

GAHC010031352023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./73/2023

SUDIP BISWAS @ BURA

Address - S/O LATE PRAKASH BISWAS, R/O NO. 1 DHUPURI, P.S.-
MANIKPUR, DIST.- BONGAIGAON (ASSAM).

VERSUS

THE STATE OF ASSAM AND ANR .
TO BE REP. BY P.P., ASSAM.

2:PHULKUMARI HARIJON
W/O JAGLAL HARIJON
R/O NO. 1 FAGUNAGAON
P.S.- BIJNI
DIST.- CHIRANG
ASSA

Advocate for the Petitioner : MR H R A CHOUDHURY

Advocate for the Respondent : Ms. B. Bhuyan, Addl. PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MITALI THAKURIA

ORDER

13.10.2023

(M. Zothankhuma, J)

1. Heard Mr. H.R.A. Choudhury, learned Senior Counsel assisted by Mr. A.

Ahmed, learned counsel for the appellant. Also heard Ms. B. Bhuyan, learned Addl. PP for the State.

2. The Office Note dated 04.08.2023 shows that the learned Trial Court's records have arrived.

3. This is an appeal against the judgment dated 26.07.2022 passed by the learned Sessions Judge, Bongaigaon in Sessions Case No.49(M)/2018 convicting the appellant under Section 376(1) IPC and sentencing him to undergo rigorous imprisonment for 12 (twelve) years with a fine of Rs.50,000/-, in default to undergo simple imprisonment for 1 (one) year.

4. The appellant, who was 24 years old has been convicted on the ground of having raped a woman of 48 years, resulting in the birth of a child. Though the appellant had filed an application under Section 389 Cr.P.C. for suspension of the sentence and release of the appellant on bail, vide I.A.(Crl.) No.160/2023, this Court had dismissed the said I.A.(Crl.) No.160/2023, vide order dated 10.10.2023 by holding that unless and until a DNA test/profiling of the appellant was done, it would not be proper to suspend the sentence and release the appellant on bail.

5. This Court had, during the pendency of I.A.(Crl.) No.160/2023, directed the appellant's counsel to obtain instructions as to whether the appellant was willing to undergo a DNA test to verify whether he was the father of the child that had been born to the victim. However, the learned Senior Counsel for the appellant had stated on 10.10.2023 that the appellant was not willing to undergo a DNA test.

6. The question that arose was whether this Court could direct the appellant to undergo a DNA test, to prove whether he was the father of the child born to the victim and which in turn would prove as to whether he was the rapist of the victim.

7. The learned Senior Counsel for the appellant submits that this Court cannot compel the appellant to undergo a DNA test without his consent. In this regard the learned Senior Counsel submits that in terms of the judgment of the Supreme Court in the case of ***Goutam Kundu Vs. State of West Bengal & Others***, reported in ***1993 3 SCC 418***, Courts in India cannot order a blood test as a matter of course. He submits that the Apex Court has held that the Courts have to carefully examine the consequence of ordering a blood test and no one can be compelled to give his/her sample of blood for analysis.

8. The learned Senior Counsel submits that the evidence adduced by the prosecution does not prove that the appellant was the rapist of the victim or that the appellant was the father of the victim's child. In this respect, he has referred to the evidence given by the prosecution witnesses, especially the evidence given by the victim in her cross-examination, wherein she has stated that she came to know the name of the appellant only when the case was filed and that she had not seen the face of the person who raped her on the relevant night, due to darkness. He also submits that as the FIR had been filed after 6/7 months after the alleged rape had been committed, the same cast a doubt on the authenticity of the contents of the FIR.

9. On the other hand, the Additional Public Prosecutor submits that the victim was mentally ill and unable to recall previous incidents, as given in the

testimony of PW-1. She also submits that the victim was 48 years of age and the appellant was 24 years of age. Further, though a bichar (village meeting under the aegis of the elder of the village) had been held in the village on 2 (two) occasions, due to the alleged illegal act of the appellant, the appellant did not turn up in the bichar held on the 2 (two) occasions. She submits that though the evidence of the prosecution witnesses proved the guilt of the appellant, the appellant should be subjected to a DNA test to conclusively prove the said fact.

10. We have heard the learned counsels for the parties.

11. The question to be decided is as to whether the appellant had raped the victim and whether the child born to the victim had been fathered by the appellant, as it has been alleged that the child was the result of the rape. As stated earlier, an issue has cropped up as to whether a DNA test could/should be done on the appellant and the child, so as to determine whether the appellant had fathered the child, besides considering the evidence that has already been recorded by the learned Trial Court.

