Before Rajive Bhalla, J.

SALAUDDIN—*Petitioner*

versus

STATE OF HARYANA—*Respondent*

CRL. R. No. 1262 of 2007

19th November, 2009

Code of Criminal Procedure, 1973—S.53—Constitution of India, 1950—Arts. 20(3), 21 and 226—Dismissal of application for taking a blood sample of accused by using force—Expression "reasonable force" used in S. 53 of Code to be read in context of definition of word "investigation" as used in S. 2 (h)—Where investigation involves collection of evidence that can be gathered from "examination" of person of an accused court would be entitled to issue a direction in terms of S. 53—Section 53 permits use of reasonable force in collecting any evidence from person of an accused—A direction, therefore, issued by a court directing an accused to furnish his blood sample and simultaneously directing use of a reasonable force would not violate Article 20(3) or Article 21 of Constitution of India.

Held, that section 53 of the Code postulates that where there is reason to believe that "examination" of the person of an accused may afford evidence as to the commission of an offence, such force as may be "reasonably necessary" can be used, by a registered medical practitioner, for such an examination, acting at the request of a police officer not below the rank of Sub-Inspector. The provisions of Section 53 of the Code have been enacted, to provide a window, in the protective wall of Article 20(3) and Article 21 of the Constitution, so as to allow an invasive examination of the person of an accused, subject to certain procedural and medical safeguards. The provisions of Section 53 neither fall within the mischeif of the expression "to be a witness against himself" or violate the privacy of person guaranteed by Article 21 of the Constitution. A note of caution needs to be sounded for the courts and the police. The power under Section 53 of the code shall not be exercised mechanically but shall be based upon

relevant material, sufficient for a Court or a police officer to form an opinion that the "examination" of the person of an accused is imperative in order to gather evidence as to the commission of an offence. A Court would, therefore, be required to satisfy itself that the request made by the prosecution under Section 53 is based upon sufficient material and is not a mere roving enquiry intended to fish for evidence as by its very nature "force" is an anathema to freedom, self incrimination and personal privacy.

(Paras 15 and 16)

Further held, the expression "reasonable force" used in Section 53 of the Code to be read in the context of the definition of the word "investigation" as used in Section 2 (h) of the Code. It is, therefore, beyond doubt that where investigation involves the collection of evidence that can be gathered from the "examination" of the person of an accused, a court would be entitled to issue a direction in terms of Section 53 of the Code i.e. direct the medical officer concerned to extract a blood sample by use of such reasonable force, as may be necessary in the circumstances of a case. It would be necessary to mention here that a D.N.A. examination is a significant tool in the armoury of the investigation agency, as Section 53 of the Code permits the use of reasonable force in collecting any evidence from the person of an accused. A direction, therefore, issued by a court directing an accused to furnish his blood sample and simultaneously directing the use of a reasonable force would not violate Article 20(3) or Article 21 of the Constitution of India.

(Paras 17 and 18)

Further held, that the accued agreed to undergo a blood test but subsequently refused to allow such a test. The respondent cannot be allowed to retract from his earlier consent. The learned trial Court fell into an error while dismissing the application, as in essence, the prayer was for issuance of a direction to the respondent to furnish his blood sample in accordance with his consent and did not involve the passing of a fresh order.

(Para 19)

R. S. Sihota, Sr. Advocate with B. R. Rana, Advocate, *for the petitioner.*

Ajay Chaudhary, D.A.G., Haryana, *for respondent No. 1.*

RAJIVE BHALLA, J.

(1) This order shall dispose of Criminal Revision Nos. 1262 of 2007 and 1830 of 2007.

(2) The complainant and the State of Haryana have filed separate revisions challenging the order dated 3rd May, 2007, passed by the Additional Sessions Judge, Fast Track Court, Gurgaon, dismissing an application for taking the blood sample of the accused. Surat *alias* Sujja, is an accused in FIR No. 318, dated 12th September, 2004, registered under Sections 302/102-B/216/201/148/149 IPC and Sections 25/54/59 of the Arms Act. After his arrest the police filed an application, before the J.M.I.C. Ferozepur Jhirka for being allowed to take his blood sample. On 7th December, 2004, the Surat @ Sujja made a statement before the Judicial Magistrate Ist Class, Ferozepur Jhirka that he has no objection if his blood sample is taken. The Magistrate, therefore, directed the Civil Surgeon, Gurgaon to take the blood sample of the accused. Surat @ Sujja, filed Criminal Revision No. 34 of 2004/2006, challenging this order. *Vide* order dated 3rd May, 2007, the revision was dismissed. It appears that when the doctor visited the jail to take a blood sample but Surat @ Sujja refused to cooperate, thus compelling the doctor to return.

