
(2011) 08 AP CK 0038
In the Andhra Pradesh High Court
Case No : Writ Petition No. 22131 of 2011

V. Prem Sagar

APPELLANT

Vs

Joint Civil Surgeon and Others

RESPONDENT

Date of Decision : 17-08-2011

Acts Referred:

Constitution of India, 1950 — Article 20, 20(3)
Evidence Act, 1872 — Section 45

Citation : (2011) 08 AP CK 0038

Hon'ble Judges : Nooty Ramamohana Rao, J

Bench : Single Bench

Advocate : V.O. Rajaveer, for the Appellant;

Final Decision : Dismissed

Judgement

Nooty Ramamohan Rao, J.—This writ petition has been instituted seeking a writ of mandamus for striking off the false report / opinion of DNA/334/2009, dated 25-05-2010, rendered in connection with C.C. No. 488 of 2010 (Crime No. 130 of 2009) on the file of the VII Additional Judicial First Class Magistrate, Rajahmundry and to declare the same as illegal.

2. This writ petition appeared in the list for the first time on 05-08-2011 and after hearing the learned Counsel for the Petitioner, I directed the learned Government Pleader for Home to make available the investigation report in the matter, before me. Thereafter the case appeared on 09-08-2011, 10-08-2011, 11-08-2011 and 12-08-2011, but I did not have the benefit of hearing the learned Counsel for the Petitioner. However, Ms. Niyathi, learned Assistant Government Pleader for Home has produced the record for my consideration.

3. It is stated that the Petitioner was carrying on business at Kakinada, East Godavari District. Serious allegations have been leveled by the Petitioner about the nature and conduct of the 5th Respondent herein. It is submitted that the 5th Respondent has unjustly implicated the Petitioner as responsible for her

pregnancy and started threatening and blackmailing him, ever since. It is further submitted that to save his reputation in the society and also to ward off the prospects of losing esteem in the society, he has signed and delivered three crossed account payee cheques for a sum of Rs. 2,20,000/-. Notwithstanding these payments, the 5th Respondent has lodged a false complaint against the Petitioner unnecessarily and unjustly implicating him. The Station House Officer, I Town Police Station (Law & Order) at Kakinada, has, therefore, been approached by the Petitioner and he lodged a complaint narrating as to how he has been subjected to victimization by the 5th Respondent and the police have registered the complaint in Crime No. 189 of 2009 and have undertaken investigation into the matter. The 5th Respondent, thereafter, seems to have approached the I Town Police Station (Law & Order), Kakinada, repeating the same old wild allegations against the Petitioner and the local police have registered Crime No. 130 of 2009 on 23-11-2009. It is further alleged that the 5th Respondent has delivered a male child on 02-10-2009 at Government Hospital, Kothapeta, Ravulapalem Mandal, East Godavari District. It is stated that the 5th Respondent, in fact, joined hands with several antisocial elements and purchased a male child at Government General Hospital, Kakinada, as a part of her plan for implicating the Petitioner and that this issue has received wide media coverage also. The 5th Respondent was said to be enjoying the support of the local politicians and hence, she has falsely implicated this Petitioner. However, it appears that the local police have collected the blood samples from three individuals; one of them is the writ Petitioner and the other is the 5th Respondent, while the third sample is said to have been collected from the tender child and sent them to the A.P. Forensic Science Laboratory, Red Hills, Hyderabad (henceforth referred to as "the FSL"). The FSL has analyzed the three blood samples and tendered its opinion that the writ Petitioner is the biological father of the male child of the 5th Respondent and the 5th Respondent is declared as the biological mother of the said child. Hence, this writ petition has been instituted for quashing the false report, thus generated by the Respondents.

