

**IN THE HIGH COURT AT CALCUTTA**  
CRIMINAL REVISIONAL JURISDICTION  
[CIRCUIT BENCH AT PORT BLAIR]

\*\*\*\*\*

**PRESENT: HON'BLE JUSTICE MOUSHUMI BHATTACHARYA**

**CRR/28/2023**

SANJAY BISWAS

... PETITIONER

VERSUS

THE STATE AND ANOTHER

... RESPONDENTS

For the petitioner : Mr. Deep Chaim Kabir  
Mr. S. Ajith Prasad

For the State : Mr. Salim Mohammed

For the private respondent : Ms. G. Mini

Heard on : 30.01.2024, 05.02.2024  
06.02.2024, 07.02.2024 &  
08.02.2024

Judgment on : 09.02.2024

**MOUSHUMI BHATTACHARYA, J.**

1. The present criminal revision arises out of an order passed by the learned Special Judge (POCSO), South Andaman District in Special Case No. 58/2018 and Special Trial No. 68/2019.

2. The impugned order was passed on 20.11.2023 on an application filed by the prosecution for taking blood samples of the accused, the victim girl and the minor baby of the victim girl for the purpose of DNA profiling. The order records that the victim girl was present before the Court on the day when the order was passed and

filed her consent for collection of her blood sample and that of her baby for DNA profiling.

3. The learned Court directed the Investigating Officer /Station House Officer (IO/SHO) of the Pahargaon Police Station to produce the accused, victim girl and the minor child of the victim girl before the Medical Superintendent of GB Pant Hospital for collection of blood samples for DNA analysis and thereafter send the samples to CFSL laboratory for further reports.

4. The petitioner was the Accused before the Special Court .

5. Learned counsel appearing for the petitioner argues that the application for DNA test was made by the prosecution to fill up the lacunae in the prosecution case and after commencement of trial. Counsel places the dates relevant to the argument and submits that the application was made after commencement of cross-examination in April, 2023. Counsel submits that a Special Public Prosecutor appointed under section 32 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 does not have the power to direct the police to act in an investigative capacity. Counsel submits that the accused was prejudiced since the Special Court directed the victim to appear once again after the examination of the victim had been completed.

6. The Learned Public Prosecutor appearing for the prosecution urges that the invocation of section 53-A of the Cr.PC cannot be faulted. Counsel relies on (*Malappa @ Malingaraya vs. State of Karnataka and another*) Single Bench decision of the Karnataka High Court in writ petition No. 201162/2021 in support of his argument. It is submitted that section 53-A can be invoked for the purpose of adducing additional evidence at any point of time.

7. The dates relevant to the adjudication on the legality of the impugned order are as follows. The statement of the victim girl, who was 17 years on the date of the complaint, was recorded on 29.09.2028. The victim girl and the accused had a physical relationship and the victim girl became pregnant thereafter. The FIR was lodged on 29.09.2018 under section 6 of the POCSO Act, 2012 and registered at Pahargaon Police Station. The Chargesheet was submitted on 17.02.2019. The victim girl in the meantime delivered a child on 22.01.2019. Charges were framed on 06.09.2019. Examination of the witnesses commenced on and from 21.04.2023 with the examination PW-1 (victim), PW-2 (doctor) on 08.08.2023 and PW-3 (victim's mother) on 01.11.2023. The application of the prosecution for collecting the blood samples of the accused, the victim girl and her child was made on 11.09.2023. The impugned order was passed on 20.11.2023.

8. From a careful reading of the impugned order, the reasons for allowing the application appears to be the presumption of paternity of the child born to the victim girl. The Ld. Special Court was of the view that the question of paternity of the minor child should not be left undecided in light of Article 21 of the Constitution. The Ld. Court relied on section 53-A of the Cr.PC which provides for examination of the accused suspected of committing rape and 3 decisions of the Supreme Court and of the Madhya Pradesh High Court on the necessity of a DNA test report in that regard.

9. The invocation of section 53-A of the Cr.PC must be placed in the context of the stage in which the application was made by the prosecution. The relevant part of section 53-A is set out:

“53-A 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 a police officer not below the rank of a sub-inspector, 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”.

....

(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 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

10. It is relevant to state that the investigation phase commenced with the lodging of the FIR on 29.09.2018 and continued until 07.02.2019 when the investigation was completed and chargesheet was submitted against the petitioner before the learned Special Court. Charges were thereafter framed on 06.09.2019 and witnesses for the prosecution were examined, cross-examined and discharged on 21.04.2023. PW-1 (victim), PW-2 (Doctor) were examined on 08.08.2023 and PW-3 (victim's mother) was examined on 01.11.2023. The victim gave birth to the child on 22.01.2019 before submission of chargesheet on 07.02.2019.

11. In this context, it is relevant to clarify the stages of a criminal proceeding in a police case. A criminal proceeding is initiated with lodging of the FIR under section 154 of the Cr.PC and the investigation commences from this stage. Section 2(h) of the Cr.PC defines "Investigation" as including 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 the Magistrate in this behalf. The investigation continues until submission of the police report or chargesheet under section 173 of the Cr.PC.

12. The term "investigation" was succinctly explained by a 3 Judge bench of the Supreme Court in *H.N. Rishbud and others vs. State of Delhi*, AIR 1955 SC 196 wherein it was held that investigation

usually starts on information relating to commission of an offence given by an Officer-Incharge of police station recorded under section 154 of the Code and consists of the ascertainment of the facts and circumstances of the case. The Supreme Court further explained that investigation, by definition, includes all the proceedings under the Code conducted by a police authority.

13. The Magistrate takes cognizance on the police report under section 190(1)(b) meaning thereby (judicial) application of mind to the police report/chargesheet. Process is thereafter issued for compelling presence of the accused. Procedural steps follow under section 207 of the Cr.PC with supply of copies and commitment to the court of Sessions in session cases under section 209 of the Cr.PC. Chapter XVIII of the Cr.PC deals with trial before a Sessions Court where the trial commences with framing of charges under section 228. Section 230 deals with prosecution evidence and section 313 with the examination of the accused. The trial culminates in a judgment of acquittal or conviction under section 235 of the Cr.PC.

14. Charges were framed in the present case on 06.09.2019 after which witnesses for the prosecution were examined and discharged in April, 2023. The other witnesses including the victim, Doctor and victim's mother were discharged in November, 2023.

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.PC in the form of collecting DNA evidence to be submitted by a supplementary chargesheet is contrary to the procedure established under the Cr.PC.

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.PC 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.PC 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 forward 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 chargesheet 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 vs. 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.PC. 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.PC.

21. The question of paternity of the defacto complainant was considered by the Supreme Court in *Inayath Ali vs. 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.PC 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 vs 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)

26. The above reasons persuade this Court to set aside the impugned order dated 20.11.2023 passed by the learned Special Judge, Special Court (POCSO), Port Blair. Needless to say, the trial will continue in accordance with law to its logical end based on the material which was before the learned trial Court as on the date of the impugned order.

27. CRR/28/2023 is accordingly allowed and disposed of in terms of the above.

28. Parties to act on a server copy of this judgment duly downloaded from the official website of the Hon'ble High Court at Calcutta.

**( Moushumi Bhattacharya, J.)**