



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO. 1115 OF 2016

VASANT SHANKAR KADAM ..PETITIONER
VS.
KAVITA VASANT KADAM AND ANR. ..RESPONDENTS

Mr. Umesh Mankapure for the Petitioner.

Mr. Ranjeet H. Patil for Respondent No.1.

Ms. S.D. Shinde, APP for the State.

CORAM : M. S. KARNIK, J.

DATE : JANUARY 03, 2024

ORAL JUDGMENT:

1. The petitioner- accused No.1 by this petition challenges the order passed by the trial Court on the application filed by respondent No.2 - State of Maharashtra below exhibit 36 in Special Case No.12 of 2014 with a prayer to collect a blood sample of the petitioner for D.N.A. test. The trial Court by the impugned order dated 14/01/2016 has allowed the application.

2. To appreciate the controversy, it would be necessary to carefully peruse the statements of respondent No.1 herein at whose instance the criminal prosecution came to

be initiated. The petitioner herein is the original accused No.1 in C.R. No. 102 of 2014 registered at Miraj Rural Police Station, District Sangli in respect of the offence alleged by respondent No.1 for the offences punishable under Sections 498-A, 494, 496, 504, 506 read with 34 of the Indian Penal Code and Sections 3(1)(r), 3(1)(s), 4(1)(u), 6 and 3(2)(va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act Amendment, 2015.

3. It is the allegation of respondent No.1- complainant that she belongs to the Hindu-Mang community which is recognised as a Scheduled Caste. The petitioner belongs to the Maratha community. The petitioner was already married. The petitioner though was a married person, insisted the respondent No.1 to maintain a relationship with him and expressed his desire to marry her. Respondent No.1 initially refused but later for a period of 2½ years maintained a relationship with the petitioner. Thereafter, on 07/01/2014, the petitioner married respondent No.1. It is alleged that some of the relatives of the petitioner as well as of his first wife were present. Respondent No.1 later

conceived. However, the petitioner was insisting that respondent No.1 should abort the child. The petitioner and his first wife abused respondent No.1 and assaulted her as is the accusation. The petitioner and his first wife were after respondent No.1 to undergo an abortion. However, respondent No.1 gave birth to a child on 25/10/2014. The FIR is dated 16/09/2014 and the charge-sheet was filed on 30/10/2014.

4. During the pendency of the Special Case before the Special Court, the prosecution made an application below exhibit 36 with a prayer to collect the blood sample of accused No.1/petitioner for the D.N.A. test. The application was resisted by the petitioner and filed his say at exhibit 37. The Special Court by the impugned order dated 14/01/2016 allowed the application below exhibit 36. The Special Court on the basis of the observations from paragraph No.3 onwards was of the opinion that the application made by the prosecution deserves to be allowed. The relevant portion of the orders reads thus:

“3. It is alleged by the informant that, the accused No.1 had performed marriage with victim and

established sexual relationship with her. In the course of time, she delivered a male child on 25-10-2014 and charge-sheet came to be filed on 30-10-2014. The victim could not inform about her delivery to the police within the said short time span. This is a new circumstance for the prosecution to its case. The statement of the victim is that, she became pregnant and the accused is the father of her child, thus requires further investigation. In view of the peculiar circumstances of the birth of child, it is for the prosecution to seek permission to take blood sample of accused No.1 for DNA test.

4. On behalf of accused, it is submitted that, during the course of investigation, the Police Officer did not attempt to collect the DNA sample and it is also not the case of the prosecution that, accused No.1 refused for the same that unless and until present accused refused to give consent to the Investigating Officer, prosecution cannot directly ask the court to compel order of DNA. It is also one of the ground of resisting Exh.36 that, during the course of investigation, the Investigating Officer did not make any effort and the present act is to fill up the lacuna in the charge-sheet. It is also one of the ground that, after filing charge-sheet, Court has no power to pass an order in respect of collection of any further evidence and further inquiry in the matter. Hence, the application of prosecution be rejected. In support of the contention on behalf of accused, he has relied on the ruling of Goutam Kundu Vs. State of West Bengal and another, reported in AIR 1993, SC 2295. In this it is held that,

"The order of blood test cannot be permitted whenever applications are made for such prayer in order to have roving_ inquiry, the prayer for blood test cannot be entertained. There must be a strong prima-facie case in that the husband must establish non-access in order to dispel the presumption arising under section 112 of the Evidence Act. The Court must carefully examine as to what would be the consequence of ordering

the blood test; whether it will have to the effect of branding a child as a bastard and the mother as an unchaste woman. No one can be compel to give sample for blood for analysis".

Perused the entire citation. The said judgment rises from a matrimonial dispute pertaining to payment of maintenance under Section 125 of Criminal Procedure Code. I am of the view that, the citation has different set of facts and it is not applicable to the facts in hand. So also the other citation relied by on behalf of accused i.e. Syed Mohd.Ghouse Vs. Noorunnisa Begum, reported in 2001 Cri.L.J. 2028 is not applicable to the facts in hand.