12. In the case of ***Goutam Kundu (supra)***, the Supreme Court was seized of an issue, wherein the paternity of a child between a married couple was disputed. The alleged father (husband) of the child prayed for a Blood Group test of the child and himself to prove that he was not the father of the child. The application was dismissed on the ground that there were other methods in the Evidence Act to prove the paternity of the child and that the Blood Group test could not conclusively prove the paternity of a child. The Supreme Court in the above case held that though a Blood Group test was a useful test to

determine the question of disputed paternity, it could be relied upon by the Courts as a circumstantial evidence, which ultimately excluded a certain individual as a father of the child. The Supreme Court further held that in terms of Section 112 of the Evidence Act, the presumption of legitimacy of a child, with regard to the father is that a child born of a married woman is deemed to be the legitimate child of a husband and would remain so, even if the child was born within 280 days after dissolution of a marriage and the mother remain unmarried, unless it could be shown that the parties to the marriage had no access to each other at any time, when the child could have been begotten. It was in the above context that the Supreme Court in ***Goutam Kundu (supra)*** held that the Courts in India cannot order a blood test as a matter of course. It thus held as follows:-

“(1) That courts in India cannot order blood test as a matter of course;

(2) Wherever applications are made for such prayers 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.”

13. The paternity test that was sought to be done by the alleged father in ***Goutam Kundu (supra)*** was a Blood Group test and not a DNA profiling/test, wherein DNA rich cells are extracted. On the other hand, Blood Group test

examines the Blood type of a person. As per the medical literature existing today with regard to DNA test and Blood test, perhaps the greatest difference between a Blood Group test and a DNA test is that a Blood Group test cannot be used as conclusive proof of fatherhood. It can only be used to disprove parentage and not to prove that the individual is the father of the child. The DNA test on the other hand, is a very reliable test, which is based on different parameters than a Blood Group test.

14. With the incorporation of Section 53A Cr.PC w.e.f. 23.06.2006, DNA test can be done to facilitate the prosecution, in proving it's case against an accused. Though it may be argued that right to privacy is a part of the right to life and personal liberty under Article 21 and that Article 20(3) provides that nobody should be compelled to give evidence against himself, we are of the view that the said would not over-ride the search for the truth, as the offence of rape is an offence against the society at large and as the objective of a Court proceeding is to find out the "truth". We are accordingly of the view that the appellant's right under Articles 20(3) & 21 would have to give way to public interest, so that the truth is laid bare for all to see.

15. In the case of ***Harishchandra Sitaram Khanorkar Vs. State of Maharashtra***, reported in ***2023 (1) ABR (CRI) 259***, the Division Bench of the Bombay High Court has held that there can be no doubt that there have been remarkable technological advancement in forensic science and in scientific investigations. The DNA testing has an unparalleled ability both to exonerate the wrongly convicted person and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. Modern DNA testing can provide powerful new evidence unlike

anything known before DNA technology. It provides not only guidance to the investigation, but also supplies the Court accurate information regarding the identification of the criminal.

16. In the case of ***Pravin Suryabhanji Gube Vs. State of Maharashtra***, reported in ***2019 (2) ABR (CRI) 70***, the Bombay High Court has held that DNA is a modern scientific technique, which is very useful and helpful not only for investigators, but also for Courts to reach to the truth. DNA conclusively points the finger of guilt towards the perpetrator of a crime. However, while considering this scientific piece of evidence, the Court is required to examine as to whether at any point of time, it could be said that there was the slightest chance of playing with the samples and/or tampering with it by anyone.

17. In the case of ***Mukesh Vs. State (NCT of Delhi) 2017 6 SCC 1***, the Hon'ble Supreme Court spoke on the importance of DNA evidence. It observed in paragraph Nos. 216 and 217 as follows:-

"216. DNA technology as a part of Forensic Science and scientific discipline not only provides guidance to investigation but also supplies the court accrued information about the tending features of identification of criminals. The recent advancement in modern biological research has regularized Forensic Science resulting in radical help in the administration of justice. In our country also like several other developed and developing countries, DNA evidence is being increasingly relied upon by courts. After the amendment in the Criminal Procedure Code by the insertion of Section 53A by Act 25 of 2005, DNA profiling has now become a part of the statutory scheme. Section 53A relates to the examination of a person accused of rape by a medical practitioner.

217. Similarly, under Section 164A inserted by Act 25 of 2005, for medical examination of the victim of rape, the description of material taken from

the person of the woman for DNA profiling is a must.”

