Taking DNA Samples of Rape Accused Does Not Violate His Constitutional Right Against Self-Incrimination: Kerala High Court

2022 LiveLaw (Ker) 560

IN THE HIGH COURT OF KERALA AT ERNAKULAM
THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH
CRL.MC NO. 8065 OF 2018; 28TH OCTOBER 2022
DAS @ ANU versus **STATE OF KERALA**

AGAINST THE ORDER IN CRMP 3697/2018 OF ADDL.SESSIONS COURT- I (SPECIAL COURT), PATHANAMTHITTA

Petitioner / Accused: by Adv M.V.S. Nampoothiry

Respondent / Complainant: by Sangeetha Raj (PP)

O R D E R

Annexure A5 order directing the accused to appear before the investigating officer to collect his blood sample for the purpose of DNA examination is under challenge in this Crl. M.C.

2. The petitioner is the accused in SC No.19/2012 on the file of Additional Sessions Court-I (Special Court), Pathanamthitta (for short, 'the court below'). He faces trial for the offences punishable under Sections 376 and 511 of 313 r/w 34 of IPC.

3. The crime was registered in the year 1997 by Konni Police as Crime No.324/1997. Altogether there were four accused. The petitioner was the accused No.1. The prosecution case, in short, is that the petitioner committed rape on the victim on 15 /6/1997 at 3.00 a.m. in the bathroom attached to the building bearing No.X/48 of Konni Panchayat belonging to one Murupel Mathai and again on 16/6/1997 at 3.30 p.m., at a house *viz.*, Binu Bhavanam and impregnated her. The allegation against the remaining accused is that they, along with the petitioner, attempted to cause miscarriage. Later, the victim delivered a girl child.

4. After investigation, the final report was filed at the Judicial First-Class Magistrate Court, Pathanamthitta, which committed the case to the Court of Session. The accused, Nos.2 and 3, alone appeared at the committal court. The case against them was committed to the Sessions Court. The Sessions Court took cognizance against them, numbered the case as SC No.79/2004 and made it over to the court below. The accused Nos.2 and 3, faced trial and they were acquitted as per the judgment dated 3rd February 2007. The case against the petitioner and the accused No. 4 was refiled as CP No.87/2003. Thereafter, the petitioner appeared at the committal court, and the case against him was also committed to the Sessions Court. The Sessions Court took cognizance against the petitioner, numbered the case as SC No.19/2012, and made it over to the court below.

5. The victim and material witnesses were examined by the court below. During the trial, the investigating officer filed Annexure A3 report stating that further investigation had been initiated u/s 173(8) of Cr.P.C. and that for DNA examination, the blood sample of the petitioner had to be collected. It was further reported that though notice was given to the petitioner to cooperate with the investigation for the said purpose, he expressed his unwillingness. It was also reported that the victim gave consent to collect the blood sample of herself and her daughter for the purpose of DNA examination. The prosecution filed Crl.M.P.No. 3697/2018 at the court below to

give a direction to the petitioner to make himself available for the collection of blood samples and for potency examination. The accused opposed the application and filed a detailed objection. Annexure A4 is the objection. It was contended that after taking cognizance, the court below is barred from issuing any order pertaining to the investigation. It was further contended that the inordinate delay in completing the trial would cause serious hardship to him. The court below, after hearing both sides, allowed the application as per Annexure A5 order. The said order is under challenge in this Crl. M.C.

6. I have heard Sri.M.V.S.Nampoothiry, the learned counsel for the petitioner and Sri. Sangeetha Raj, the learned Public Prosecutor.

