’s satisfaction of want of proper, fair, impartial and effective investigation eroding its credence and reliability is the precondition for a direction for

further investigation or reinvestigation, submission of the charge-sheet ipso facto or the pendency of the trial can by no means be a prohibitive impediment. The contextual facts and the attendant circumstances have to be singularly evaluated and analyzed to decide the needfulness of further investigation or reinvestigation to unravel the truth and mete out justice to the parties. The prime concern and the endeavour of the court of law is to secure justice on the basis of true facts which ought to be unearthed through a committed, resolved and a competent investigating agency.

79. A trial encompasses investigation, inquiry, trial, appeal and retrial i.e. the entire range of scrutiny including crime detection and adjudication on the basis thereof. Jurisprudentially, the guarantee under Article 21 embraces both the life and liberty of the accused as well as interest of the victim, his near and dear ones as well as of the community at large and therefore cannot be alienated from each other with levity. It is judicially acknowledged that fair trial includes fair investigation as envisaged by Articles 20 and 21 of the Constitution of India. Though, well demarcated contours of crime detection and adjudication do exist, if the investigation is neither effective nor purposeful nor objective nor fair, it would be the solemn obligation of the courts, if considered necessary, to order further investigation or reinvestigation as the case may be, to discover the truth so as to prevent miscarriage of the justice. No inflexible guidelines or hard and fast rules as such can be prescribed by way of uniform and universal invocation and the decision is to be conditioned to the attendant facts and circumstances, motivated dominantly by the predication of advancement of the cause of justice.”(emphasis supplied).

27. A two Judge Bench of the Hon’ble Supreme Court in **Asha Ranjan Vs. State of Bihar and others, 2017(2) RCR(Criminal) 146,**

speaking through Justice Dipak Misra, observed as follows:-

*“53. Be it stated, circumstances may emerge that may necessitate for balancing between intra-fundamental rights. It has been distinctly understood that the test that has to be applied while balancing the two fundamental rights or inter fundamental rights, the principles applied may be different than the principle to be applied in intra-conflict between the same fundamental right. To elaborate, as in this case, the accused has a fundamental right to have a fair trial under Article 21 of the Constitution. Similarly, the victims who are directly affected and also form a part of the constituent of the collective, have a fundamental right for a fair trial. Thus, there can be two individuals both having legitimacy to claim or assert the right. The factum of legitimacy is a primary consideration. It has to be remembered that no fundamental right is absolute and it can have limitations in certain circumstances. Thus, permissible limitations are imposed by the State. The said limitations are to be within the bounds of law. However, when there is intra-conflict of the right conferred under the same Article, like fair trial in this case, the test that is required to be applied, we are disposed to think, it would be “paramount collective interest” or “sustenance of public confidence in the justice dispensation system”. An example can be cited. A group of persons in the name of “class honour”, as has been stated in *Vikas Yadav v. State of U.P. & Ors.*[35], cannot curtail or throttle the choice of a woman. It is because choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognized in the Constitution under Article 19, and such a right is not expected to succumb to the concept of*

“class honour” or “group thinking”. It is because the sense of class honour has no legitimacy even if it is practised by the collective under some kind of a notion. Therefore, if the collective interest or the public interest that serves the public cause and further has the legitimacy to claim or assert a fundamental right, then only it can put forth that their right should be protected. There can be no denial of the fact that the rights of the victims for a fair trial is an inseparable aspect of Article 21 of the Constitution and when they assert that right by themselves as well as the part of the collective, the conception of public interest gets galvanised. The accentuated public interest in such circumstances has to be given primacy, for it furthers and promotes “Rule of Law”. It may be clarified at once that the test of primacy which is based on legitimacy and the public interest has to be adjudged on the facts of each case and cannot be stated in abstract terms. It will require studied scanning of facts, the competing interests and the ultimate perception of the balancing that would subserve the larger public interest and serve the majesty of rule of law. In this regard, we are reminded of an ancient saying:-

*“yadapi siddham, loka viruddham
Na adaraniyam, na acharaniyam”*

The aforesaid saying lays stress on public interest and its significance and primacy over certain individual interest. It may not thus have general application, but the purpose of referring to the same is that on certain occasions it can be treated to be appropriate.”

It was further held as under:-

“74. (i) The right to fair trial is not singularly absolute, as is perceived, from the perspective of the accused. It takes in its ambit and sweep the right of the victim(s) and

the society at large. These factors would collectively allude and constitute the Rule of Law, i.e., free and fair trial.”