18. In the case of ***Pantangi Balarama Venkata Ganesh Vs. State of A.P.***, reported in ***2009 14 SCC 607***, the Supreme Court held that experts opine that identification by DNA profiling is hundred percent precise. However, there is a need for quality control. Further, the evidence of experts is admissible in evidence in terms of Section 45 of the Evidence Act, 1872. The Supreme Court in the above case has held at paragraph No. 41 as follows:-

“41. Submission of Mr. Sachar that the report of DNA should not be relied upon, cannot be accepted. What is DNA? It means:

(Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on. Using this genetic fingerprinting identification of an individual is done like in the traditional method of identifying fingerprints of offenders. The identification is hundred percent precise, experts opine.”

19. In the case of ***Prakash Nishad Alias Kewat Zinak Nishad Vs. State of Maharashtra***, reported in ***AIR 2023 SC (CRIMINAL) 1081***, the Supreme Court has held that even though the DNA evidence by way of a report was present, its reliability is not infallible, especially not so in light of the fact that the uncompromised nature of such evidence cannot be established.

20. In the case of ***Pattu Ranjan Vs. State of T.N.***, reported in ***AIR 2019 SC 1674***, the Supreme Court has held at paragraph No. 52 as follows:-

"52. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on the facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party."

21. In the case of ***Manoj Vs. State of M.P.***, reported in ***AIR Online 2022 SC 767***, the Supreme Court has held at paragraph No. 158 as follows:-

"158. This Court, therefore, has relied on DNA reports, in the past, where the guilt of an accused was sought to be established. Notably, the reliance was to corroborate. This Court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence; it also held that being an opinion, the probative value of such evidence has to vary from case to case."

22. Section 53A(2)(iv) Cr.PC provides that a registered medical practitioner shall prepare a report of his examination, of a person/material taken from the person, arrested on a charge of committing an offence of rape or an attempt to commit rape by way of DNA profiling, if there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence. Section 164A (2)(iii) Cr.PC provides that the registered medical practitioner, to whom a victim of rape or attempted to be raped is sent, shall, without delay, examine her person and prepare a report of his examination giving various particulars, one of them being, the description of material taken from the person of the woman for DNA profiling.

23. Section 53A Cr.PC and Section 164A Cr.PC are reproduced herein below as follows:-

“Section 53A of Cr.PC:-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.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely;

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and”.

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of 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.

Section 164A Cr.PC:- Medical examination of the victim of rape---

(1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

(2) The registered medical practitioner, to whom such woman is sent shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely—

(i) the name and address of the woman and of the person by whom she was brought;

(ii) the age of the woman;

(iii) the description of material taken from the person of the woman for DNA profiling;

(iv) marks of injury, if any, on the person of the woman;

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the woman or of the person competent, to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) 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.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf."

24. In the case of ***Santosh Kumar Singh Vs. State***, reported in **2010 9 SCC 747**, which was in respect of a young girl who was raped and murdered, the DNA report relied upon by the High Court was approved by the Supreme Court and held that the DNA report can be accepted as being scientifically accurate and an exact science as held by the Supreme Court in ***Kamti Devi Vs. Poshi Ram***, reported in **2001 5 SCC 311**.

25. In the case of ***Krishan Kumar Malik Vs. State of Haryana***, reported in **2011 7 SCC 130**, which was a case of gang rape, the prosecution had not conducted the DNA test or made any analysis and matching of the semen of the accused with that found on the undergarments of the prosecutrix. The Supreme Court has held at paragraph No. 44 as follows:-

"44. Now, after the incorporation of Section 53-A in the Criminal Procedure Code w.e.f. 23.06.2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in Cr.PC the prosecution

could have still restored to this procedure of getting the DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences.”

26. In the case of ***Sandeep Vs. State of U.P.***, reported in **2012 6 SCC 107**, which was a case of murder of a pregnant girlfriend and the unborn child of the accused, the Supreme Court held that the DNA report confirmed the accused as the father of the unborn child.

27. In the case of ***Rajkumar Vs. State of M.P.***, reported in **2014 5 SCC 353**, which was a case involving the rape and murder of a 14 year old girl, the Supreme Court held that the DNA report established the presence of the semen of the accused in the vaginal swab of the prosecutrix.

