HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

S.B. Criminal Misc(Pet.) No. 4963/2024

----Petitioner

Versus

1. State Of Rajasthan, Through Pp
2.

----Respondents

For Petitioner(s) : Mr. Vinit Jain, Sr. Adv. assisted by Mr. Pravin Vyas.

For Respondent(s) : Mr. Sumer Singh Rajpurohit, P.P.

HON'BLE MR. JUSTICE ARUN MONGA

Order

30/07/2024

1. The question of law that arises in the case in hand is whether an order passed by the Court for DNA profiling of an accused by itself violates the Constitutional protection against self-incrimination, as enshrined in Article 20(3)? This issue strikes at the heart of a fundamental principle in criminal law - that no individual accused of an offence can be forced to testify against himself. Conflict thus is between modern forensic techniques and long-standing Constitutional safeguards.

Petitioner is an under trial and is accused of alleged offences under Sections 363, 366-A, 376(2)(n), 376(3) of IPC and Section 6, 5(J-II), 5(1) of POCSO Act and 3(2)(va) of SC/ST Act. He is impugning an order dated 12.07.2024 passed during pendency of the trial by the learned Special Judge, POCSO & Child Rights Protection Act, Sri Ganganagar allowing the complainant’s application for petitioner’s DNA examination by a medical expert.

2. The peculiar factual narrative leading to the instant petition is as follows:

2.1 FIR in question was registered on the information given by respondent No.2 on 19.05.2023, in which, he has alleged that his daughter 'U', aged about 17 years, got friendly with the petitioner (a resident of the same village) four years back. He further alleged that under the pretext of marriage, the petitioner developed physical relations with his daughter. Their relationship lasted for about 3 to 4 years. He also alleged that the petitioner is in possession of obscene photographs and videos, on the strength of which, exploited his daughter with a threat that he will make them viral. On 16.05.2023, the petitioner took his daughter to Ganganagar on a motorcycle. There, he committed forcible intercourse with her. With these allegations, FIR in question was registered and investigation ensued.

2.2 The charge-sheet was filed against the petitioner. The trial commenced thereafter. During trial, an application was filed by the complainant on 12.07.2024, stating that a girl child has been delivered by his daughter and therefore, to secure ends of justice, it is essential that a D.N.A. examination of the petitioner and the female child be carried. Learned trial court vide its order dated 12.07.2024 has proceeded to allow the said application and directed the petitioner to appear before the Doctor with the help of police for giving his blood samples. Hence, this petition.

3. In the aforesaid backdrop, I have heard learned Senior Counsel representing the petitioner as well as the learned Public Prosecutor.

4. First and foremost, Mr. Vinit Jain, learned Senior Counsel would draw my attention to Section 53-A of the Cr.P.C. and argue that the application filed by the prosecution invoking the said section *per se* is not maintainable at this stage, once the trial has begun. Being so, any order passed pursuant to the said application is *ex facie* illegal and has to be necessarily set aside. It is also contended that that the impugned order violates the protection under Article 20(3) of the Constitution against testimonial compulsion.

5. Learned counsel for the petitioner also relies on judgment rendered by Calcutta High Court in the case of ***Sanjay Biswas Vs. State***[1] in support of his aforementioned contentions.

6. Learned Public Prosecutor on the other hand supports the impugned order and argues that no interference of this Court is warranted.

7. Having heard both *sides* and perused the record, I am of the opinion that the petition deserves dismissal. Let us now delve into the reasons thereof.

8. Synopsis filed with the petition shows that the application was filed by the complainant on 12.07.20204 seeking DNA examination of the child and that of the petitioner.

9. Before filing of the aforesaid application, the Bhartiya Nagarik Suraksha Sanhita, 2023 (for short BNSS and/or Sanhita) had come into force and the Code of Criminal Procedure (for short the Code) stood repealed with effect from 01.07.2024.

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[1] ***2024 SCC OnLine Cal 1337***

10. Section 531(2)(a) BNSS provides that notwithstanding such repeal, if immediately before the date on which the Sanhita comes into force, there is, *interalia*, any application pending, then such application etc shall be disposed of in accordance with the provisions of the Code as in force immediately before such commencement, as if this Sanhita had not come into force.