28. The duty of the trial Court, in cases under the POCSO Act, is not of being a third umpire detached from the ground merely maintaining the scoresheet to announce the verdict at the end of the trial. It is required to be proactive to ensure that the investigating agencies conform to the Rule of Law leading to fairness in investigation. The trial Court has ample power to ensure that the investigating agency and the accused follow the drill of Section 53-A of the Cr.P.C. It is settled law that a Court must discharge its statutory function whether discretionary or obligatory. To ensure compliance of Section 53-A of the Cr.P.C. is certainly an obligatory duty of the trial Court, conducting trial under the POCSO Act.

CONCLUSION

29. In view of the ratio of law laid down in various pronouncements discussed above, we are of the considered opinion that:-

- (i) directing an accused to give blood sample for DNA profiling would not amount to violation of Article 20(3) of the Constitution of India;
- (ii) the investigating agency is bound to scrupulously follow the provisions of Section 53-A of the Cr.P.C.;
- (iii) the refusal of the accused to give blood sample for DNA profiling under Section 53-A of the Cr.P.C. would entail adverse inference.

30. It is imperative for the investigating officer to scrupulously follow the drill of Section 53-A of the Cr.P.C., keeping in mind the fact that very often the victims under the POCSO Act are of a tender age. The investigating officer is duty bound to produce the accused before a medical

practitioner and submit a written application for collection of his blood sample as provided under Section 53-A of the Cr.P.C. and use such force as necessary for that purpose. In case the accused refuses to give his blood sample, the investigating officer shall approach the concerned Illaqa Magistrate and move an application seeking direction of the Court for the purpose of collecting blood sample of the accused for DNA analysis.

31. Ex. PA/1, the FIR, was recorded on the statement of PW2-Smt.Kariman, mother of the victim/prosecutrix and the same was promptly lodged with the name of the accused/appellant duly mentioned therein. The police proceedings further indicate that the information with regard to the rape committed on the victim/prosecutrix was received at 3.00 p.m. The medical examination of the victim/prosecutrix was conducted at 2.18 p.m. The version put forth by the complainant-PW2, Smt.Kariman, was duly corroborated by the testimony of PW4-Sunil who is stated to have seen the appellant in semi nude condition and also saw the blood oozing out of the private parts of the victim. As per MLR(Ex.PD), multiple scratch marks, abrasions were found on various parts of the victim and small blood stain discharge was found on the vaginal orifice. The prosecution has duly proved the age of the victim/prosecutrix to be approximately 4 years on the basis of the testimony of the complainant (PW2-Smt. Kariman). The prosecutrix was also subjected to ossification test and as per the testimony of Dr. Narinder Kumar (PW13) her age was determined to be between 4-5 years. Thus, from the evidence led by the prosecution, the age of the victim/prosecutrix is proved to be between 4-5 years. As such, the prosecution has been able to knit together the circumstances pointing towards the guilt of the accused/appellant.

32. One conspicuous fact which has pricked the conscience of this Court is the mischief played by Dr. Manoj Bajaj (PW9) who deposed on 18.09.2014 i.e. barely three months after the occurrence. While appearing before the Court, he stated that he was not informed by the police regarding the registration of the FIR under Sections 363, 366-A, 376 IPC and Section 4 of the POCSO Act prior to conducting the medical examination of the accused/appellant, whereas Ex.PI, the medico-legal report of the accused/appellant clearly indicates his endorsement that the patient brought by the police for medico-legal examination in a case under Sections 363, 366-A, 376 IPC and Section 4 of the POCSO Act pertaining to Police Station NIT Faridabad. Further, the application for medical examination of the accused/appellant (Ex.PI/1) shows that a request was made for DNA and blood sample of the accused/appellant. As such, PW9 (Dr.Manoj Bajaj) has tried to shift the burden on the investigating agency for not drawing the blood sample of the appellant/accused for DNA analysis. We refrain ourselves to comment on the conduct of Dr.Manoj Bajaj.

33. After the insertion of Section 53-A of Cr.P.C. (w.e.f. 23.06.2006), the intention of the legislature is clear that under Section 53-A and Section 164-A examination of the victim as well as the accused is a must and further the material collected during investigation along with the blood sample of the accused should be sent for DNA profiling. The medical practitioner as well as the investigating officer are bound to follow the drill of Section 53-A and Section 164-A of the Cr.P.C., especially in rape cases with respect to the minors where the provisions of POCSO Act are attracted. Under Sections 29 and 30 of the POCSO Act, a presumption is drawn against the accused and he is required to rebut the presumption but a perusal

of the statement of accused/appellant recorded under Section 313 Cr.P.C. reveals that he has made no attempt to explain or clarify the incriminating circumstances. A simple denial would not absolve him of the presumption as provided under Sections 29 ad 30 of the POCSO Act.

