
(2004) 07 OHC CK 0039

In the Orissa High Court

Case No : Writ Petition (Criminal) No. 198 of 2003

Thogorani alias K. Damayanti

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 20-07-2004

Acts Referred:

Constitution of India, 1950 — Article 20(3), 21
Criminal Procedure Code, 1973 (CrPC) — Section 173(8), 53
Evidence Act, 1872 — Section 114

Citation : (2004) CLT 913 (Suppl CrI) : (2004) CriLJ 4003 : (2004) 29 OCR 29 : (2004) 2 OLR 183 : (2005) 1 RCR(Criminal) 346

Hon'ble Judges : M.M. Das, J;A.K. Patnaik, J

Bench : Division Bench

Advocate : V. Narasingh and N. Panigrahi, for the Appellant; Additional Government Advocate and A.C. Mohanty, G.N. Rout and Lina Patnaik, for the Respondent

Final Decision : Allowed

Judgement

M.M. Das, J.—Petitioner is the victim lady and the informant in Sessions Case No. 20 of 2002 corresponding to G. R. Case No. 225/2001 pending in the Court of Addl. Sessions Judge, Gajapati, Parlakhemundi.

2. The matrix of this case, bereft of unnecessary details is that the petitioner lodged an F.I.R. before Parlakhemundi Police Station on 16-7-2001 alleging therein that when she was 14 years of age, the opposite party No. 3 developed relationship with her giving assurance of marriage and cohabitated with her. As a consequence of the same, a female child was born to her who is now aged about two and half years and by the time of lodging the F.I.R. she conceived for the second time through opp. party No. 3. She further alleged in the F.I.R. that the family members of opposite party No. 3 were threatening and forcing her to forbear from such relationship with opposite party No. 3 and at a point of time even offered her Rs. 10,000/- for aborting the child which she conceived through the opposite party No. 3 and also ill treated and tortured her.

3. The petitioner has averred in the writ petition that initially the said F.I.R. was registered as P.S. Case No. 123/2001 against the opposite party No. 3 and others for commission of offences under Sections 498A/506/34. I.P.C.

4. During the course of investigation, which was being done by the S.D.P.O. Parlakhemundi, an application was filed on 3-12-2001 by the said S.D.P.O. opposite party No. 2, before the S.D.J.M., Parlakhemundi to treat the said P.S. Case No. 123/2001 to be one under Sections 376/417/506/34, IPC read with Section 3 of the S.C. & S.T. (P.A.) Act and on the basis of the said application G.R. Case No. 225/2002 was registered for the offences under the aforesaid Sections. During the course of investigation, the petitioner gave birth to a second female child on 24-12-2001 at Melliaplaitti Government Hospital and after completion of investigation, charge sheet was filed on 18-4-2001 on which cognizance of offences under Sections 376/506/34, IPC and Section 3 of the S.C. and S.T. (P.A.) Act was taken by the learned S.D.J.M., Paralakhemundi on 10-5-2003 and thereafter the case has been committed to the Court of Session and is now pending as S.C. Case No. 20 of 2002 before the learned Addl. Sessions Judge, Paralakhemundi. The order granting bail to opposite party No. 3 has been cancelled by this Court in Crl. Misc. Case No. 4140 of 2002.

5. The petitioner further averred that on 10-2-2003 an application was filed on her before the learned Addl. Sessions Judge, Paralakhemundi u/s 173(8), Cr.P.C. for directing to make further investigation of the aforesaid P.S. Case No. 123 of 2001, stating therein that the police during investigation has not taken steps for medical examination of the petitioner with regard to her age and has not conducted DNA test regarding paternity of the issues born and unless the Investigating Agency conducts the aforesaid test, the accused opposite party No. 3 will go scot free. This application was rejected by the Court below only on the ground that the petition having not been filed by the public prosecutor, the same cannot be taken into consideration. It appears that the petitioner thereafter challenged the said order of rejection in Crl. Revision No. 332 of 2003 before this Court in which the impugned order was set aside and the Addl. Sessions Judge was directed to take a decision on the said petition afresh. Pursuant to the said order, the learned Addl. Sessions Judge by order dated 24-7-2003 directed the opposite party No. 2, the S.D.P.O. to investigate into the case and submit a supplementary case diary within 45 days from the date of the said order before the learned S.D.J.M., Paralakhemundi with regard to the age of the petitioner by conducting ossification test and further gave liberty to the Investigating Officer to take steps for DNA test after determining the Blood Group of the victim lady, her two children and the opposite party No. 3. Consequently to the said order the petitioner was examined by the doctor and ossification test was conducted and the report of the said test filed in the Court shows that the age of the petitioner was above 17 years and below 19 years on the date of the test. It is alleged that the Investigating Officer neither conducted any DNA test nor Blood Grouping test of anybody, but has given an opinion in the supplementary case diary that considering the date and time of occurrence no DNA test or Blood Grouping test