7. The learned counsel for the petitioner, Sri.M.V.S.Nampoothiry submitted that Article 20(3) of the Constitution of India gives protection to an accused against selfincrimination, and the impugned order directing the petitioner to submit to DNA profiling test would amount to self-incrimination and thus unsustainable. The learned counsel further submitted that the question of paternity of the child has absolutely no nexus to the offence of rape, and the allegation regarding rape must be independently proved by the prosecution and hence, the court below went wrong in ordering DNA examination. In support of the said submission, the learned counsel relied on two decisions of the Single Bench of this Court – ***Sisu Bhavan v. Joy Yohannan*** (2008 (4) KLT 550) and ***Divine Providence Foundling Home v. Raju Gopi*** (2014 (3) KLT 384). The learned counsel also submitted that a strong *prima facie* case is necessary to direct a person to undergo a DNA examination, and when the victim was examined in SC No.79/2004, she categorically deposed that she was not aware of the person responsible for her pregnancy. In these circumstances, no *prima facie* case is made out, and hence, the court below ought not to have directed the DNA test, submitted the counsel. The counsel added that the petition is highly belated and without any bonafides. On the other hand, the learned Public Prosecutor Sri. Sangeetha Raj submitted that the police have sufficient power to seek direction from the court to make an accused person undergo a DNA test in a case of rape u/s 53A of Cr.P.C. To prove the offence of rape allegedly committed by the petitioner, the matching of the DNA samples and conduct of DNA profiling test is very essential, and thus, the court below was absolutely justified in allowing the application, submitted the learned Public Prosecutor.

8. The recent advancement in modern biological research has regularized forensic science resulting in radical help in the administration of justice. DNA technology, as a part of forensic science and scientific discipline, not only provides guidance to the investigation but also supplies the court accrued information about the tending features of the identification of criminals. After the amendment of Cr. P.C, by the insertion of S.53A by Act 25 of 2005 , DNA profiling has now become a part of the statutory scheme. S.53A relates to the examination of a person accused of rape by a medical practitioner. DNA profiling test is now specifically included by way of explanation to S.53 of Cr.P.C. Similarly, u/s 164A of Cr.P.C inserted by Act 25 of 2005, for medical examination of the victim of rape, the description of material taken from the person of the woman for DNA profiling is must. Thus, S.53A and S.164A inserted in the Cr. P.C by way of the Amendment Act of 2005, makes the DNA profiling of the accused and the victim permissible in cases of rape. The observation to this effect has been made by the Apex Court in ***Krishan Kumar Malik v. State of Haryana*** [(2011) 7 SCC 130] in the following words.

"Now, after the incorporation of S.53-A in the Criminal Procedure Code w.e.f. 23/6/2006, it has become necessary for the prosecution to go in for DNA test in such type of cases facilitating the prosecution to prove its case against the accused."

The Apex Court in ***Sunil v. State of Madhya Pradesh*** [(2017) 4 SCC 393] has held that a positive result of a DNA test would constitute clinching evidence against the accused in a prosecution for rape.

9. Article 20(3) of the Constitution of India provides that "no person accused of any offence shall be compelled to be a witness against himself". The petitioner's contention is that obtaining a sample from him for a DNA test violates his right against self-incrimination. The privilege of Article 20(3) is applicable only to testimonial evidence. Drawing DNA samples from the body of an accused in a criminal case, especially in a case involving sexual offence, will not violate his right against self-incrimination protected under Article 20(3) of the Constitution of India. The right against self-incrimination is just a prohibition on the use of physical or oral compulsion to extort testimonial evidence from a person, not an exclusion of evidence taken from his body when it may be material. There is no testimonial compulsion in the process of taking a sample of the blood by a qualified and registered medical practitioner, and in no case could it be said that by this process, the accused is forced to tender evidence against himself nor by this process accused is being compelled to be a witness against himself. That apart, as per S.53A of Cr.P.C, the police have got enough power to send the accused to a qualified medical practitioner for the purpose of taking samples. The examination of the person of the accused is contemplated as an aid to the investigation of the trial to ascertain facts which may afford evidence as to the commission of the offence under investigation. The Apex Court in ***State of Bombay v. Kathi Kalu Oghad*** (AIR 1961 SC 1808) has held that the use of material samples such as fingerprints for the purpose of comparison and identification does not amount to testimonial act for the purpose of Art.20(3). Relying on the said judgment, the Apex Court in ***Selvi and Others v. State of Karnataka*** (AIR 2010 SC 1974) has held that taking and retention of DNA samples which are in the nature of physical evidence, does not face constitutional hurdles in the Indian context. Thus, the protection guaranteed under Article 20(3) of the Constitution of India does not extend to protecting an accused from being compelled to give his sample of blood etc., for the purposes mentioned in S.53 and 53A of Cr.P.C. during the investigation into an offence. No doubt, the investigation includes further investigation as well. Though S.53A refers only to the examination of the accused by a medical practitioner at the request of the police officer, in the appropriate case, the court can give a direction to the police officer to collect the blood sample of the accused and conduct DNA test for the purpose of further investigation u/s 173(8) of Cr.P.C.