11. As noted above, in this case, the application was filed by the complainant on 12.07.20204 for DNA examination. Thus, it was not pending immediately before or at the time of coming into force of the BNSS/Sanhita from 01.07.2024. This being the position, it fell outside the scope of saving clause sub-section(2) (a) of section 531 of the BNSS/Sanhita. It follows that for disposal of the said application, the provisions of the BNSS would apply and not those of Code of Criminal Procedure. The impugned order disposing of application dated 12.07.2024 is thus deemed to have been passed under the BNSS/Sanhita, though not formally so stated.

12. Section 193(3)(i) of the Sanhita provides that as soon as the investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, in the form as the State Government may, by rules provide stating therein the specified particulars/details. Sub section (9) of section 193 *ibid* provides that nothing in this section shall be deemed to preclude further investigation in respect of an offence after the report under sub-section 3 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 as the State Government may, by rules provide; and the provisions of sub-sections (3) to (8) 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 (3): **Provided that further investigation during the trial may be conducted with the permission of the Court trying the case.** For ready reference, Section 193 of BNSS, is reproduced herein below:

193. Report of police officer on completion of investigation.-

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2) The investigation in relation to an offence under sections 64, 66, 67, 68, 70, 71 ofthe Bharatiya Nyaya Sanhita, 2023 or under sections 4, 6, 8 or section 10 of the Protection ofChildren from Sexual Offences Act, 2012 (32 of 2012) shall be completed within two months from the date on which the information was recorded by the officer in charge of the police station.

(3) (i) As soon as the investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form as the State Government may, by rules provide, stating -

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether the accused has been released on his bond and, if so, whether with or without sureties;

(g) whether the accused has been forwarded in custody under section 190;

(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under sections 64, 66, 67, 68 or section 70 of the Bharatiya Nyaya Sanhita, 2023.

(ii) The police officer shall, within a period of ninety days, inform the progress of the investigation by any means including electronic communication to the informant or the victim.

(iii) The officer shall also communicate, in such manner as the State Government may, by rules, provide, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(4) Where a superior officer of police has been appointed under section 177, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(5) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(6) When such report is in respect of a case to which section 190 applies, the police officer shall forward to the Magistrate along with the report—

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 180 of all the persons whom the prosecution proposes to examine as its witnesses.

(7) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(8) Subject to the provisions contained in sub-section (7), the police officer investigating the case shall also submit such

number of copies of the police report along with other documents duly indexed to the Judicial Magistrate for supply to the accused as required under section 230:

Provided that supply of report and other documents by electronic communication shall be considered as duly served.

(9) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (3) 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 as the State Government may, by rules, provide; and the provisions of sub-sections (3) to (7) 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 (3):

Provided that further investigation during the trial may be conducted with the permission of the Court trying the case and the same shall be completed within a period of ninety days which may be extended with the permission of the Court."

(emphasis supplied)

13. It is amply clear from the relevant provisions of the Sanhita, referred to above, that after completion of investigation and submission of police report under section 193(3)(i) of the Sanhita to the Magistrate, further investigation during the trial may be conducted with the permission of the Court trying the case. In other words, after submission of police report under Section 193(3)(i) of the Sanhita to the Magistrate, the trial Court is vested with the powers to allow/order further investigation during the trial under proviso of Section 193(9) of Sanhita.

14. Section 2(1)(l) of the Sanhita defines 'investigation' to mean and include all the proceedings under the Sanhita 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. For ready reference Section 2(1)(l)) of BNSS, is reproduced herein below:

> *"*2(1).- In this Sanhita, unless the context otherwise requires,-
> *Xx xxx*
> (l) *"investigation"includes all the proceedings under this Sanhita 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."*

15. Chapter V captioned 'Arrest of Persons' of the Sanhita *ibid* opens with section 35, which provides that any police officer may arrest any person, *inter alia*, for proper investigation of the offence. Section 52 (corresponding with Section 53-A of Cr.P.C.) is also contained in *Chapter V* of the Sanhita. It provides that 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 acting at the request of a police officer 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. The medical practitioner conducting such examination shall examine such person and prepare a report of examination giving the requisite particulars, *interalia*, the description of material taken from the person of the accused for DNA profiling.