34. A three Judge Bench of the Hon'ble Supreme Court in **Joseph v. State of Kerala, (2000)5 SCC 197**, observed that during the time of questioning under Section 313 Cr.P.C, the appellant instead of making an attempt to explain or clarify the incriminating circumstances inculcating him and connecting him with the crime by his adamant attitude of total denial of everything when those circumstances were brought to his notice by the Court has not only lost an opportunity but stood self-condemned. Such incriminating links of facts could, if at all, have been only explained by the appellant and by nobody else as they are in his personal and exclusive knowledge. Of late, Courts have, from the falsity of the defence plea and false answers given to Court, when questioned, found the missing links to be supplied by such answers for completing the chain of incriminating circumstances necessary to connect the person concerned with the crime committed (see **State of Maharashtra Vs. Suresh, 2000(1) SCC 471**).

35. A two Judge Bench of the Hon'ble Supreme Court in **Musheer Khan @ Badshah Khan and another vs. State of Madhya Pradesh (2010) 2 SCC 748**, observed that it is obligatory on the part of the accused, while being examined under Section 313Cr.P.C., to furnish some explanation with respect to the incriminating circumstances associated with him, and the court must take note of such explanation even in a case of circumstantial evidence, to decide whether or not the chain of circumstances is complete.(See also:

Phula Singh v. State of Himachal Pradesh, (2014) 4 SCC 9).

36. Another fact which weighs with the mind of the Court is the stringent punishment provided under the POCSO Act and the presumption is often fastened on the accused in routine without taking recourse to determine the age of the victim under Section 34(2) of the POCSO Act. The determination of the age under Section 34(2) of the POCSO Act is a condition precedent before imposing the presumption under Sections 29 and 30 of the Act. Section 34(2) of the POCSO Act envisages that the Special Court is required to satisfy itself about the age of the victim and record in writing the reasons for the same. Section 34(2) of the POCSO Act is reproduced hereunder for ready reference:-

“S. 34. Procedure in case of commission of offence by child and determination of age by Special Court.

(1) xxxxxxxxxxxx

(2) *If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.”*

37. The provisions of Section 34(2) of the POCSO Act are similar to Rule 12(3) of the Juvenile Justice (Care & Protection of Children) Rules, 2007 which provide for the procedure to be followed in determination of the age and it is no longer *res integra* that these provisions are not only restricted to the accused but are extended to the victim as well. The Hon’ble Supreme Court in **Jarnail Singh vs. State of Haryana 2013(7) SCC 263**, held that the provisions of the Juvenile Justice Act and Rules would equally

apply to determine the age for both the victim as well as the accused person.

In particular, the Hon'ble Supreme Court has relied on Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007. As such, the learned Special Courts are first required to determine the age of the victim under Section 34 (2) of the POCSO Act and only if the victim is found to be a child within the meaning of Section 2(1)(d) of the POCSO Act, the presumption under Sections 29 and 30 of the Act would be imposed on the accused. The determination of the age under Section 34(2) of the POCSO Act is a condition precedent before fastening the presumption under Sections 29 and 30 of the Act. The said Sections are reproduced hereunder:-

“S.29. Presumption as to certain offences.- *Where a person is prosecuted for committing or abetting or attempting to commit any offence "sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.*

S.30. Presumption of culpable mental state.- *(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.*

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation.—In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.”

38. In view of the above discussion, we do not find any ground to interfere with the judgment of conviction and order of sentence passed by the learned trial Court. The same is based on sound and cogent reasons. Resultantly, the appeal is dismissed.

39. In the light of the above discussion, the Director Generals of Police of the States of Punjab, Haryana and UT, Chandigarh are directed to issue necessary directions for scrupulous compliance of Section 53-A of the Cr.P.C. in cases registered under the POCSO Act.

40. Pending application(s), if any, shall also stand disposed of.

41. The trial Court record be sent back.

42. A copy of this judgment be transmitted to the DGPs for the States of Punjab, Haryana and UT of Chandigarh through the good offices of the Advocate Generals to issue necessary directions to the investigating officers conducting investigation under the POCSO Act.

(RAJ MOHAN SINGH)
JUDGE

(HARPREET SINGH BRAR)
JUDGE

27.07.2023

sunita

Whether Reasoned/Speaking : Yes/No

Whether Reportable : Yes/No