was necessary.

6. Being aggrieved by the said action of opposite party No. 2, the S.D.P.O., the petitioner has filed this writ petition under 226 and 227 of the Constitution of India praying for a direction to opposite party No. 2 to conduct DNA test and Blood Grouping test for determination of paternity of her children. The case of opposite party No. 1, State, is that in view of the ossification test establishing the fact that the victim petitioner was a minor at the time of commission of offence, it was not necessary to conduct the DNA test to establish the charge u/s 376, IPC.

7. Opposite party No. 3, who is the accused in S.C. No. 20/2002 has entered appearance in this Court through his counsel, but has chosen not to file any counter.

8. Mr. V. Narasingh, learned counsel appearing for the petitioner submitted that opp. party No. 2 has failed to perform his duty in spite of the order passed by the learned Addl. Sessions Judge, by not taking steps for conducting DNA test to conclusively prove that opp. party No. 3 is the father of the two children given birth by the petitioner. He submitted that the reason assigned by the State in support of the action of opp. party No. 2 that it was not necessary to conduct the DNA test in view of the admitted position that the petitioner was a minor when she conceived the two female issues is fallacious, since no doubt, a person having sexual intercourse with a woman would amount to rape bereft of the fact of consent or no consent if the woman is a minor, but in order to prove an offence of rape the prosecution is required to prove that the accused committed sexual intercourse with the victim lady and in the instant case if, DNA test is not conducted to conclusively prove that the opp. party No. 3 is the father of the two female issues born to the petitioner and is therefore guilty of commission of the offence of rape, not only the opp. party No. 3 will go scot free, but also it will have the effect of branding the children as bastards and the mother (petitioner) as an unchaste woman.

9. It is further submitted on behalf of the petitioner that such a direction to conduct DNA test is not contrary to the provisions of either Section 315 Cr. P.C. or Articles 20(3) and 21 of the Constitution of India and as such the petitioner is entitled to the reliefs claimed in the writ petition to secure the ends of justice.

10. Mr. A.C. Mohanty, learned counsel for opp. party No. 3 accused opposing the contentions and prayer made by petitioner, submitted that after submission of charge-sheet, commitment of the case to the Court of Session and after trial of the case has begun it is no more open under law for the Court to issue a direction to the Investigating Officer to conduct DNA test by drawing a sample of blood from the person of opp. party No. 3 and as such in the event such a direction is issued the same would run contrary to law. It is further submitted that directing the Investigating Officer to draw a sample of blood from the person of opp. party No. 3 would infringe his right guaranteed under Articles 20(3) and

21 of the Constitution of India.

11. Before answering the above contentions raised by the learned counsel for opp. party No. 3 it would be apt to note that the DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at scene of crime. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict but also serves to exonerate. The sophisticated technology makes it possible to obtain conclusive results in case in which the previous testing had been inconclusive. Moreover, DNA sampling may also impinge on familial privacy where information obtained from one person's sample provides information regarding his or her relatives.

12. For properly appreciating the controversy raised before us, it would be appropriate to make a detail reference to the provisions of Sections 53 and 173(8) of the Criminal Procedure Code which read as under :

"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 necessary 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 Section 54, "registered medical practitioner means a medical practitioner who possesses any recognized 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.

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xxx xxx xxx xxx (8) Nothing in this section 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 and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of Sub-section (2) to (6) shall, as far as may be apply in relation to such report or reports as they apply in relation to a report forwarded under Sub-section (2)."