For ready reference Section 52 of BNSS, is reproduced herein below:

"52. 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 any police officer, 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 to the investigating officer, who shall forward it to the Magistrate referred to in section 193 as part of the documents referred to in clause (a) of sub-section (6) of that section."

16. Reverting to Section 193 of BNSS, such further investigation under section sub section (9) of section 193 *ibid* of the Sanhita

would obviously include the medical examination of the person arrested on charge of committing an offence of rape or an attempt to commit rape, if there are grounds for believing that his medical examination will afford evidence as to commission of such offence, in terms of section 52 *ibid*.

17. Conjoint reading of sections 2(1)(l), 35, 52 and 193 of the Sanhita shows that after the submission of a report under section 193(2) by the police to the Magistrate, the court can order further investigation including a medical examination of the accused in terms of section 52 *ibid*.

18. In present case, as per the report lodged by the complainant on 19.05.2023, his daughter was then 17 years old. The complainant alleged, *interalia*, that since last 3-4 years, the accused was having physical relations with her; on 16.05.2023, the accused took his daughter to Ganganagar and committed forcible intercourse. Upon this report, the police had registered FIR No. 64/2023. Impugned order by the learned trial Court in Sessions case No. 37/2023 was passed as on 12.07.2024. Obviously, the police investigation report under section 173(2) had already been forwarded to the Magistrate in 2023 itself. Later, it travelled to the Sessions Court, leading to the registration of Sessions case No. 37/2023.

19. After submission of the police investigation report under section 173(2) of the Code to the Magistrate in 2023, the victim is stated to have given birth to a baby girl on 14.01.2024. As already noted above, according to the report lodged on 19.05.2023 by the complainant with the police, on 16.05.2023, the accused took his

daughter (aged 17 years on 19.05.2023) to Ganganagar and committed forcible intercourse. In such circumstances, there is reasonable ground for believing that DNA profiling and test of the petitioner-accused vis-à-vis that of the baby girl delivered on 14.01.2024 by the rape victim will afford evidence as to the commission of the stated offence. Thus, the case for allowing the complainant's application for petitioner'sDNA test seems to fall within the scope of sections 2(1)(l), 35, 52 and 193 of the Sanhita.

20. Accordingly, I have already opined above that in the case in hand the complainant's application for petitioner's DNA test seems to fall within the scope of sections 2(1)(l), 35, 52 and 193 of the Sanhita.

21. Furthermore, if the test is carried out, result may go either way. The result of DNA test will be known only after the actual test. It may be in favour of the accused petitioner or may be against him. At this point of time, one can only say that the result of DNA test will be a piece of relevant evidence as to the commission of the stated offence. The evidentiary value of result of DNA test will be seen at the time of appreciation of evidence by the court.

22. In any case, after passing of the impugned order by the learned Sessions Court, option/choice lies with the petitioner whether or not to give his blood sample for the contemplated DNA test. If he does not want not to give his blood sample for the contemplated DNA test, the petitioner can appear in the learned trial Court and make a categorical statement refusing to give his

blood sample. Needless to say that in that case, he will bear the legal consequences of such refusal.

23. At this stage, I may hasten to refer to section 119(1) and illustration (h) thereunder of the Bhartiya Sakshya Adhiniyam, 2023 (for short BSA) which are as under :

"Bhartiya SakshyaAdhiniyam, 2023 :

(1) 119. Court may presume existence of certain facts.- *The court may presume the existence of any fact which it thinks likely to have happened, regad being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*

Illustrations

The court may presume-

XXX XXXXXX

(h) if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him."

As result of the above discussion, I am of the opinion that mere passing an order by the Court for DNA profiling of the accused by itself does not violate the Constitutional protection against self-incrimination as enshrined in Article 20(3) and that after passing of such an order by the Court, the option/choice still lies with the accused whether or not to give his blood sample for the contemplated DNA test. The question of law framed in the opening part of this order is answered accordingly.

24. It thus follows that in present case, the mere passing of the impugned order allowing the complainant's application for petitioner's DNA test does not, by itself, amount to compelling the petitioner to be a witness against himself for self incrimination and that the option/choice still lies with the accused whether or not to give his blood sample for the contemplated DNA test.

