

**Thaniel Victor Vs. State**

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**Court :** Chennai

**Decided On :** Mar-15-1990

**Reported in :** 1991CriLJ2416

**Judge :** T.S. Arunachalam, J.

**Appeal No. :** Crl. Misc. Petition No. 1711 of 1990

**Appellant :** Thaniel Victor

**Respondent :** State

**Advocate for Def. :** G.K. Krishnamurthy, Additional Public Prosecutor

**Advocate for Pet/Ap. :** S. Shanmugavelayutham, Adv.

**Judgement :**

ORDER

1. The Petitioner is the sole accused in Crime No. 519 of 1988 on the file of the Courtallam Police Station, Tirunelveli-Kattabomman District, registered for an offence under S. 376, I.P.C.

2. The prosecution case is that on 10-4-1988 at or about 8 p.m. when the first informant Prema went to the Petitioner's house to purchase beedi leaves, the latter raped her in his house, and while promising to marry her advised her not to disclose the alleged occurrence to anyone else. However, Prema is said to have

disclosed this incident to her mother, two months later, leading to the launching of the F.I.R. on 30-12-1988 at or about 12.00 Noon, after eight months.

3. The Petitioner filed Crl.M.P. No. 191 of 1989 on the file of the Principal Sessions Judge, Tirunelveli, under S. 438 Cr.P.C., Praying for release on bail in the event of arrest in respect of Crime No. 519 of 1988. The plea made by the petitioner was acceded to and the petitioner was directed to be released on bail in the event of his arrest. In pursuance of the said order, the petitioner appeared before the Judicial Magistrate, Tenkasi, and executed his personal bond, apart from producing sureties, as directed by the Principal Sessions Judge, Tirunelveli.

4. The crime is still under investigation. While so, on 13-6-1989, the Inspector of Police, Tenkasi, filed a petition before the Judicial Magistrate, Tenkasi obviously under S. 53, Cr.P.C. to issue summons to the petitioner to appear before a registered Medical Practitioner for being examined to ascertain if he was physically capable of having intercourse. This prayer was made by the Investigating Officer to facilitate effective investigation. On the same day, the Magistrate directed issue of summons to the petitioner. The petitioner did not choose to appear before the Government Medical Officer, but chose to file a counter, opposing the plea made by the Investigating Officer, to direct the petitioner to appear for medical examination. The petitioner did not also choose to appear before the learned Magistrate but on his behalf, arguments were advanced. The main contention urged on behalf of the petitioner before the Magistrate was, that the Court had no jurisdiction to direct medical examination of the petitioner, since he had been released on bail in the event of arrest, by the Principal Sessions Judge and, if at all any direction could be given, it must be by the Court of Session. It was further pointed out before the Magistrate that his order, directing issue of summons to the petitioner to appear for medical examination, was the subject-matter of a pending revision before the Court of Session, Tirunelveli. However, it was submitted by the prosecuting counsel, that the examination of the petitioner was an important and necessary step in the course of investigation of the crime and in a case of rape, physical capability of the accused being in a position to commit the offence alleged, was an important circumstance, which would have to be placed before the Court by the prosecution. At any rate, the Enquiring Magistrate, while holding that

under S. 53, Cr.P.C. in the interests of justice, the Petitioner could be sent for medical examination, concluded that he could not pass any order towards that end, since the summons issued by him had been challenged before the Principal Sessions Judge, Tirunelveli.

5. The challenge made by the petitioner in CrI.R.C. No. 86/89 before the Principal Sessions Judge, Tirunelveli, against the order of the Judicial Magistrate, Tenkasi, ended against the petitioner and the revisional Court held that though the petitioner could not be considered as a person arrested, the reasonable request made by the prosecution to have the petitioner examined by a Medical Officer could not be rejected. Such medical examination was necessary to find out if the petitioner was potent to have had sexual intercourse as alleged. The Sessions Judge also held that it would not be fair on the part of the petitioner to refuse to subject himself for medical examination.

6. This petition has been filed to set aside the aforesaid order of the Principal Sessions Judge, Tirunelveli, rendered in CrI.R.C. No. 86/89, confirming the initial order made by the Judicial Magistrate, Tenkasi, by invoking the inherent powers of this Court under S. 482, Cr.P.C.