4. It is not in dispute that the three blood samples collected from three different persons were submitted to the FSL for rendering an opinion. The blood sample collected from the 5th Respondent is marked as Item No. 1 by the FSL. The blood sample said to have been collected from the male child of the 5th Respondent, who is two months old, is marked as Item No. 2, while the blood sample collected from the Petitioner is marked as Item No. 3. The FSL, Hyderabad, have rendered their opinion on 25-05-2010. It is stated therein that the DNA was extracted from all the three samples and they were subjected to Autosomal STR analysis. The result of this test is that the DNA profile obtained from Items No. 1 and 3 samples, when compared with the DNA obtained from the blood sample of Item No. 2, the allelic pattern of the DNA of Item No. 2 matched with the allelic pattern of Items No. 1 and 3 and based upon this finding, the FSL has given an opinion that the Petitioner is the biological father of the child of the 5th Respondent herein and that the 5th Respondent was the

biological mother of the said child.

5. Before proceeding any further, it will be appropriate to notice the scientific rationale behind the method adopted and understand the same.

6. The cells are the basic building blocks of all living organisms. The human body is composed of trillions of such cells. They provide the structure for the body. They absorb nutrients from food and convert those nutrients into energy for facilitating specific and specialized functions of various cells. Cells are identified to contain hereditary material and are capable of replicating the copies thereof. Essentially, the cells contain Cytoplasm, a jelly like fluid, surrounding the nucleus of the cell. The Cytoskeleton can be described as a network of long fibers that make the cell's structural framework. Mitochondria is the one, which is responsible for converting energy from the food into a form that the cell will be able to utilize it. The nucleus of the cell can be compared as the "command center" issuing directions to the cell to grow, mature, divide or die.

7. One of the most important questions which occupied the early molecular biologists was the mechanism by which the hereditary traits could be passed from one generation to another. In one experiment, Professor Hammeling a Danish scientist could show in 1930 that the hereditary material is stored in the nucleus. He used a green alga called "*Acetabularia mediterranea*" for the experiment. When the cap was cut off, a new cap was generated from the stalk and stem, however when the foot was removed no new foot was generated. In a second experiment he used a different strain - "*Acetabularia crenulata*" - which has a flower like cap. When the stem of *acetabularia crenulata*, wasrafted on the foot of *acetabularia mediterranea* the cap which developed was disc like. An obvious conclusion from these experiments was that the hereditary material was stored in the nucleus.

8. Every organism including microbes, plants and animals transmit their hereditary information in form of distinct units to the next generation. The material which contains this information is called nucleic acids. There are two types of nucleic acids: DNA and RNA. Most organisms store their hereditary information in the sequence of DNA (deoxyribonucleic acid) bases with the exception of retro viruses, which use RNA instead of DNA. DNA or RNA is a polymer made from repeating units of nucleotides. Ribonucleotides, which make up RNA consist of ribose, a pyrimidine or purine base and phosphate. The repeating units of DNA are deoxyribonucleotides, which consist of deoxyribose, a pyrimidine or purine base and phosphate.

9. The nucleus of the cell houses DNA. It is the DNA, which is repository of the hereditary material. Nucleus is surrounded by a membrane, which functions as a nuclear envelope that protects the DNA and separates the nucleus from the rest of the cells. Every cell lying within the same organism contains exactly the same DNA. The genetic information in DNA is stored as a code made up of four chemical bases: adenine (A), guanine (G), cytosine (C) and thymine (T). The

human DNA consists of about three billion bases and more than 99% of those bases are the same or common in all people. However, the order or the sequential formation of these bases determines the information available for building and maintaining an organism. This pattern is comparable to the position of letters or alphabets that appear in a sequential order to form words and sentences. DNA bases pair up with each other; A with T and C with G, to form units called base pairs. Each base is attached to a sugar molecule and a phosphate molecule. All these together -a base, sugar and phosphate -are called as nucleotide. Nucleotides are arranged in two long strands that form a spiral called double helix. The structure of the double helix is comparable to a twisted ladder in which the base pairs form the ladder's rungs, while the sugar and phosphate molecules form the vertical sidepieces of the ladder. Most significant property of a DNA is that it can replicate itself. Each strand of DNA in the double helix can serve as a pattern for duplicating the sequence of bases. This is a critical function when cells divide, because each new cell that is formed needs to have an exact copy of the DNA present in the old cell. Most of the DNA is packaged in chromosomes within the nucleus.