10. The learned counsel for the petitioner argued that the petitioner appeared at the committal court in the year 2012. At that time, the prosecution did not file any application to draw his blood samples to conduct the DNA test. The present application has been filed after the elapse of six years, that too after the examination of all the prosecution witnesses. Such a petition is highly belated and ought not to have been allowed by the court below, submitted the learned counsel. It is a case where the petitioner was absconding all along during the investigation stage. Hence, the investigating agency could not take samples of his blood to conduct a DNA examination. Now, the investigating agency has initiated further investigation. It is settled that further investigation u/s 173(8) of Cr. P.C can be initiated at any stage of

the trial. In ***Siva Vallabhaneni v. State of Karnataka and Another*** [(2015) 2 SCC 90], a contention was raised before the Apex Court that the DNA profiling test must be conducted immediately after the arrest and cannot be allowed at a later point in time. Repelling the contention, it was held that S.53A does not put fetters on the investigating agency to get the accused examined at a later stage. Thus, the argument based on delay must fail.

11. The learned counsel for the petitioner next argued that the question of paternity of the child has no nexus to the alleged offence of rape and hence, DNA test cannot be allowed. In support of the submission, learned counsel relied on two decisions of this Court in ***Sisu Bhavan*** (supra) and ***Divine Providence Foundling Home*** (supra). In ***Sisu Bhavan*** (supra), the petition was filed by the accused for a direction to the person in custody of the child to produce the child for the purpose of subjecting it and the victim to undergo the DNA test. The Court held that since the paternity of the child is not in question, the child cannot be compelled to undergo DNA test. That apart, the child in question was already placed in local adoption, and the details of the adoptive parents of the child cannot be divulged in view of the decision of the Apex Court in ***Lakshmi Kant Pandey v. Union of India*** (AIR 1984 SC 469). It was in these circumstances the court held that the petitioner institution could not be directed to produce the child to undergo DNA test. In ***Divine Providence Foundling*** (supra) also, it was the accused who filed an application to produce the prosecutrix and child for taking the blood sample for the DNA test. Relying on ***Sisu Bhavan*** (supra), this Court found that no such direction can be given. Thus, the dictum laid down in both these decisions is not applicable to the facts of the present case. It is a case where the prosecution invoking S.53A of Cr.P.C has filed an application to draw the sample of the accused to conduct the DNA test. It is true that in a rape case, the prosecution must prove, by positive evidence, that the accused had sex with the victim without her consent or against her will. However, it cannot be said that the proof of paternity of the child born in the alleged sexual act has no relevance in deciding the case. Certainly, the proof of paternity of the child is a corroborative piece of evidence to establish the commission of rape. Here, the victim was an unmarried minor girl aged 15½ years at the time of the alleged incident. Hence, the question of the application of Section 112 of the Evidence Act does not arise. Going by Clause (VI) of Section 376 of IPC (prior to amendment in 2013), when the victim was under the age of sixteen, sexual intercourse with her was rape, whether it was with or without her consent. Thus, the paternity of the child assumes significance.

12. Lastly, the learned counsel submitted that in SC No.79/2004, when the victim was examined, she did not support the prosecution case and deposed that she could not say the person who is responsible for her pregnancy and hence, the Court below ought not to have ordered the DNA test. The petitioner was not facing trial in SC No.79/2004. He was absconding at that time. Therefore, he cannot take advantage of the said evidence given by the victim. The victim has already been examined in SC No.19/2012. The petitioner has no case that she did not support the prosecution case.

For the reasons stated above, I find no illegality or infirmity in the impugned order. Crl.M.C. fails, and it is accordingly dismissed.

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