

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

Friday, the 19th day of April 2024 / 30th Chaithra, 1946

CRL.MC NO. 5136 OF 2023

UNDER SECTION 482 OF THE CODE OF CRIMINAL PROCEDURE R/W ARTICLE 227 OF
CONSTITUTION OF INDIA REGARDING VIOLATION OF PRIVACY OF ADOPTED CHILDREN
BY ISSUING ORDERS FOR COLLECTING THEIR DNA BY COURTS IN THE STATE

PETITIONER:

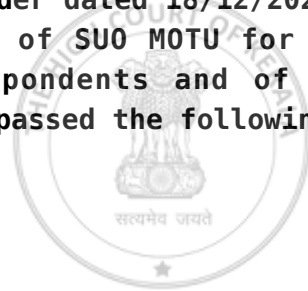
SUO MOTU

RESPONDENTS:

1. THE STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF
KERALA

AND 4 OTHERS

This Criminal Misc. case again coming on for orders, upon persuing
the petition this court's order dated 18/12/2023 in CrL.M.C.5136/2023 and
upon hearing the arguments of SUO MOTU for the Petitioner and of the
Public Prosecutor for respondents and of Adv. SMT. PARVATHI MENON
A.,AMICUS CURIAE, the court passed the following:



'C.R'

K.BABU, J.

Criminal.M.C No.5136 of 2023

Dated this the 19th day of April, 2024

ORDER

This Criminal Miscellaneous Case has been registered suo motu based on the report of the Project Co-ordinator, Victims Rights Centre, the Kerala State Legal Services Authority.

2. The report of the Project Co-ordinator points to the glaring conflicts of law relating to a sensitive and vulnerable issue touching the privacy of the children given in adoption. The various Courts in Kerala issued orders on the applications preferred by the prosecution to collect DNA of children born to rape victims. The report of the Project Co-ordinator indicates that such orders conflict with Regulation 48 of the Adoption Regulations, 2022 issued in exercise of the powers conferred under Clause (c) of Section 68 read with Clause (3) of Section 2 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short 'the J.J Act') which deals with the confidentiality of records to be maintained in the case of adopted children by all agencies and authorities involved.

3. The issue involved is the legality and the adverse impact on the adopted children and the respective families following the issuance of orders by the competent Courts to collect DNA of children born to rape victims and given in adoption on the applications preferred by the prosecution to strengthen the case of rape.

4. This Court appointed Smt.Parvathi Menon.A as Amicus Curiae. The learned Amicus Curiae submitted that the principle of “eminent need” propounded by the Supreme Court in various decisions is to be applied to the cases in which the prosecution seeks permission to collect DNA samples of children born to rape victims, especially in the case of children given in adoption. The learned Amicus Curiae submitted that the collection of DNA samples may have an adverse impact on the person and it is an encroachment upon privacy and personal autonomy.

5. The learned Amicus Curiae added that the exercise of collecting DNA samples is done to strengthen the prosecution case of rape which can be successfully proved by positive evidence that the accused had sexual intercourse with the lady without her consent or against her will and the proof of paternity would not help the

Court in deciding the issue whether the accused committed rape on her. The learned Amicus Curiae relied on the following precedents to substantiate her contentions:

- (i) **Bhabani Prasad Jena v. Orissa State Commission for Women [(2010) 8 SCC 633]**
- (ii) **Ashok Kumar v. Raj Gupta [(2022) 1 SCC 20].**
- (iii) **K.S. Puttaswamy v. Union of India [(2017) 10 SCC 1].**
- (iv) **Aparna Ajinkya Firodia v. Ajinkya Arun Firodia, [2023 SCC OnLine SC 161].**
- (v) **Sisu Bhavan v. Joy Yohannan [2008 (4) KLT 550].**
- (vi) **Divine Providence Foundling Home, Idukki v. Raju Gopi and Another [2014 (3) KHC 298].**
- (vii) **Afan Ansari v. State of Jharkhand, [2022 SCC OnLine Jhar 1649] = [MANU/JH/1200/2022].**
- (viii) **Dilesh Nishad v. State of Chhattisgarh (MANU/CG/1664/2023).**
- (ix) **Inayath Ali v. State of Telangana, [2022 SCC OnLine SC 1867].**

(x) **Surender Vijay Paswan v. State of Maharashtra
and Anr., (2023:BHC-AS:34959).**

6. Chapter VIII of the JJ Act deals with the adoption of children in general under the categories of orphan, abandoned and surrendered. Regulation 48 of the Adoption Regulations 2022 deals with the confidentiality of adoption records. Regulation 48 reads thus:

“Confidentiality of adoption records.—All agencies or authorities involved in the adoption process shall ensure that confidentiality of adoption records is maintained, except as permitted under any other law for the time being in force and for such purpose, the adoption order may not be displayed on any public portal.”