10. Human DNA is organized into long linear strands called Chromatin (Structure of Chromatin). During cellular division chromatin assumes the characteristic shape of chromosomes. Normal metabolizing cells or somatic cells in humans have 46 chromosomes, with 22 chromosomes having nearly identical copies of each other, called "homologous chromosomes". In females chromosome 23 consists of two nearly identical copies called Xchromosome. In males chromosome 23 consists of a X-chromosome and a Y-chromoso some.

11. A gene is the basic physical and functional unit of heredity. Genes are made up of DNA and act as instructors to make molecules called proteins. It is estimated that human beings have anywhere between 20000 to 25000 genes in them. Every person has two copies of each gene; one inherited from each parent. Though most of the genes are the same in all the people, but a small number of these genes slightly differ from person to person. Alleles are the forms of the same gene with small differences in the sequence formation of the DNA bases, which distinguish themselves and contribute to each person's unique physical features. If this can be segregated, then the identification of the sources of the gene becomes easy.

12. The first step to making a genetic fingerprint requires getting a sample of DNA. This sample can come from blood, semen, hair or saliva, and may be an extremely small sample. The root from a single strand of hair is enough for researchers to work with. This sample contains white blood cells which are broken open using detergent, and all the useable DNA is separated from the extra cellular material. Next the restriction enzymes are used to cut the DNA into smaller pieces. Restriction enzymes work by cutting the DNA at a specific sequence, which produces either blunt ends or sticky ends, and results in many fragments of different lengths.

13. A commonly adopted procedure for DNA finger printing is "Restriction Fragment Length Polymorphism" (RFLP). In this method, DNA is extracted from a sample and cut into segments using special restriction enzymes. RFLP focuses on segments that contain sequences of repeated DNA bases, which vary widely from person to person. The segments are separated using a laboratory technique called electrophoresis, which sorts the fragments by length. The segments are radioactively tagged to produce a visual pattern known as an autoradiograph, or "DNA fingerprint", on X-ray film. A newer method known as "Short Tandem Repeats" (STR) analyzes DNA segments for the number of repeats at 13 specific DNA sites. The chance of misidentification in this procedure is one in several billion. This is the method adopted by the FSL to determine the percentage of the child of the 5th Respondent.

14. In view of the well accepted scientific method adopted as the basis for the opinion of the FSL, it will be very difficult for one to treat the opinion of the FSL as wrong or false opinion lacking credibility.

15. Perhaps, in the present context, it is worth noticing as to how far opinions of experts upon a point of science will have relevance? A look at Section 45 of the Indian Evidence Act, 1872, offers an insight. It has been clearly set out therein that when the Court has to form an opinion upon a point of science as to the identity of handwriting or fingerprint impressions, the opinions upon that point by persons specially skilled in such science, are relevant facts and such persons are called as "Experts".

16. An opinion is derived from the inference drawn from observed facts. Since, the Courts may not be necessarily and properly equipped to draw the right kind of inference, upon facts narrated on points of science by a witness, law has recognized that in such matters, the opinion of a specially knowledgeable individual or a skilled professional can be acted upon. Thus, Section 45 renders, an opinion of an expert witness, possessing specialized knowledge and skill, as relevant and admissible.

17. When molecular biology has made rapid advance, helping the identity of an individual to be established as nearer to 100%, as was noticed supra, the opinions rendered by such experts become admissible in evidence, deserving the weight they ought to be given to.