7. Mr. S. Shanmugavelayutham, learned counsel appearing for the petitioner, contended that the request made by the Investigating Officer, was not maintainable in law and would not be covered under the provision of S. 53, Cr.P.C. According to the learned counsel, S. 53, Cr.P.C. contemplated subjecting of arrested persons alone for medical examination at the request of the police officer of a particular rank. On facts, since the petitioner had been enlarged on bail in the event of arrest as early as on 13-1-1989, without any condition like reporting before the respondent or Court, the provision of S. 53, Cr.P.C. will have no application, and more so, when the petitioner cannot be deemed to be a person arrested by the police in connection with the offence. He would also contend that a person released on bail in the event of arrest never gets arrested and, therefore, seeking to invoke the provision of S. 53, Cr.P.C. will not be tenable. He further contended that S. 53, Cr.P.C. did not prescribe any procedure to send a person released either on bail or on bail in the event of arrest, to a Medical Practitioner for

examination at the request of the police. He also submitted that the petitioner cannot be deprived of his constitutional right except in accordance with procedure relating to due process of law.

8. Mr. G. Krishnamurthy, learned Additional Public Prosecutor, appearing on behalf of the respondent, contended that S. 46, Cr.P.C., which deals with the manner of making arrests, certainly takes within its fold submission to the custody by word or action by the person sought to be arrested. According to him, if the person sought to be arrested submits to the custody by word or action, actual touch by the police officer or confining the body of the arrestee will not be necessary to constitute arrest. He further contended that if a person were to be arrested, on a charge of committing an offence, S. 53, Cr.P.C. would become operative and the release of the petitioner on bail at a subsequent stage cannot extinguish the right of the Investigating Agency to have the accused medically examined. He would strenuously contend that a person released on bail in the event of arrest under S. 438, Cr.P.C. must be deemed to be under the custody of the Court and, therefore, there would be no difficulty whatsoever in the Court directing the examination of the petitioner by a Medical Practitioner at the request of the Investigating Agency. On this aspect, he referred to the observations of the Supreme Court in *Gurbaksh Singh v. State of Punjab*, : 1980 CriLJ1125 wherein it was held that an order of anticipatory bail does not in any way directly or indirectly take away from the police their right to investigate into charges made or to be made against the person released on bail. He relied on certain further observations made in the same judgment, which will be referred to in the relevant Context, while considering the catena of cases cited by him and the learned counsel for the petitioner.

9. It was also contended on behalf of the prosecution that this petition under S. 482, Cr.P.C. will not be maintainable and this petition will have to be dismissed in limine, since what cannot be achieved by the petitioner by filing a second revision under S. 397(2) and (3), Cr.P.C., cannot be achieved by invoking the inherent powers. To this argument of the learned Additional Public Prosecutor, the learned counsel for the petitioner contended that in extraordinary circumstances, this Court is empowered to exercise the inherent powers to prevent miscarriage of justice

and this position is now settled law.

10. I have carefully considered the rival contentions urged before me by both the Additional Public Prosecutor and the counsel for petitioner. I do not think that this petition will have to be barred even at its threshold, since the question posed, interesting, as well as important, is bound to arise quite often needing an authoritative answer.

11. In *Madhu Limaye v. State of Maharashtra*, : 1978 CriLJ165 , the Supreme Court had held that on a plain reading of S. 482, Cr.P.C., it would follow that nothing in the Code which would include S. 397(2) shall be deemed to limit or affect the inherent powers of the High Court. However, it cannot be said that the said bar was not to operate in the exercise of the inherent power at all, because it would be setting at naught one of the limitations imposed upon the exercise of revisional powers. A happy and harmonious solution would be to say that the bar provided in S. 397(2) would operate only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. The inherent power will come into play, when there is no other provision in the Code for the redress of the grievances of the aggrieved party.

12. Therefore, it is apparent that in a case where the impugned order brought about a situation where for the securing of the ends of justice, interference by the High Court would be absolutely necessary, there could not be no limit to exercise the inherent power of this Court. However, such cases would be few and far between. As stated by the Supreme Court, the High Court may have to exercise its inherent power very sparingly for the furtherance of the cause of justice. A Full Bench of the Andhra Pradesh High Court in *in re Puritipati Jagga Reddy*, : AIR 1979 AP146 and this Court in *Patturaju v. Station House Officer, Comangalam*, 1979 LW Cri 27 : (1979 Lab IC (NOC) 84) have taken the view that the High Court can exercise its inherent power if such exercise was warranted on the facts and circumstances of the case. Once that prima facie satisfaction has been reached at the time of admission, the label given to the petition is immaterial. It is the satisfaction of the Court, whether the case warrants the exercise of its powers

under S. 482, Cr.P.C., which is important. I have no hesitation to hold, that to settle the law, it will be expedient to invoke the inherent powers of this Court under S. 482, Cr.P.C. The first hurdle having been crossed, the question which would invite attention would be the scope of S. 53, Cr.P.C. and its applicability to persons to have been either bailed out after arrest or who had been released on bail in the event of arrest.