25. I am, therefore, unable to accept the contention of his learned senior counsel that the impugned order allowing the complainant's application for petitioner'sDNA test directing the petitioner to provide his blood sample for DNA test, by itself, amounts to compelling the petitioner to be a witness against himself for self incrimination and violates the protection under Article 20(3) of the Constitution of India and that the option/choice still lies with the accused whether or not to give his blood sample for the contemplated DNA test.

26. Adverting now to the reliance placed on High Court of Clacutta Judgment in ***Sanjay Biswas*** (supra) by the learned counsel for the petitioner. Learned Single Judge, speaking for High Court of Calcutta, *inter alia,* observed / held therein as under:-

> *"15. The trial commenced after framing of charges and hence effectively ended the period during of which any further investigative process could be carried out including any orders passed by the learned Special Court either suo moto or on an application made by the party before the learned Special Court. Thus, the order directing further investigation by the learned Court under section 53-A of the Cr. P.C. in the form of collecting DNA evidence to be submitted by a supplementary chargesheet is contrary to the procedure established under the Cr. P.C.*
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> *16. It is also pertinent to refer to section 311 of the Code which confers power to a Court to summon material witnesses or examine persons present at any stage of any enquiry, trial or proceeding under the Code. Section 311 falls under Chapter XXIV of the Code which lays down certain general provisions as to enquiries and trials. Section 311 of the Cr. P.C. is a powerful section in the sense of conferring unlimited powers on a Court to do certain acts with a profusion of the word "any" in the provision. The provision however pertains to clarification of any question of the Court or clarification of any issue which the Court may find to be essential for a just decision in the case. An analogy may be drawn in this respect between sections 311 of the Cr. P.C. and section 165 of the Evidence Act, 1872 which also gives similar powers to a Judge to ask any question, in any form or at any time about a relevant/irrelevant fact or order*

production of document without the parties being entitled to object to such question or order. Despite such unlimited powers, both the provisions operate within the statutory framework and do not contemplate powers being exercised de hors the respective statutes. More important, section 311 cannot be used for filling up lacunae through recall or examination of witnesses for the purpose of creating fresh evidence.

17. The gaps in the conduct of investigation in the present case would be evident from the failure of the police to collect material which they had the option of doing during the course of investigation. Section 53-A comes in Chapter V of the Code and deals with arrest of persons. Section 53-A is an enabling provision which gives a roadmap to the police after arrest. Section 53-A(5) provides for the registered medical practitioner forwarding the report to the Investigating Officer who shall thereafter forwarded it to the Magistrate. Hence sub-section (5) of section 53-A makes it clear that the report has to be sent under section 173(5)(a) (specified under section 53-A(5) which points to the legislative intent which is to use section 53-A as a tool for investigation during the stage of investigation (for emphasis). Significantly, section 53-A does not vest the Court with any power for directing an examination under that section after the investigative phase which ends with framing of the charge.

18. In the facts of the present case, the petitioner was granted bail during the period of investigation. The Investigating Officer however failed to take steps under section 53-A during the period of investigation and even after the victim child was born on 22.01.2019. Significantly, the investigation was pending on 22.01.2019, continued through submission of the charge-sheet on 07.02.2019 and continued till the framing of charges till 06.09.2019.

19. The above facts constitute the lacunae of the investigation. Ignoring the gaps in the investigation in the form of collecting material contemplated under section 53-A gives rise to a presumption that the prosecution sought to fill up the gaps by invoking section 53-A after the stage of investigation was over. The Supreme Court in Chotkau v. State of Uttar Pradesh, (2023) 6 SCC 742, held that the failure of the prosecution to subject the appellant to medical examination was fatal to the prosecution case and sufficient to overturn the conviction and penalty.

20. The impugned order in this case reflects that the learned Court proceeded on the assumption that the accused/petitioner would not suffer any prejudice if the DNA profiling of the child was allowed. The Court proceeded on the collateral issue of determining the paternity of the child. The underlying presumption which weighed with the Court was that the rights

of the child cannot be compromised in the event issue of paternity is left undecided. It must be said in this regard that presumption of paternity or the prevention of bastardization of a child are based purely on civil considerations. Criminal law punishes the guilty upon the offence being proved beyond reasonable doubt. The adjudication of guilt is to be determined within the procedure laid down in the Cr. P.C. The future interest of the child, however laudable, cannot justify invoking a provision at any point of time in contravention of the provisions of the Cr.P.C.