7. The intention of the statute is the paramount welfare of the adopted child. The JJ Act permits couples who maintain intense longing for a child, irrespective of religion, to adopt.

Intention of Adoption

8. An adopted child cannot be at any point of his/her growth be violated of his/her privacy. We have come across many instances where blood samples for DNA tests are ordered to be collected from adopted children who have attained an age of reasonable comprehension. In some cases, adopted parents would

not have even divulged the fact of adoption to the child. The child would have blended so well with the adopted family that a sudden revelation that he/she is an adopted child and that too of a rape victim can imbalance his/her emotional status and can result in them exhibiting behavioural disorders and aberrations. This exercise of subjecting the child to DNA test will only defeat the purpose of the divine concept of adoption.

9. Rape as defined in Section 375 IPC and penetrative sexual assault as defined in the POCSO Act do not demand the paternity of the child born to rape victims to be proved to establish the offence. The relevant statutory provisions in any manner do not demand a situation for the conduct of a DNA test on the child of the rape victim to prove the offence of rape.

10. In **Bhabani Prasad Jena v. Orissa State Commission for Women [(2010) 8 SCC 633]** the Supreme Court enunciated the test of the “eminent need” while considering a prayer for DNA test of the child. It was a case where in a family dispute, the paternity of a child was disputed. The State Commission for Women, Orissa issued orders directing DNA test of a child. The matter reached

the High Court in a writ petition. The High Court also issued an order directing that the DNA test of the child shall be conducted. The Supreme Court considered the question of whether the High Court and the State Commission for Women were justified in ordering a DNA test of the child. The Supreme Court, after appreciating the rights entitled to the child, especially the right to privacy, held thus:

“21. In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.

22. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of “eminent need” whether it is not possible for the court to reach the truth without use of such test.”

11. In K.S. Puttaswamy v. Union of India [(2017) 10 SCC 1], the

Supreme Court declared that the Right to Privacy is a fundamental right enshrined within the Right to Life and Liberty under Article 21 of the Constitution of India. The Supreme Court laid down the threefold test of Reasonableness while elevating the right to privacy to the stature of a fundamental right. As per the test, an action must fulfil the following three prongs to be considered a reasonable restriction imposed by the procedure established by law:

Legality: Such an action must be supported by the existence of a law that warrants such action to be taken in the given circumstances.

Necessity: There must be a legitimate State aim. The action must be one that is pertinent and requisite in the light of the circumstances that prevail to achieve the aim of the State.

Proportionality: The parameter of proportionality shall be fulfilled on the establishment of a rational nexus between the objects and the means adopted to achieve them.

12. The Supreme Court elaborated the principle of proportionality as:

- * The action must be sanctioned by law;
- * The proposed action must be necessary in a democratic society for a legitimate aim;
- * The extent of such interference must be proportionate to the need for such interference;
- * There must be procedural guarantees against abuse of such interference.

13. In **Ashok Kumar v. Raj Gupta [(2022) 1 SCC 20]**, the Supreme Court applied the test of “eminent need” and the doctrine of proportionality. In **Ashok Kumar** (supra) the defendants (in a title suit) denied the claim of the plaintiff that he is the son of Sri.T.C.Gupta and Sona Devi and filed an application seeking direction to conduct DNA test of the plaintiff. The Supreme Court held that where other evidence (the presumption of legitimacy as provided in Section 112 of the Evidence Act) is available to prove or dispute the relationship, the Court should ordinarily refrain from ordering blood tests as such tests impinge upon the right of privacy

of an individual and could also have major societal repercussions.

14. In **Ashok Kumar** (supra), the Supreme Court further observed thus:

“15. DNA is unique to an individual (barring twins) and can be used to identify a person's identity, trace familial linkages or even reveal sensitive health information. Whether a person can be compelled to provide a sample for DNA in such matters can also be answered considering the test of proportionality laid down in the unanimous decision of this Court in *K.S. Puttaswamy (Aadhaar-5 J.) v. Union of India*, [(2019) 1 SCC 1], wherein the right to privacy has been declared a constitutionally protected right in India. The Court should therefore examine the proportionality of the legitimate aims being pursued i.e. whether the same are not arbitrary or discriminatory, whether they may have an adverse impact on the person and that they justify the encroachment upon the privacy and personal autonomy of the person, being subjected to the DNA test.”