13. Section 53, Cr.P.C. reads as here under :

'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.'

Section 53 of the Code was introduced for the first time in the 1974 Code. The purpose of introducing this section was to facilitate effective investigation. If, from the nature of the alleged offence or the circumstances under which it is alleged to have been committed, there was reasonable ground for believing that the examination of the person will afford evidence, examination of the arrested person by a medical practitioner was authorised. The provision made under S. 54 of the Code for examination of an arrested person by a medical practitioner at the request of the arrested person, will also show that the object of the law-maker was to provide a facility during investigation by scientific approach, which may either benefit the prosecution or the accused. This scientific approach during

investigation is thus under the protective eye of the law. The constitutional mandate does not say that no person shall be deprived of his right or personal liberty under any circumstances. On the contrary, if such deprivation of right or personal liberty is in accordance with the procedure established by law, it does not get protected by Art. 21. The function of deciding as to whether certain procedure of life or personal liberty was reasonable or not was not of the Court, since it was an exclusively legislative function. This view was expressed by a Division Bench of the Bombay High Court in *State v. Sheshappa*, : AIR1964 Bom253 while considering a similar provision for medical examination, in the Bombay Prohibition Act.

14. How exactly an arrest could be made is the subject-matter of S. 46, Cr.P.C., which contemplates three modes of arrest viz., (i) Submission of the arrestee to custody by word or action, (ii) Touching of the body the person to be arrested, and (iii) Confining the body of such person. The arrest being a restraint of the liberty of the arrested person, unless there is submission as contemplated in S. 46, Cr.P.C., actual contact will be necessary to effect the arrest. In short, arrest is a formal mode of taking a person into police custody.

15. A Full Bench of this Court in *Roshan Beevi v. Joint Secretary to the Government of Tamil Nadu*, 1983 LW Cri 283 had occasion to consider the meaning of the words 'arrest' and 'custody'. After noting various definitions on the meaning of the word 'arrest', the Full Bench held that it was clear that when the 'arrest' is used in its ordinary and natural sense, it means apprehension or restraint or the deprivation of one's personal liberty. The question whether the person was under arrest or not, depended not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases. When used in the legal sense, in the procedure connected with criminal offences, the Full Bench held that an arrest consists in the taking into custody of another person under authority empowered under law for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the Authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the

person arrested.

16. As stated earlier, submission to the custody by word or action by the arrestee is one of the modes of arrest. Arrest is complete when there is submission to custody by word or action. In order to effect arrest, unless of course the person concerned submits to the custody of the arrestor, the conditions prescribed in S. 46, Cr.P.C. may have to be fulfilled.

17. The next question to be considered is whether S. 53, Cr.P.C. will take within its fold persons who have either been released on bail after arrest or others who have been released on bail in the event of arrest. On facts, since the petitioner had been released on bail in the event of arrest, it has to be decided whether he could be stated to be a person arrested on a charge of committing an offence, as contemplated under S. 53 of the Code.

18. In *Balchand Jain v. State of Madhya Pradesh*, AIR 1977 SC 366 : 1977 Cri LJ 225 the apex Court, while considering S. 438, Cr.P.C. vis-a-vis its consistency with the Defence and Internal Security of India Rules, 1971, observed as follows :-

'We do not find in this section the words 'anticipatory bail', but that is clearly the subject with which the section deals. In fact 'anticipatory bail' is a misnomer. It is not as if bail is presently granted by the Court in anticipation of arrest. When the Court grants 'anticipatory bail', what it does is to make an order that in the event of arrest, a person shall be released on bail. Manifestly there is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting 'anticipatory bail' becomes operative.' In the same pronouncement of the Supreme Court, Fazl Ali, J. has observed thus : 'We might, however, mention here that the term 'anticipatory bail' is really a misnomer, because what the section contemplates is not anticipatory bail, but merely an order releasing an accused on bail in the event of arrest. It is manifest that there can be no question of a person being released on bail if he has not been arrested or placed in police custody. Section 438 of the Code expressly prescribes that any order passed under that section would be effective only after the accused has been arrested. The object which is sought to be achieved by S. 438 of the Code is that the moment a person is arrested, if he has already obtained an order from the

Sessions Judge or the High Court, he would be released immediately without having to undergo the rigors of jail even for a few days which would necessarily be taken up if he has to apply for bail after arrest.'

