
(2014) 04 MAD CK 0126

In the Madras High Court

Case No : Crl. RC (MD) No. 199 of 2014 and M.P. (MD) No. 1 of 2014

Jeya Priya and Sivakarthykeyan

APPELLANT

Vs

State and Dhanasekara Pandian

RESPONDENT

Date of Decision : 08-04-2014

Acts Referred:

Constitution of India, 1950 — Article 20, 20(3)
Criminal Procedure Code, 1973 (CrPC) — Section 53, 53-A, 54
Penal Code, 1860 (IPC) — Section 294(b), 495, 506(ii)
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 3(1)(x)

Citation : (2014) 04 MAD CK 0126

Hon'ble Judges : P.N. Prakash, J

Bench : Single Bench

Final Decision : Allowed

Judgement

P.N. Prakash, J.—This Criminal Revision Petition is filed challenging the order dated 27.01.2014 passed in Cr. M.P. No. 4049 of 2013 in P.R.C. No. 41 of 2013 by the learned Judicial Magistrate, Melur, whereby the learned Magistrate had dismissed the petition filed by the prosecution, for sending the accused Dhanasekara Pandian and the child of the de facto complainant for DNA test in order to prove the paternity of the child.

2. When notice was ordered on the accused in this Criminal Revision Petition, it was reported that he was not appearing before the Judicial Magistrate and non-bailable warrant was issued against him on 19.03.2014 by the learned Judicial Magistrate, Melur and the same is pending and that the whereabouts of the accused was not known. On 28.03.2014, when the matter was listed, Mr. S. Balaji, Advocate appeared on behalf of the accused and sought for time. He was also furnished with the copies of the petition and typed set of papers and the case was adjourned to 02.04.2014. In the mean time, Mr. S. Balaji also filed his vakalat for the accused on 01.04.2014 and the same is on record. On 02.04.2014, when the matter was taken up for hearing, the learned counsel for

the revision petitioner was present, but Mr. S. Balaji, learned counsel for the accused, whose name is printed in the cause list, did not appear.

3. On a complaint lodged by the de facto complainant alleging that the accused had sexual intercourse with her by promising to marry her, and thereafter reneged from the promise, a case in Crime No. 9 of 2013 for offences under Sections 294(b), 495, 506(ii) IPC and Section 3(1)(x) of the SC/ST Act, was registered by the learned Magistrate, Melur and investigation was taken up. During the course of investigation, the Deputy Superintendent of Police filed an application before the learned Judicial Magistrate, Melur for sending the accused and the child born to the de facto complainant for DNA test. This application was resisted by the accused on the ground that if an order is passed, it will violate the constitutional protection under Article 20(3) of the Constitution of India. After hearing the parties, the learned Magistrate has passed the following order:

Art 20(3) of the Constitution of India protect the accused to compelling him as a witness. Sec. 53-A of Criminal Procedure Code clearly stated that when a person who is arrested, at the time when he is produced before the Magistrate or at any time during the period of his detention in custody only the medical examination is to be done. Otherwise a Magistrate has no power to pass a order for medical examination. On the other hand, the matter regarding in civil nature it can be done. Considering the said aspects this Court do not find any merits in this petition.

4. The reasoning given by the Magistrate that the accused is protected under Article 20 of the Constitution of India, has no legs to stand, in view of the authoritative pronouncement of the Supreme Court way back in The State of Bombay Vs. Kathi Kalu Oghad and Others, . This is a Constitutional Bench judgment of eleven Judges and this judgment has been extensively discussed in Smt. Selvi and Others Vs. State of Karnataka, . After Kathi Kalu Oghad's case, taking of finger impressions, footprints, handwriting, signature, blood, semen, saliva etc. from the accused, will not in any way offend the Article 20(3) of the Constitution of India.

5. The other reasoning of the Judicial Magistrate is that he has no power to order such a test de hors Section 53-A of Cr.P.C. This reasoning of the learned Magistrate is also not tenable in the light of the following passage from Selvi's case, cited supra:

The respondents have urged that the impugned techniques should be read into the relevant provisions i.e. Sections 53 and 54 Cr.P.C. As described earlier, a medical examination of an arrested person can be directed during the course of an investigation either at the instance of the investigating officer or the arrested person. It has also been clarified that it is within the powers of a court to direct such a medical examination on its own. Such an examination can also be directed in respect of a person who has been released from custody on bail as well as a person who has been granted anticipatory bail. Furthermore, Section 53

contemplates the use of "force as is reasonably necessary" for conducting a medical examination. This means that once a court has directed the medical examination of a particular person, it is within the powers of the investigators and the examiners to resort to a reasonable degree of physical force for conducting the same.

6. Therefore, a Magistrate has got the power to send the accused for DNA profiling even if he is on bail or has been granted anticipatory bail by the superior Court. Just because the Police, either on account of oblique motives or due to genuine remiss, had failed to act u/s 53-A, the Court cannot throw its hands up and plead helplessness. After all, procedural law is only a handmaid of justice and not its mistress. Therefore, I hold that the Magistrate has the power to send the accused and the child for medical examination for the purpose of DNA profiling.

7. In the result, the Criminal Revision Petition is allowed and the order of the learned Magistrate is set aside. The first respondent Police is directed to take the child of the de facto complainant and the accused and produce them before the Dean, Government Rajaji Hospital, Madurai for drawing blood samples and other samples for the purpose of DNA profiling. If the accused does not cooperate with the Police, steps may be taken to cancel his bail, as one of the conditions of granting bail is that the accused should cooperate with the investigation. Further, as noted by the Supreme Court in Selvi's case, the Police can resort to a reasonable degree of physical force on the accused for conducting the tests. Consequently, the connected miscellaneous petition is closed.