

GAHC010013912024



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

Case No. : Crl.Pet./79/2024

SAIDUR ALI
S/O ABDUL HALIM
R/O CHIKARBHITA
MOUZA- NAGAON,
P.S. BARPETA,
DIST. BARPETA, ASSAM

VERSUS

THE STATE OF ASSAM AND ANR
REP. BY THE PP, ASSAM

2:RUSTAM ALI
S/O SALIM UDDIN
R/O BHERALDI
MOUZA- BARPETA
P.S. BARPETA
DIST. BARPETA
ASSA

Advocate for the Petitioner : MR. S SAHU
Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

13.06.2024

1. Heard Mr. S. Sahu, learned counsel for the petitioner and Ms. D. Saikia,

learned Amicus Curiae, representing respondent No.2. Also heard learned Additional Public Prosecutor Mr. B. Sarma.

2. By filing this petition under Section 482 Cr.P.C., the petitioner has prayed for quashing and setting aside the order dated 04.12.2023 passed in Special POCSO Case No. 09/2023, by the learned Additional Sessions Judge cum Special Judge, POCSO, Barpeta.

3. The allegation against the petitioner is that the respondent No.2 lodged an FIR before the O/C Barpeta PS stating *inter alia* that her minor daughter used to visit the jewellery shop of the accused petitioner and the accused petitioner was enticing her daughter that he would marry her. Thereafter, the accused petitioner started to have sexual relationship with the victim by paying money for one year as a result of which she became pregnant and ultimately she gave birth to a child. On receipt of the complaint, a case was registered vide Barpeta PS Case No. 1184/2022 under Section 376 IPC read with Section 4 of POCSO Act.

4. Learned counsel for the petitioner has submitted that the case is now at the stage of defence witness. After completion of evidence of the prosecution witness, the statement of the accused petitioner was recorded under Section 313 Cr.P. C. and in the said statement the accused had categorically stated that false case has been lodged against him. He is innocent and he is not the father of the victim's child and the petitioner also stated that a DNA test if conducted would prove his innocence.

5. It is further submitted that since the victim had categorically stated that she had become pregnant owing to keeping of such physical relationship with the petitioner and thereby committed an offence under Section 4 of POCSO Act but the accused petitioner denied the same and there is no other option to prove his innocence except holding of DNA test. With that view the accused petitioner filed

an application before the trial court for conducting DNA test but learned Special Judge after hearing both the parties rejected the prayer of the petitioner for conducting DNA test on the ground that identity of the father has no relevancy in the offence under Section 376 IPC or POCSO Act.

7. It is also the submission of the learned counsel for the petitioner that in case of rape or sexual offence usually there is no eye witness to the incident as a result of which the court has to rely on the evidence of the victim and medical evidence but the statement of the victim is not the gospel truth of the fact. Therefore, under the facts and circumstances of the case the DNA test is required to be conducted to prove the fact in question.

8. It is also contended by the learned counsel for the petitioner that the learned Special Judge misconstrued and misunderstood the law laid down in the case of *Sunil vs State of MP* reported in (2017) 4 SCC 393. Under the facts and circumstances of the present case, the law laid down therein has more relevance in case of the petitioner and as such the order passed by the learned Special Judge is not tenable in the eye of law.

In support of his submission the learned counsel for the petitioner has relied on the following case laws:

(i) (2011) 7 SCC 130 (*Krishan Kr. Malaik vs state of Haryana*).

(ii) (2020) 3 SCC 443 (*Santosh Prasad @ Santosh Kumar vs State of Bihar*).

9. In response to the submission of the learned counsel for the petitioner, the learned Amicus Curiae representing the respondent No.2 has supported the order of the trial court for rejecting the prayer for DNA test. By referring the judgment of

in *Sisu Bhaban vs Joy Yohannan (2008) 4 KLT 550*, the learned Amicus Curiae has pointed out that the question regarding the necessity of DNA test in a rape trial was considered in the said case. 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 the victim. If the sexual intercourse was with the consent of the victim, the question is whether the consent was obtained under circumstance 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 her 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.

10. The learned Amicus Curiae has also referred two other case laws i.e. *Afan Ansari vs State of Jharkhand (2022) SCC online JHAR 1649* and *Dilesh Nishad vs State of Chhatishgarh (Manu/CG/1664/2023)*. In both the cases, it was held that for deciding the case under Section 376 IPC, paternity of the child is not relevant and therefore, there is no need to hold DNA test to prove the charge.

11. Learned Additional Public Prosecutor has also opposed in allowing the prayer of the petitioner in conducting DNA test at this stage. It is further submitted that the case is at the fag end of the trial as such there is no need to conduct DNA test at this stage as because there is every possibility of manipulation in the coming report.

12. Having heard the learned counsel for both the parties and under the facts and circumstances of the case, it is apt to rely on some decisions of the Hon'ble Supreme Court as follows:

13. 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 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.”

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

15. 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.

16. 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."

17. 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.

18. In view of the aforesaid legal propositions, it is quite vivid that the baby child of the victim is neither party in the instant POCSO case nor his status/paternity is required to be examined in this criminal petition filed by the petitioner herein as such ascertaining the paternity of the victim's child is not at all required to be determined in this criminal petition relating to aforesaid POCSO case filed by the petitioner 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 as declared by the Hon'ble Supreme Court in K.S. Puttaswamy (supra). In that view of the matter, I do not find any merit in this criminal petition filed by the petitioner for DNA test and accordingly, the prayer of the petitioner is rejected.

19. Accordingly, the criminal petition is disposed of.

JUDGE

Comparing Assistant