Section 53 of the Criminal Procedure Code makes a provision for the examination of the person of the accused by a registered medical practitioner at the request of a police officer not below the rank of Sub-Inspector in order to ascertain the fact which may afford evidence and also to use such force as is reasonably necessary for that purpose. This is a part and parcel of the process of investigation. "Investigation" has been defined in Section 2(h) of the Cr. P.C. In the following terms :

"2(h). "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf:"

This definition includes all the proceedings under the Code for the collection of evidence by a police officer who after completion, of investigation is expected to submit a report u/s 173 of the Code. Sub-section (8) of Section 173 was introduced in the Criminal Procedure Code in 1974 and the true import of this sub-section was considered by the Supreme Court in *Ram Lal Narang Vs. State (Delhi Administration)*, The Supreme Court in the said case after referring to decisions of various High Courts and the report of the Law Commission observed that further investigation is not all together, ruled out merely because the Court has taken cognizance of the case. Defective investigation coming to the light during the course of trial may be cured by further investigation if circumstances permit it. In paragraph 22 of the said decision the Supreme Court has held as follows :--

"As observed by us earlier, there was no provision in the Code of Criminal Procedure, 1898 which, expressly or by necessary implication barred the right of the police to further investigation after cognizance of the case had been taken by the Magistrate. Neither Section 173 nor Section 190 lead us to hold that the power of the police to further investigate was exhausted by the Magistrate taking cognizance of the offence. Practice, convenience and preponderance of authority, permitted repeated investigations on discovery of fresh facts. In our view, notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted u/s 173 of the 1898 Code, the right of the police to further investigate was not exhausted and the police could exercise such right as often as necessary when fresh information came to light. Where the police desired to make a further investigation, the police could express their regard and respect for the Court by seeking its formal permission to make further investigation."

13. This being the position prior to amendment of the Code and before Sub-section (8) of Section 173 of the Code was introduced, in our view, the new provision, i.e. Section 173(8) of the Code of Criminal procedure has clarified this position. This subsection confers such an express and specific power upon the Investigating Officer.

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 u/s 173(8) of the Code.

15. No doubt, as observed by the Supreme Court in *Sharda Vs. Dharmpal*, it is axiomatic that a Court shall not order a roving inquiry. It must have sufficient materials before it to enable it to exercise its discretion. The Court must arrive at a finding that the applicant has established a strong prima facie case before passing such an order.

16. In the present case we find that even though the petitioner established a strong prima facie case in support of her contention that it is a fit case where a direction should be issued to the Investigating Officer to collect blood, sample from the person of the opp. party No. 3 and from her two female issues and conduct DNA test the learned Addl. Sessions Judge failed to exercise the discretion in not issuing such a direction to the Investigating Officer in the order under Annexure-2.

17. In the case of *Sharda Vs. Dharmpal*, the Supreme Court has further held that if despite an order passed by the Court a person refuses to submit himself to such medical examination a strong case for drawing an adverse inference would be made out which the Court is entitled to draw u/s 114 of the Indian Evidence Act.

18. It is, therefore, inevitable to hold that in the event of refusal of opp. party No. 3 to give his blood sample for conducting DNA test, an adverse inference can be drawn by the trial Court.

19. Now, therefore, the only question left for determination is as to whether if a direction is issued to conduct DNA test by collecting blood sample from the person of opp. party No. 3, the same would infringe his rights under Articles 20(3) and 21 of the Constitution of India.

20. In India right of privacy has been culled out of the provisions of Article 21 of the Constitution and other provisions relating to the fundamental rights read with the directive principles of State Policy. Referring to Article 12 of the universal declaration of the Human Rights of 1948, the Supreme Court in *People's Union of Civil Liberties (PUCL) Vs. Union of India (UOI) and Another*, held that the right of privacy is a part of right to "Life" and "personal liberty" enshrined under Article 21 of the Constitution and it cannot be curtailed except according to the procedure established by law. In *M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others*, it was observed that a power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. The Court observed that when the constitution-makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right