(3) The petitioner/complainant filed an application praying that the prosecution should be directed to take the blood sample of the accused by using force as prescribed by Section 53 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). The trial court dismissed the application by holding that a second application, for taking a blood sample is not maintainable and even otherwise an accused cannot be forced to furnish his blood sample.

(4) Counsel for the petitioner submits, that Section 53 of the Code, allows the use of "reasonable force" for "examination" of the person of an accused. The accused agreed and, thereafter, refused to undergo a blood test. The trial court should have, therefore, directed the Civil Surgeon, Gurgaon to use "reasonable force", for the purpose of drawing a blood sample for the purpose of D.N.A. profiling. It is further submitted that the

court below misconstrued the prayer in the application as in essence, the prayer is to carry out the order dated 7th December, 2004 in accordance with the provisions of Section 53 of the Code.

(5) Counsel for the accused, on the other hand, submits that though he does not dispute the facts but in view of Article 20(3) and Article 21 of the Constitution, the accused cannot be forced to give a blood sample. It is argued that though Section 53 of the Code includes the taking of a blood sample within the meaning of the word "examination", the prosecution or a medical examiner cannot be allowed to use force. It is further submitted that as the respondent had already refused to furnish his blood sample, the second application for the same purpose is not maintainable.

(6) I have heard learned counsel for the parties and perused the orders passed by the courts below. It is not disputed that respondent No. 2 voluntarily agreed to provide a blood sample but later refused to cooperate. The question that falls for adjudication is whether the prosecution can be allowed to use force to take a blood sample of an accused.

(7) The argument against the use of force for an invasive "examination" of the person of an accused flows from Article 20(3) and Article 21 of the Constitution. Article 20(3) mandates that no person accused of an offence shall be compelled to be a witness against himself. Article 21 protects the life and personal liberty of a person and its import extends to the protection of personal privacy, except in accordance with the procedure established by law. A long line of judicial precedents have consistently held that where the intrinsic character of the evidence does not undergo a change, an order calling upon an accused to submit to a physical examination of his person would not breach the protective wall of Article 20(3) of the Constitution, as it does not fall within the mischief of the expression "to be a witness". Evidence like finger prints, hair and skin samples, blood and semen sample, to name a few, are unvariable constants and, therefore, the calling cards of the genetic make up of a person. An order requiring an accused to undergo an "examination" would not fall within the mischief of the expression "to be a witness". Reference in this regard

would necessarily have to be made to a judgment of the Supreme Court in **State of Bombay** *versus* **Kathikalu, (1)** while considering the nature of an order directing an accused to furnish his specimen handwriting or finger impression, it was held as follows :—

"16. In view of these considerations, we have come to the following conclusions :—

1. An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

2. The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not 'compulsion'.

3. 'To be a witness' is not equivalent to 'furnishing evidence' in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.

4. Giving thumb impressions or impressions of foot or palm or fingers of specimen writings or showings parts of the body by way of identification are not included in the expression 'to be a witness'.

5. 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise.

(1) AIR 1961 S.C. 1808

6. 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence orally or in writing.

7. To bring the statement in question within the prohibition of Art. 20 (3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."

(8) As the intrinsic character of finger prints, blood samples, hair samples etc. do change even though the taking of a sample may amount to furnishing evidence in the larger sense of the expression but would not fall within the expression "to be a witness".

(9) In another judgement reported as **Gobind** *versus* **State of M. P., (2)** while considering the necessity of surveillance and the rights available under Article 21 of the Constitution, the Hon'ble Supreme Court observed as follows :—

> "Depending on the character and antecedents of the person subjected to surveillance, as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest.