5. The criminal provision says that, when a person is arrested it is to be understood that he is in judicial custody even after he is enlarged on bail. It is regulated freedom and he is available and amenable on all occasions for examination and re-examination which also includes investigation. By virtue of Section 173(1) of the Criminal Procedure Code, the prosecution is entitled for further investigation. In this context, reference can be made to the judgment of the Apex Court in the case of State (Delhi Administration) Vs. Paliram, AIR 1979 Supreme Court, wherein it was held that, "in the revision petition filed by the accused before the High Court a grievance is sought to be made out that Magistrate order will work to prejudice the defence and enable the prosecution to fill gap and loopholes in its case. This contention is devoid of force. Once a Magistrate is in session of a case, duly form a opinion that the assistance of an expert is essential to enable the court to arrive at a just determination of the issue of identity of disputed writing the fact that this may result in "filling of loopholes", in the prosecution case as purely a subsidiary factor which may give a paramount consideration of doing justice. Moreover, it could not be predicated at this stage whether the opinion of Government expert of the questioned document would go in favour of the prosecution or

the defence. The argument raised before the High Court, is thus purely speculative". In our pinion these observations purely apply to the present case also. Therefore, it is open to the court which is a ceased of the matter to issue direction or to grant approval or permission to police for carrying out further investigation.

6. In support of his request for further investigation, the learned APP has relied on Samaj Parivartan Samudaya & Ors. Vs. State of Karnataka & Ors. It is held by the Hon'ble Supreme Court that,

"The provisions of Section 173(8) of Cr.P.C. pen with nonobstante language that nothing in the provisions of Section 173(1) to 173(7) shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate. Thus, under Section 173(8), where charge-sheet has been filed, that Court also enjoys the jurisdiction to direct further investigation into the offence. This power cannot have any inhibition including such requirement as being obliged to hear the accused before any such direction is made. The casting of any such obligation on the Court would only result in encumbering the Court with the burden of searching for all potential accused to be afforded with the opportunity of being heard".

Filing charge-sheet in a case does not by itself bring absolute end to exercise of power by the investigation agency or by the Court.

Investigation Agency is not required to hear affected party prior to registration o case against suspect."

In view of the peculiar circumstances this case and the fact that the child is born when the charge-sheet

was filed, just within 5 days of its birth. In such peculiar circumstances, the request of the prosecution for taking the sample of blood for DNA test in order to establish prosecution case beyond reasonable doubt, is required to be considered in the interest of justice. There is an object to consideration by the Trial Judge when a person seeking for justice, it is paramount duty of the judges to tender justice especially in criminal proceeding where the prosecution has to prove its case beyond reasonable doubt. The party who know for what reason he/she is convicted and for what reason he or she has lost the case. Hence, I hold that the application made by the prosecution deserves to be considered.”

5. I have heard the learned counsel for the petitioner who argued in support of the grounds which are raised in the petition memo. Learned counsel placed reliance on the decision of the Hon’ble Supreme Court in the case of Goutam Kundu vs State Of West Bengal And Anr.¹ to contend that no person can be compelled to give sample of blood for analysis and no adverse inference can be drawn against a person on account of such refusal.

6. Learned APP and learned counsel for respondent No.1 supported the impugned order. It is submitted that the Special Court gave cogent reasons while allowing the application. It is further submitted that in the collateral

¹ 1993 Supreme Court Cases (3) 418

proceeding filed under the Domestic Violence Act, the petitioner has denied the paternity to the child and hence the order passed by the trial Court which is in furtherance of the interest of justice be sustained.

7. Perusal of the statements of respondent No.1 and the relevant materials produced before the trial Court would indicate that the complaint has been filed by respondent No.1 under the aforesaid Sections on the accusations that though the petitioner had married respondent No.1, the petitioner as well as his first wife were forcing respondent No.1 to abort the child. It is further alleged that the petitioner was ill-treating and assaulting respondent No.1. Having regard to the nature of the accusations and the sections which have been invoked in the present case which allegedly constitute an offence, in my opinion, the application made by the prosecution below exhibit 36 was unwarranted and not at all relevant for a decision on the controversy. The dispute is not about the paternity of the child. The impugned order passed is clearly beyond the scope of the complaint which has been filed.

8. The impugned order calls for interference and is accordingly quashed and set aside. It is made clear that it is always open for the prosecution or the respondent No.1 to make an appropriate application with similar prayers as in the application below exhibit 36, in appropriate proceedings when the occasion so arises. I may not be construed to have made any observations on the merits of the application exhibit 36. I am only of the opinion that it was not necessary to entertain such an application as below exhibit 36 for a decision in the proceedings before the Special Judge, having regard to the nature of the accusations made in the complaint by respondent No.1.

9. The impugned order dated 14/01/2016 passed below exhibit 36 in Special Case No. 12 of 2014 is set aside and consequently the application below exhibit 36 is rejected.

10. It is once again made clear that it is always open for respondent No.1 or the prosecution to make an appropriate application of a similar nature as exhibit 36 if the occasion arises in appropriate proceedings which shall be considered on its own merits and in accordance with law without being

influenced by the observations made hereinabove.

11. A request is made by the learned counsel for respondent No.1 that the trial be expedited. As the complaint is of the year 2014, the request made appears to be reasonable and deserves consideration. Learned Special Judge is requested to expedite the trial.

12. The writ petition is accordingly allowed and disposed of in the above terms.

(M. S. KARNIK, J.)