to privacy, analogous to the American Fourth Amendment, "we have no justification to import it into a totally different fundamental right, by some process of strained construction". Nor is it legitimate to assume that the constitutional protection under Article 20(3) (right against self-incrimination) would be defeated by the statutory provisions for searches. However, the right to privacy was more specifically in issue in the context of disclosure of the outcome of the blood test in Mr "X" Vs. Hospital "Z", in which the appellant's blood sample was tested and he was found to be HIV positive which resulted in the appellant's proposed marriage being called off. The Supreme Court held that the right to privacy has been culled out of the provisions of Article 21 and other provisions of the Constitution. However, the right was not absolute and may be lawfully restricted or prevention of crime, disorder or protection of health or morals or protection of rights and freedom of ethers. It was held that, having regard to the fact that the appellant was found to be HIV (+), its disclosure would not be violative of either the rule of confidentiality or the appellant's right of privacy as "A", whom the appellant was likely to marry, was saved in time by the disclosure, otherwise, she too would have been infected with the dreadful disease if the marriage had taken place and consummated. Once the law provides "venereal disease" as a ground for divorce to either husband or wife, such a person who was suffering from that disease, even prior to the marriage cannot be said to have any right to marry so long as he is not fully cured of the disease.

21. With regard to the right guaranteed under Article 20(3) of the Constitution of India which says that "no person accused of any offence shall be compelled to be a witness against himself" it would be seen from the case of *The State of Bombay Vs. Kathi Kalu Oghad and Others*, the phrase "to be a witness" was interpreted to mean "imparting knowledge in respect of relevant facts by means of oral statement or statements in writing by a person who has personal knowledge of the facts to be communicated to a Court or to person holding an enquiry or investigation. The Supreme Court has pointed out that the hand-writing or finger impression could not change their intrinsic character and, therefore, even "though the taking of finger impression or specimen hand-writing may amount to furnishing evidence in the larger sense, but they could not be included within the expression to be a Witness". It was further observed that the Constitution makers may have intended to protect an accused from the hazards of self-incrimination, but they could not have intended to put obstacles in the way of efficient and effective investigation into a crime and of bringing criminals to justice. The majority Judges in the said decision came to the finding that taking specimen writing or thumb impressions etc. did not amount to "testimonial compulsion".

22. The only restriction according to us for issuing a direction to collect the blood sample of the accused for conducting DNA test would be that before passing such a direction, the Court should balance the public interest vis-a-vis the rights under Articles 20(3) and 21 of the Constitution in obtaining evidence tending to confirm

or disprove that the accused committed the offence concerned.

23. In balancing this interest, consideration of the following matters would be relevant:

- (i) the extent to which the accused may have participated in the commission of the crime;
- (ii) the gravity of the offence and the circumstances in which it is committed;
- (iii) age, physical and mental health of the accused to the extent they are known;
- (iv) whether there is less intrusive and practical way of collecting evidence tending to confirm or disprove the involvement of the accused in the crime;
- (v) the reasons, if any, for the accused for refusing consent (See Paper prepared by Hon'ble Mr. Justice R.K. Abichandani, Judge of Gujarat High Court, titled "(Impact of New Biology on Justice Delivery System -- The Gene Age--A Legal Perspective)").

Applying the said test, to the facts of the present case, we are of the view that taking blood sample of the accused-opp. party No. 3, in the instant case, will not amount to the accused becoming a witness against himself and thus a direction if issued to collect blood sample from the accused-opp. party No. 3 for conducting DNA test would not in any way take away his rights enjoyed under Article 20(3) of the Constitution.

24. So viewing we have no hesitation in allowing this writ petition with the following directions:

- (i) the opp. party No. 2, the S.D.P.O. Parlakhemundi (Investigating Officer) shall collect blood samples from the person of opp. party No. 3 (accused) and the two children of the petitioner and take steps to conduct DNA test and submit the said report to the learned Addl. Sessions Judge, Parlakhemundi in S.C. No. 20/2002.
- (ii) After submission of the said report, the learned Addl. Sessions Judge, Parlakhemundi should summon and examine the concerned person giving the said report and admit the said report to evidence for proving or disproving the guilt of the accused which is to be considered along with other evidence adduced by the parties.
- (iii) The DNA test report should be submitted by the I. O. (Opp. party No. 2) within a period of eight weeks from the date of receipt of this order.
- (iv) The petitioner shall cooperate with the trial of the case.
- (v) The stay order passed by this Court on 16-12-2003 shall remain in force till submission of DNA test report, as directed above.

The writ application is accordingly allowed.

A.K. Patnaik, J.

25. I agree.