18. However, the collection of blood sample of the writ Petitioner when he was facing a serious criminal charge amounts to compelling him to be a witness against himself, contrary to Clause (3) of Article-20 in Chapter-III of our Constitution, has been dealt with by the Full Court of the Supreme Court in the case of M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, But however, when some of the propositions laid down in M.P. SHARMA's case, have been considered to have been widely stated, the matter was once again considered by a Larger Bench of 11 Judges of the Supreme Court in The State of Bombay Vs. Kathi Kalu Oghad and Others,

19. B.P. Sinha, the Chief Justice of India, rendering the majority opinion in the matter, has said the following:

8. Indeed, every positive volitional act which furnishes evidence is testimony and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the person, as opposed to the negative attitude of silence or submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the Court room. The phrase used in Article 20(3) is "to be a witness" and not to "appear as a witness": It follows that the protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him.

1 The guarantee was, thus, held to include not only oral testimony given in Court or out of Court, but also to statements in writing which incriminated the maker when figuring as an accused person. After having heard elaborate arguments for and against the views thus expressed by this Court, after full deliberation, we do not find any good reasons for departing from those views. But the Courts went on to observe that "to be a witness" means "to furnish evidence" and includes not only oral testimony or statements in writing of the accused but also production of a thing or of evidence by other modes.

2 "To be a witness" may be equivalent to "furnishing evidence" in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification. "Furnishing evidence" in the latter sense could not have been within the contemplation of the Constitution makers for the simple reason that-though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject-they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions of parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect a accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice.

12. In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself. A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being

wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of "testimony".

14. In this connection the question was raised before us that in order to bring the case within the prohibition of Clause (3) of Article 20, it is not necessary that the statement should have been made by the accused person at a time when he fulfilled that character; it is enough that he should have been an accused person at the time when the statement was sought to be proved in Court, even though he may not have been an accused person at the time he had made that statement. The correctness of the decision of the Constitution Bench of this Court in the case of *Mohamed Dastagir Vs. The State of Madras*, , was questioned because it was said that it ran counter to the observations of the Full Court in *M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others*, In the full court decision of this Court this question did not directly arise; nor was it decided. On the other hand, this Court, in *M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others*, , held that the protection under Article 20(3) of the Constitution is available to a person against whom a formal accusation had been levelled, inasmuch as a First Information Report had been lodged against him. *M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others*, : *M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others*, , therefore, did not decide anything to the contrary of what this Court said in *Mohamed Dastagir Vs. The State of Madras*, The latter decision in our opinion lays down the law correctly.

15. In order to bring the evidence within the inhibitions of Clause (3) of Article 20 it is must be shown not only that the person making the statement was an accused at the time he made it and that it had a material bearing on the criminality of the maker of the statement, but also that he was compelled to make this statement. "Compulsion" in the context, must mean what in law is called "duress". In the Dictionary of English Law by Earl Jowitt, "duress" is explained as follows: "Duress is where a man is compelled to do an act by injury, beating or unlawful imprisonment (sometimes called duress in strict sense) or by the threat of being killed, suffering some grievous bodily harm, or being unlawfully imprisoned (sometimes called menace, or duress "permines). Duress also includes threatening beating or imprisonment of the wife, parent or child of a person." The compulsion in this sense is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted. Hence, the mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion within the meaning of Article 20(3) Hence, the mere fact that the accused person, when he made the statement in question was in police

custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement.

20. This principle has been subsequently followed in *State of Uttar Pradesh v. Boota Singh* AIR 1978 SC 1770, *Musheer Khan Alias Badshah Khan v. State of Madhya Pradesh* 2010 Supreme (1) 574 and in *Selvi v. State of Karnataka* 2010 Supreme (3) 558.

21. In view of the principle enunciated by the Supreme Court in *Kathi Kalu Oghad*'s case (cited 2 supra), collection of a blood sample for the purpose of DNA fingerprinting does not amount to a custodial compulsion of self-incrimination. Hence, it is a perfectly legitimate exercise to have ordered for a DNA fingerprinting test to be conducted by the FSL and its opinion rendered on the subject can neither be treated nor termed as a false or improper opinion. For the above reasons, I do not find any merit in the writ petition and it is accordingly, dismissed at the stage of admission, but however, without costs.