(10) Other judgements that may be referred to are **Kharak Singh** *versus* **State of U. P. (3)** and **Malak Singh** *versus* **State of Punjab and Haryana, (4).**

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(2) (1975) 2 S.C.C. 148
(3) AIR 1963 S.C. 1295
(4) 1981 (1) S.C.C. 420

(11) While considering Articles 20(3) and 21 of the Constitution in the context of H.I.V. (+) patient, the Hon'ble Supreme Court in **Mr. X** *versus* **Hospital Z, (5)** after considering these judgements held that the right under Article 20(3) is not absolute and is subject to such action, as may be lawfully taken for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others. In **Goutam Kundu** *versus* **State of West Bengal. (6),** while considering the question whether the collection of a blood sample of a party violates Article 20(3) of the Constitution, in the context of a dispute with respect to paternity the Hon'ble Supreme Court held as follows :—

> "1. That courts in India cannot order blood test as a matter of course.
>
> 2. Wherever applications are made for such prayer in order to have roving inquiry, the prayer for blood test cannot be entertained.
>
> 3. There must be a strong *prima facie* case in that the husband must establish non access in order to dispel the presumption arising under Section 112 of the Evidence Act.
>
> 4. The court must carefully examine as to what would be the consequence of ordering the blood test ; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
>
> 5. No one can be compelled to give sample of blood for analysis."

(12) In **Sharda** *versus* **Dharampal, (7)** the Hon'ble Supreme Court after considering the judgement in **Gautam Kundu (supra)** held as follows :—

> "Gautam Kundu *(supra)* is, therefore, not an authority for the proposition that under no circumstances the Court can direct that blood tests be conducted. It having regard to the future of the child, has, of course, sounded a note of caution as regard mechanical passing of such order. In some other jurisdictions,

(5) 1998 (8) S.C.C. 296
(6) AIR 1993 S.C. 2295
(7) AIR 2003 S.C. 3450

it has been held that such directions should ordinarily be made if it is in the interest of the child."

After observing as above, the Hon'ble Supreme Court proceeded to review the entire law on the subject, in the context of Article 20(3) and Article 21 of the Constitution and observed as follows :—

"78. At this stage we may observe that taking of a genetic sample without consent may in some countries e.g. Canada be viewed as a violation of the persons physical integrity although the law allows such forced taking of sample. But even this practice was held to be valid when the sample is collected by a health care professional. Collecting samples from the suspects for DNA tests in some countries have not been found to be violative of right of privacy.

80. The matter may be considered from another angle. In all such matrimonial cases where divorce is sought, say on the ground of impotency, schizophrenia....etc. normally without there being medical examination, it would be difficult to arrive at a conclusion as to whether the allegation made by his spouse against the other spouse seeking divorce on such a ground, is correct or not. In order to substantiate such allegation, the petitioner would always insist on medical examination. If respondent avoid such medical examination on the ground that it violates his/her right to privacy or for a matter right to personal liberty as enshrined under Article 21 of the Constitution of India, then it may in most of such cases become impossible to arrive at a conclusion. It may render the very grounds on which divorce is permissible nugatory. Therefore, when there is no right to privacy specifically conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21, it cannot be treated as absolute right. What is emphasized is that some limitations on this right have to be imposed and particularly where two competing interests clash. In matters of aforesaid nature where the legislature has conferred a right upon his spouse to seek divorce on such grounds, it would be the right

of that spouse which comes in conflict with the so-called right to privacy of the respondent. Thus the Court has to reconcile these competing interests by balancing the interests involved.

81. If for arriving at the satisfaction of the Court and to protect the right of a party to the lis who may otherwise be found to be incapable of protecting his own interest, the Court passes an appropriate order, the question of such action being violative of Article 21 of the Constitution of India would not arise. The Court having regard to Article 21 of the Constitution of India must also see to it that the right of a person to defend himself must be adequately protected.

82. It is however, axiomatic that a Court shall not order a roving inquiry. It must have sufficient materials before it to enable it to exercise its discretion. Exercise of such discretion would be subjected to the supervisory jurisdiction of the High Court in terms of S. 115 of the Code of Civil Procedure and/or Article 227 of the Constitution of India. Abuse of the discretionary power at the hands of a Court is not expected. The Court must arrive at a finding that the applicant has established a strong *prima facie* case before passing such an order.

83. 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. S. 114 of the Indian Evidence Act also enables a Court to draw an adverse inference if the party does not produce the relevant evidences in his power and possession."