19. Similarly, the Supreme Court in *Gurbaksh Singh v. State of Punjab*, : 1980 CriLJ1125 while considering S. 438 of the Code, observed as follows :

'In fact, two of the usual conditions incorporated in a direction issued under S. 438(1) are those recommended in sub-section (2)(i) and (ii) which require the applicant to co-operate with the police and to assure that he shall not tamper with the witness during and after the investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery under S. 27 of the Evidence Act, person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of S. 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in *State of U.P. v. Deoman Upadhyaya*, : 1960 CriLJ1504 to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the police. The broad foundation of this rule is stated to be that S. 46 of the Cr.P.C. does not contemplate any formality before a person can be said to be taken in custody; submission to the custody by word or action by a person is sufficient.'

The Supreme Court, in the aforementioned case, took the view that the order of anticipatory bail could not and did not in any way directly or indirectly take away from the police their right to investigate into charges made or to be made against the person released on bail.

20. In *Pokar Ram v. State of Rajasthan*, : 1985 CriLJ1175 while considering the scope of S. 438, Cr.P.C., the Supreme Court made the following observations (at page 1176; 1985 Cri LJ) :

'Unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. A direction under S. 438 is intended to confer conditional immunity from the touch as envisaged by S. 46(1) of confinement.'

21. The observations in the decisions cited above, squarely fit in with the purpose contemplated under S. 53, Cr.P.C., which as stated earlier had been enacted to facilitate effective investigation. In view of the authoritative pronouncement of law by the Supreme Court, the release of an arrested person on bail, does not appear to make any difference, since he does not cease to be an arrested person or an accused person for the purpose of S. 53 of the Code, if the examination contemplated therein is found to be necessary by the Court for the purpose of proper investigation or an effective trial.

22. At this stage, useful reference can be made to the following observations of the Supreme Court in *Niranjan Singh v. P. Rajaram Kharote*, : 1980 CriLJ426 :

'Here the respondents were accused of offences but were not in custody, argues the petitioner. So no bail, since this basic condition being in jail is not fulfilled. This submission has been rightly rejected by the Court's below. We agree that, in our view, an out law cannot ask for the benefit of law and he who flees justice cannot claim justice. But here the position is different. The accused were absconding but had appeared and surrendered before the Sessions Judge. Judicial jurisdiction arises only when persons are already in today and seek the process of the Court to enlarged. We agree that no person accused of an offence can move the Court for bail under S. 439, Criminal P. C., unless he is in custody.

When is a person in custody, within the meaning of S. 439, Criminal Procedure Code When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the Court having been remanded by judicial order, or having offered himself to Court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor presidential profusion is needed to come to the realistic conclusion that he who is under the control of the Court or is in the physical hold of an officer with coercive power is in

custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties some times heard in court that the police have taken a man into informal custody and other like terminological dubiotics are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.'

23. It is, therefore, seen that, applying the principles enunciated by the Supreme Court, a person released on bail in the event of arrest submits himself to the jurisdiction of the Court and the law had taken control of such person. The person released on bail in the event of arrest had submitted to the jurisdiction of the Court and, as stated earlier, the term 'anticipatory bail' is a misnomer and the order directing bail in the event of arrest takes effect, the instant a person is arrested.

24. As early as in 1961, in *State of Bombay v. Kathi Kalu*, : 1961 CriLJ856 the Supreme Court, while considering Article 20(3) of the Constitution, regarding the person in custody giving his specimen handwriting or signature or impression of his thumb, fingers, palm or foot, to the Investigating Officer under the Orders of Court for the purpose of comparison, held, cannot be included in the expression 'to be a witness'.

25. The Andhra Pradesh High Court in *Ananth Kumar v. State of Andhra Pradesh*, 1977 CriLJ 1797 had occasion to consider the scope of S. 53 Cr.P.C. The Court held that under the new Code, provision had been made for the medical examination of the arrested person at the instance of a police officer of a proper rank and also at the instance of the arrested person himself, and such examination necessarily formed part of investigation as defined in S. 2(4) of the Code. The Court also took the view that examination of a person by a Medical Practitioner must logically take in examination, by testing his blood, sputum, semen, urine, etc. which cannot be held to be outside the scope of S. 53 of the Code. As the section itself contemplated, even reasonable force can be used to subject the arrested to medical examination, though it may discomfort him. The opinion expressed by me earlier is echoed in this ruling of the Andhra Pradesh High Court. Where it has

been held that release of an arrested person on bail cannot take away the reality of the situation and the arrested person does not cease to be an arrested person or an accused person for the purpose of Sections 53 and 54 of the Code. On the question of imposition of conditions, while directing release on bail of the accused, the learned Judge held that the condition 'otherwise in the interests of Justice' contemplated in Section 437(3)(c) Cr.P.C. can be imposed. The Court further held that direction could be given by a Court, subjecting a person released on bail, for medical examination, since it was a condition necessary for investigation.