15. **Aparna Ajinkya Firodia v. Ajinkya Arun Firodia [2023 SCC OnLine SC 161]**, was a case wherein the parents were fighting in divorce proceedings. DNA was sought for. The Supreme Court held that only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy, the Court can direct such a test.

16. In **Aparna** (supra), the Supreme Court observed thus:

“86. Allowing DNA tests to be conducted on a routine basis, in order to prove adultery, would amount

to redefinition of the maxim, "*Pater est quem nuptiae demonstrant*" which means, *the father is he whom the nuptials point out*. While dealing with allegations of adultery and infidelity, a request for a DNA test of the child, not only competes with the presumption under Section 112, but also jostles with the imperative of bodily autonomy.

87. Another aspect that needs to be considered in the instant case is whether, for a just decision in the divorce proceedings, a DNA test is eminently necessary. This is not a case where a DNA test is the only route to the truth regarding the adultery of the mother. If the paternity of the children is the issue in a proceeding, DNA test may be the only route to establish the truth. However, in our view, it is not so in the present case. The evidence of DNA test to rebut the conclusive presumption available under Section 112 of the Evidence Act, can be allowed only when there is compelling circumstances linked with 'access', which cannot be liberally used as cautioned by this Court in *Dipanwita Roy*."

17. In **Sisu Bhavan v. Joy Yohannan [2008 (4) KLT 550]**, this Court considered the question regarding the necessity of a DNA test in a rape trial. The Court held that the cardinal issue to be addressed in a rape trial is whether there was sexual intercourse against the will and without the consent of a victim. If the sexual intercourse was with the consent of the victim, the question is whether the consent was obtained under circumstances falling under clauses thirdly, fourthly and fifthly of Section 375 IPC. The Court observed that merely because there was an allegation by the

prosecution that pursuant to the sexual intercourse which the accused had with the victim a child was born, the question of paternity of the child which has absolutely no nexus with the alleged offence of rape, cannot arise. Whether the accused is proved to be the biological father or not was wholly irrelevant about the fact in issue in the trial.

18. In Divine Providence Foundling Home, Idukki v. Raju Gopi and Another [2014 (3) KHC 298] this Court held thus:

“3. Here the allegation is that the first respondent committed rape on a lady and impregnated her. The prosecution will have to prove that the first respondent had sexual intercourse with the lady without her consent or against her will. It doesn't matter whether she was impregnated or not. It doesn't matter whether the petitioner is the father of the child or not.”

19. In Afan Ansari v. State of Jharkhand, [2022 SCC OnLine Jhar 1649], the Jharkhand High Court held that for deciding the case under Section 376 of IPC, paternity of the child is not relevant and therefore, there is no need to hold DNA test to prove the charge.

20. In Dilesh Nishad v. State of Chhattisgarh (MANU/CG/1664/2023), the Chattisgarh High Court held that ascertaining the paternity of the victim's child is not at all required

and directing for DNA test of the child of the victim would violate the privacy right of the infant, which is a constitutionally protected right.

21. In **Surender Vijay Paswan v. State of Maharashtra and Anr.,(2023:BHC-AS:34959)**, the Bombay High Court while considering an application filed by the Investigating officer in a rape case seeking permission to collect DNA sample of the victim's child who was already given in adoption held that DNA test of the child may not be in the interest of the child.

22. While considering the request of the prosecution for DNA examination of the children who are given in adoption, it is relevant to note Regulation 39 of the Adoption Regulations, 2022, which reads thus:

“Child Welfare Committee.—

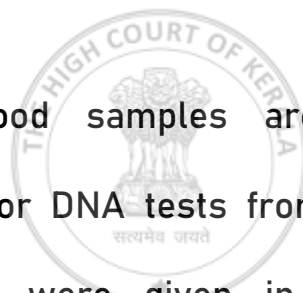
The Child Welfare Committee shall take actions as provided in regulations 6 and 7 and as provided in rule 18 and 19 of the rules.

Explanation: Further for removal of doubt, it is hereby clarified that, in cases where a child is willingly surrendered by the biological mother, the child being born out of non-consensual sexual relations or where cases have been registered under the Protection of Children from Sexual Offences Act or Indian Penal Code, the Child Welfare Committee is obliged to issue an order clearing the child legally free for adoption within the stipulated period within

which the Dioxyribo Nucleic Acid (DNA) sample collection should be completed to avoid undue harassment to the families who adopt the children in such cases.”