21. The question of paternity of the defacto complainant was considered by the Supreme Court in Inayath Ali v. State of Telangana, SPL (Crl.) No. 4946/2017 where the Supreme Court found the judgment of both the trial Court as well as the High Court permitting DNA fingerprint test to be liable for interference on the ground that the paternity of the children of the defacto complainant was a collateral factor to the allegation on which the criminal case was founded. The Supreme Court was also of the view that the test would be invasive of the privacy and the physical autonomy of the person. The issue of Section 53-A of the Code was not in issue before the Supreme Court.

22. In this regard, it is important to hold that although the concept of privacy is considerably diluted in respect of an accused in a criminal proceeding, Article 21 of the Constitution will rear its protective head once when there is an infraction of the procedure established by law.

23. It is clear from the facts of the present case that the prosecution sought to fill in the gaps in its case by applying for DNA profiling and the learned Court allowed the application on the collateral consideration of the issue of paternity. Diversion of the procedure established under the Cr. P.C. or creating a procedure unknown to law raises the presumption of arbitrariness which is violative of rights of the accused. Article 21 of the Constitution embodies a fair trial and presumes that every person will have the benefit of a trial which follows the procedure established by law. The principles of criminal jurisprudence cannot be diluted or bent to justify civil or social considerations which are collateral in nature.

24. The prejudice caused to the petitioner/accused was automatic and irreversible once the trial Court allowed creation of new evidence after the stage of investigation for filling up the gaps in the prosecution case.

25. The prosecution has relied on Malappa @ Malingaraya (supra). The issue before the Single Bench of the Karnataka High Court in that decision was whether drawing of blood sample would amount to self-incrimination under Article 20 (3)

of the Constitution and whether the petitioner had given consent to undergo DNA profiling. The Court relied on Selvi v. the State of Karnataka, (2010) 7 SCC 263, to hold that it was within the power of the Court to direct medical examination on its own motion. It should however be pointed out that paragraph 166 of Selvi specifically states that medical examination of an arrested person can be directed during the course of investigation. (for emphasis).”

27. While appreciating the views expressed above in the facts of the case therein, with due respect, I may however point out that the trial Court’s enabling powers under 173(8) of the then Code to order further investigation after submission of the police report under sub-section (2) of Section 173 of the Code seem to have escaped notice of the learned Single *Judge of Calcutta High Court.* Moreover, in the said case (Sanjay Biswas), the impugned order was passed by the trial court and subsequently the case was also decided by the High decided with reference to the then applicable provisions of the Code of Criminal Procedure.

27.1 Further, in that case, the rape victim had delivered the child before filing of the report under section 173(2) of the Code by the police in the Court on 22.01.2019. The charge-sheet was submitted by police in Court on 17.02.2019. Thus, during the course of investigation before filing it’s report under section 173(2) in the Court, the police could have, if it so desired, taken steps for the medical examination of the person of the accused including taking of his sample for DNA test *vis-à-vis* that of the baby already delivered by the rape victim. This was not done. Charge was framed by the Court on 06.09.2019. Numerous witnesses, including the prosecutrix, had already been examined. Thereafter, the application for DNA test of the accused was made

on 11.09.2023. In such circumstances, the learned Bench observed that there were lacunae of investigation in the form of collecting material contemplated under section 53A of the Code, which gave rise to the presumption that the prosecution had sought to fill up the gaps in it's investigation by invoking section 53A of the Code *ibid*.

27.2 Facts and circumstances in present case are different. Reliance by the petitioner's learned counsel on the judgment *ibid* and the provisions of Section 53-A Cr.P.C. since repealed is, thus, wholly misplaced.

28. As a result of above discussion, I find no illegality or procedural irregularity fatal to the passing of the impugned order by the learned trial Court, so as to warrant interference by this Court in exercise of powers under section 528 of the Bhartiya Nagarik Suraksha Sanhita, 2023. As observed above, if the petitioner does not want not to give his blood sample for the contemplated DNA test, he can appear in the learned trial Court and make a categorical statement refusing to give his blood sample. Needless to say that in that case, he will bear the legal consequences of such refusal.

29. Accordingly, the petition is dismissed.

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

(ARUN MONGA),J

28-Sumit/-

Whether Fit for Reporting: Yes / No