A Division Bench of the Bombay High Court went into this very same question very elaborately in *Anil A. Lokhande v. State of Maharashtra*, . While considering the scope of Section 53 Cr.P.C., the Bombay High Court took note of Section 173(8) Cr.P.C. which conferred an express and specific power to the Police to carry out further investigation after cognizance had been taken by Court. Though Section 53 of the Code lays down a condition that medical examination will have to be done at the instance of a police officer not below the rank of Sub-Inspector, it did not debar other superior officers or the Court concerned from exercising the said power when it was necessary for doing justice in a criminal case. The object of Sections 53 and 54 of the Code is not far to seek, since it may help the prosecution the defence, but the ultimate aim is that justice must be done in a criminal case. Therefore, it is open to the Court which is seized of the matter to issue direction or to grant approval or permission to the police for carrying out further investigation in view of Section 53 of the Code. As long as the directions are made by Court, which agree with the Procedure established by law, the Constitution cannot be an obstacle for efficient and effective investigation into the Crime and of bringing criminals to justice which will be necessary for the benefit of the community. The sacrosanct approach contemplated in Sections 53 and 54 of the Code, to my mind, appears to be necessary either for proving the guilt or the innocence of the concerned accused. The Bombay High Court also took the view that it will not be correct to say that only because the accused had been released on bail he ceased to be in custody and, therefore, powers under section 53 of the Code could not be exercised. The release on bail does not change the reality and from that fact alone, it cannot be said that he is not a person arrested for an offence. A person released on bail is still considered to be detained in the constructive custody of the

Court through his surety. He has to appear before the Court whenever required or directed. Therefore, to that extent, his liberty is objected to restraint. He is nationally in the custody of the Court and Hence continues to be a person arrested. Even in spite of the fact that the accused had been released on bail, he continues to be a person arrested on a charge of commission of an offence and, therefore, his medical examination can be carried out under S. 53 of the Code. Thus, a person who is released on bail in the event of arrest, also cannot challenge this concept in view of the observations of the Supreme Court in Balchand Jain v. State of M.P., AIR 1977 SC 366 : 1977 Cri LJ 225 and Gurbaksh Singh v. State of Punjab, : 1980 CriLJ1125 extracted earlier.

26. In State (Delhi Administration) v. Pali Ram, : 1979 CriLJ17 the Supreme Court was concerned with the power of the Court to direct the accused to give his specimen handwriting and the Supreme Court upheld such powers. Therefore, it is open to the Court which is seized of the matter to issue direction for carrying out further investigation under sections 53 and 54 of the Code.

27. Modern community living requires modern scientific methods of crime detection, (detection ?) lest the public go unprotected. The right of an individual will have to be considered in the background of the interests of the Society. Section 53 at this stage of this case related to further investigation under the protective eye of law.

28. The examination of a person under S. 53 Cr.P.C. would take in the fold the potency test as well. In Jameshed v. State of Uttar Pradesh, 1976 Cri LJ 1680 the Allahabad High Court held that the Examination of the accused contemplated under S. 53 of the Code included taking blood from the accused Examination of a person, under S. 53 of the Code cannot only mean what is visible on the body and if necessary would include examination of an internal organ for the purpose contemplated the said Section.

29. The law laid down by several Court is in conformity with the view I have taken and hence the order of the Judicial Magistrate, Tenkasi, in Cri.M.P.No. 3367 of 1989 on his file, directing the Petitioner to appear in Court for the purpose of medical examination under S. 53 of the Code, confirmed by the Principal District

and Sessions Judge, Tirunelveli, in CrI.R.C. No. 86 of 1989, is in consonance with law and needs no interference. The Petitioner must obey the summons issued by the Judicial Magistrate, Tenkasi, and present himself in person before the said court for being forwarded for examination by a Medical Practitioner as contemplated under S. 53 Cr.P.C., CrI.M.P. No. 1711 of 1990 is therefore dismissed.

30. As soon as orders were pronounced in this petition, Mr. S. Shunmugavelayutham, learned counsel for the petitioner, made an oral application for leave to appeal to the Supreme Court. The order pronounced by me is based on the law laid down by the Supreme Court and I do not consider this to be a fit case for appeal to the Supreme Court. Leave refused.

31. Order accordingly.

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