23. Regulation 39 mandates that the Child Welfare Committee has to collect the DNA sample to avoid undue harassment to the families who adopt the children. This indicates that in an extreme case of necessity, the prosecution has an option to get the DNA sample.

The Conclusions

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- (i) Where blood samples are ordered to be collected for DNA tests from adopted children after they were given in adoption, it may imbalance their emotional status, which will only defeat the purpose of the divine concept of adoption.
- (ii) Rape as defined in Section 375 IPC and penetrative sexual assault as defined in the POCSO Act do not demand the paternity of the child born to rape victims to be proved to establish the offence. When there is a conflict

between the right to privacy of a person not to submit himself forcefully to medical examination and the duty of the Court to reach the truth the Court must exercise its discretion only after balancing the interest of the parties and on due consideration whether for a just decision in the matter, DNA test is essentially needed.

- (iii) All agencies or authorities involved in the adoption process are bound to ensure that the confidentiality of adoption records is maintained except as permitted under any other law for the time being in force and for such purpose, the adoption order shall not be displayed on any public portal.
- (iv) The Child Welfare Committee has a statutory duty to collect DNA samples of children given in adoption before the completion of the process of adoption.
- (v) Even in cases where the children were not

given in adoption, in a rape case or cases coming under the POCSO Act, the request for a DNA test of the child of the victim need to be considered on the touchstone of the principle of “eminent need” and doctrine of proportionality.

24. Therefore, the following guidelines are issued:

- (i) The Courts shall not entertain applications seeking DNA examination of children given in adoption.
- (ii) The Child Welfare Committee shall see that the DNA samples of children given in adoption are taken before the completion of the process of adoption.
- (iii) All agencies or authorities involved in the adoption process shall ensure that the confidentiality of adoption records is maintained except as permitted under any other law for the time being in force.

- (iv) Even in cases where the children were not given in adoption the Court shall consider the request for a DNA test of the children of the victim only after assessing the principle of “eminent need” and doctrine of proportionality.

The orders under challenge

25. The Fast Track Special Court, Manjeri as per order dated 31.08.2021 in CrL.M.P No.210/2021 in S.C No.603/2017 ordered a further investigation under Section 173(8) of Cr.PC in a case alleging offences punishable under Sections 450 and 376(2)(f) of IPC and Sections 5(j), 5(j)(ii) and 5(l) read with Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012 holding that analysis of the blood sample of the child to prove the paternity is required.

26. The Special Court for the Trial of Offences under the Protection of Children from Sexual Offences Act, 2012, Kattappana as per order dated 05.08.2022 in CrL.M.P No.693/2022 in S.C No.1/2018 directed the Kerala State Adoption Resource Agency to furnish details of the child born to a rape victim for facilitating

collection of blood samples from the child.

27. The Judicial First Class Magistrate Court, Ramankary as per order dated 03.11.2022 in Crl.M.P No.2914/2022 directed the taking of blood sample of the child who was given in adoption. The Additional Sessions Court-I, Kollam as per order dated 17.11.2022 in S.C No.857/2017 directed the Member Secretary of the Kerala State Adoption Resource Agency to furnish necessary details of the child of the victim for facilitating collection of blood sample of the child. The Sessions Court, Palakkad Division as per order dated 19.05.2023 in Crl.M.C No.2077/2023 in S.C No.91/2015 directed the Member Secretary of the Kerala State Adoption Resource Agency to furnish the details of the child of the victim given in adoption for facilitating collection of blood samples of the child.

28. In view of the conclusions arrived at above, the impugned orders are not sustainable. Therefore, the order dated 31.08.2021 in Crl.M.P No.210/2021 in S.C No.603/2017 of the Fast Track Special Court, Manjeri, the order dated 05.08.2022 in Crl.M.P No.693/2022 in S.C No.1/2018 of the Special Court for the Trial of Offences under the

Protection of Children from Sexual Offences Act, 2012, Kattappana, the order dated 03.11.2022 in CrI.M.P No.2914/2022 of the Judicial First Class Magistrate Court, Ramankary, the order dated 17.11.2022 in S.C No.857/2017 of the Additional Sessions Court-I, Kollam and the order dated 19.05.2023 in CrI.M.C No.2077/2023 in S.C No.91/2015 of the Sessions Court, Palakkad Division stand quashed.

Post the Criminal M.C for further hearing on 27.05.2024.



KAS

Sd/-
K.BABU,
JUDGE