28. The above cases show that there is no bar or restriction in having a DNA profiling of an accused in a case of rape. In the present case, not only is there an allegation of rape against the appellant, but the appellant has been accused of being the father of the child born due to the rape inflicted by the appellant. It is quite clear that DNA profiling of the appellant could prove whether the appellant was the father of the child born to the victim. As Section 53A Cr.PC allows for examination of a person accused of rape through DNA profiling on the request of a Police Officer not below the rank of Sub-Inspector, we do not find any bar or restriction for this Court to pass a direction for DNA profiling of the appellant, which would prove whether the appellant was the father of the child and thus further prove the question whether any rape had been committed on the victim by the appellant.

29. Now let us see whether DNA profiling can be done in civil cases, wherein paternity of a child between couples is in question.

30. In the case of ***Bhabani Prasad Jena Vs. Orissa State Commission for Women***, reported in ***2010 8 SCC 633***, the Supreme Court has held that depending on the facts and circumstances of a case, it would be permissible for a Court to direct the holding of a DNA examination to determine the paternity of a child. However, 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 needed. Thus, in a case relating to the charge by the husband regarding the alleged infidelity of the wife, the same could be ordered by the Court depending upon the facts and circumstances of the case.

31. In the case of ***Dipanwita Roy Vs. Ronobroto Roy***, reported in ***2015 1 SCC 365***, the Apex Court has allowed the DNA test to be done with regard to the paternity of the child born to his wife, to establish whether or not the husband was the father of the child, so as to prove the alleged infidelity of the wife. It also held that in view of the issue involved in the above case, Section 112 of the Evidence Act was not strictly attracted to the case.

32. As can be seen even in civil cases regarding disputes with regard to infidelity of the wife and paternity of a child, the Supreme Court has allowed DNA test to be done, after balancing the interests of the parties, keeping in view the facts and circumstances of a case. The case in hand is however different, as it pertains to a criminal case and in the view of this Court, the right to preserve individual privacy claimed by the appellant, has to give way to the object of finding out the truth, otherwise the same could amount to sacrificing the cause

of justice. Thus, in criminal cases, the requirement of finding out the truth would over-ride the stand of the appellant, in not agreeing to undertake a DNA test.

33. The present case is with regard to whether the appellant had committed a crime against society, which can be proved by way of a DNA test. We are of the view that the principal of proportionality is also in favour of the Court resorting to DNA testing, to find out whether a crime had been committed by the appellant, keeping in view the allegation made by the victim and the fact that a child has been born.

34. A perusal of the orders passed by the Supreme Court clearly go to show that DNA test/profiling is useful and helpful in coming to a decision with regard to identifying the perpetrator of a crime. The Supreme Court has in many cases as referred to above, supported the use of DNA test/profiling. However, it is only in respect of civil cases where the paternity of a child is in dispute between the married couples that the Hon'ble Supreme Court has given words of caution that DNA test/profiling should not be done at the drop of a hat, in view of Section 112 of the Evidence Act. As stated in the earlier paragraphs, the Supreme Court in the case of ***Sandeep Vs. State of U.P. (supra)*** has accepted the confirmation that the accused therein was the father of the unborn child, who had died during the murder of a pregnant woman, determined on the basis of a DNA test. In the present case, the victim has accused the appellant of raping her and making her pregnant. In that view of the matter, we are of the view that the DNA test/profiling would conclusively prove whether the appellant had fathered the child and whether he had raped the victim, as he has denied raping her.

35. In view of the reasons stated above, we are of the view that additional evidence is required to be taken in terms of Section 391 Cr.P.C, as DNA test of the appellant and the child born to the victim, would conclusively prove whether the child has been fathered by the appellant and whether the appellant was the perpetrator of the rape committed on the victim. Accordingly, we direct the learned Trial Court to take additional evidence under Section 391 Cr.PC, by taking steps for ensuring that a DNA test/profiling of the appellant and the child of the victim alleged to have been fathered by the appellant, is undertaken, after taking the samples from the appellant and the child in the presence of the learned Judge of the learned Trial Court. In this regard, necessary directions may be issued by the learned Trial Court to the Superintendent of the concerned Jail to produce the appellant and also to the victim to produce the child. The learned Trial Court shall ensure all precautions are taken at the time of taking of samples from the above persons and making sure the samples are not compromised in any manner. The learned Trial Court shall also ensure that the persons/institution which is going to conduct the DNA test/profiling takes all possible precautions so that the entire testing procedure is not compromised in any manner. The entire exercise should be conducted at the earliest and preferably within a period of 2 (two) months from the date of receipt of a copy of this order.

36. Send back the LCR.

37. As and when the result of the DNA test/profiling is received by the learned Trial Court, the same shall be transmitted to this Court along with the Lower Court records.

38. List this case **after 2 (two) months.**

JUDGE

JUDGE

Comparing Assistant