(13) The framers of the Constitution may have intended to protect an accused against self incrimination but could not have intended to place obstacles in the way of efficient and effective investigation into a crime for bringing a criminal to justice. Articles 20(3) and 21 of the Constitution of India would admit to exceptions, as may be established by law. Section 53 of the Code, is one such exception to the rule of law enunciated by Articles 20(3) and 21 of the Constitution, as it prescribes a procedure established by law to extract evidence from the person of an accused.

(14) Section 53 of the Code, in its present form, was enacted by the 1973 Code but by way of Act No. 25 of 2005, the original explanation to Section 53 was deleted and a new explanation was added. The explanation defines the word "examination" by includjng the examination of blood, blood stains, semen, sputum and sweat, hair samples and finger nail clipping by use of modern and scientific technique including DNA profiling etc.

Section 53 of the Code reads as follows :—

"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 53-A and 54 (a) "examination" shall include the examination of blood, blood-stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) "registered medical practitioner" means a medical practitioner who possesses any 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."

(15) Section 53 of the Code, postulates that where there is reason to believe that "examination" of the person of an accused may afford evidence as to the commission of an offence, such force as may be "reasonably necessary" can be used, by a registered medical practitioner, for such an examination, acting at the request of a police officer not below the rank of Sub Inspector.

(16) The provisions of Section 53 of the Code have been enacted, to provide a widow, in the protective wall of Article 20(3) and Article 21 of the Constitution, so as to allow an invasive examination of the person of an accused, subject to certain procedural and medical safeguards. The provisions of Section 53 neither fall within the mischief of the expression "to be a witness against himself" or violate the privacy of person guaranteed by Article 21 of the Constitution. A note of caution needs to be sounded for the courts and the police. The power under Section 53 of the Code shall not be exercised mechanically but shall be based upon relevant material, sufficient for a court or a police officer to form an opinion that the "examination" of the person of an accused is imperative in order to gather evidence as to the commission of an offence. A court would, therefore, be required to satisfy itself that the request made by the prosecution under Section 53 is based upon sufficient material and is not a mere roving enquiry intended to fish for evidence as by its every nature "force" is an anathema to freedom, self incrimination and personal privacy.

(17) The expression "reasonable force" used in Section 53 of the Code has to be read in the context of the definition of the word "Investigation" as used in Section 2(h) of the Code that reads as follows :—

> "(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."

(18) It is, therefore, beyond doubt that where investigation involves the collection of evidence that can be gathered from the "examination" of the person of an accused, a court would be entitled to issue a direction in terms of Section 53 of the Code i.e. direct the medical officer concerned to extract a blood sample by use of such reasonable force, as may be necessary in the circumstances of a case. It would be necessary to mention

here that a D.N.A. examination is a significant tool in the armoury of the investigation agency, as Section 53 of the Code permits the use of reasonable force in collecting any evidence from the person of an accused. A direction therefore, issued by a court directing an accused to furnish his blood sample and simultaneously directing the use of a reasonable force would not violate Article 20(3) or Article 21 of the Constitution of India.

(19) In the present case, the accused agreed to undergo a blood test but subsequently refused to allow such a test. The respondent cannot be allowed to retract from his earlier consent. The learned trial court fell into an error while dismissing the application, as in essence, the prayer was for issuance of a direction to the respondent to furnish his blood sample in accordance with his consent and did not involve the passing of a fresh order.

(20) In view of what has been stated herein above, the revision petition is allowed. The order dated 3rd May, 2007 is set aside. The learned trial court shall direct the Civil Surgeon, Gurgaon, to take a blood sample of the accused and for the said purpose use such force, as may be reasonably necessary.

R.N.R.

Before Ajai Lamba, J.

SURAT RAM SHARMA—*Petitioner*

versus

STATE OF PUNJAB AND ANOTHER—*Respondents*

C.W.P. No. 14627 of 2007

17th December, 2009

Constitution of India 1950—Art. 226—Prevention of Corruption Act, 1988—S.19—Allegation against an S.D.O. of taking illegal gratification—Vigilance Bureau seeking necessary sanction for prosectuion from employer/department of petitioner—Department refusing to grant sanction to prosecute petitioner—Vigilance Bureau again writing to department to reconsider decision—Competent authority reviewing its earlier order and giving sanction to prosecute