

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION No.6369 of 2014

ORDER :

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This Criminal Petition is filed by the Petitioner/ accused under Section 482 Cr.P.C seeking to quash the order passed on 01.05.2014 in CrI.M.P. No.282 of 2014 in Crime No.242 of 2012, on the file of First Metropolitan Magistrate at Vijayawada. The Crime No.242 of 2012 is registered on 01.05.2014 of Nunna Police Station, Vijayawada City registered for the offences punishable under Section 376 IPC and Sections 3 (i) (xii) and 3 (ii) (v) of SC & ST (Prevention of Atrocities) Act, 1989 for the alleged offences committed against the minor girl (victim).

2) It is from the investigation the police filed final report on 25.03.2013 and the case consequently committed to the Court of Sessions by learned First Metropolitan Magistrate, Vijayawada. It is after filing of the final report that was taken cognizance as PRC and before the case committed to the Court of Sessions under Section 209 Cr.P.C, on 27.01.2014 with notice to accused, the Assistant Commissioner of Police, Central Zone, Vijayawada, the Investigating Officer, through Assistant Public Prosecutor concerned, filed the memo on behalf of prosecution referring to Section 53-A Cr.P.C stating that the minor girl (victim) aged nearly 16 years was raped by accused on 12.02.2012. On 18.04.2012 at about 8.00 hours, the complainant lodged the report against the accused stating that they are residing at Balaji Towers with her parents and the accused Kalakoti Subba Reddy, S/o.Pullu Reddy, R/o.Patamata Bazar, Nunna Village, Vijayawada Rural used to visit their house and developed family friendship. On 12.02.2012 while the victim alone in the house, the accused having knowledge that the parents of the victim went to Visakhapatnam and she is alone in the house, taking advantage of the situation including leniency of the caste of the victim belongs to Madiga by caste to satisfy his evil desire trespassed into the house at about 12.00 noon and victim informed to the accused that her parents went to Visakhapatnam and will return during night, on that the accused went outside and brought a cool drink pet bottle by mixing stupefying or unwholesome substance and gave it to the victim. The victim became semiconscious after

consuming cool drink. The accused taking advantage of her situation had sexual intercourse having knowledge that she is aged about 16 years and incapable of giving consent due to her age and semi unconscious and forcibly sexually enjoyed her body satisfied his evil desire of lust on the victim. Thereafter, on knowing the same by her mother brought her to police station and in the course of investigation, after registration of the crime, the accused was arrested and remanded to judicial custody and the victim girl during investigation blessed with a female child by name Nitigna on 16.11.2012 at Chikitsa Hospital, Vijayawada and thereby, the Assistant Commissioner of Police, Central Zone, Vijayawada City filed a memo requesting the Magistrate to issue summons to the accused and the victim to take them to FSL for conducting DNA test to proceed further in that case or forward them to Director, FSL, Hyderabad for proof of Paternity of the child, for which the accused filed a counter on 26.02.2014 with the contentions that the allegations are false and the school TC regarding the so-called age of minority not correct for no any medical examination regarding the age of the victim and the material on record covered by wound certificate/ final opinion dated 03.12.2012 reads that she was pregnant carrying 10 to 11 weeks with no evidence of recent intercourse which rules out possibility of alleged offence attributed against accused and prosecution cannot seek to project its case on the hypothesis ignoring the evidence on record collected and with a belated version by maligning the accused with the prosecution story and causing defamation and to blackmail him and the petition is not in accordance with the stipulations and requirements under the provisions of Indian Evidence Act or Criminal Procedure Code. Apart from that there is no nexus between the offence alleged against the accused and proposed DNA test sought to be undergone, paternity of child and the offence alleged are distinct concepts and the petition prayer tantamounts to offending the constitutional protection of accused under Article 20 (3) of Constitution of India and the accused cannot be compelled to be a witness against himself. The prosecution cannot seek to compel the accused to provide evidence by submitting to DNA examination from the right of silence of the accused and that too after investigation completed and charge sheet filed with any attempt to add or restart to the accusations by way of parallel proceedings to the concluded investigation before the commencement of trial by competent Court and thereby sought for dismissal.

3) The learned Magistrate after hearing both sides at length passed the

impugned order dated 01.05.2014 in his order saying as per Section 53-A, the prosecution has right to seek for DNA test directing the accused and the victim to undergo, to prove the paternity of the child. The Apex Court in **Krishan Kumar Malik vs State of Haryana** observed the right of the prosecution to conduct DNA test by order of Court and that even earlier the prosecution sought for DNA test, the victim was carrying child in the womb and thereby from showing danger to the child in the mother's womb till delivery occurred held is not just to conduct, to submit to the DNA test by the victim in dismissing that application and thereby the present application for DNA is pursuant to the right not at all violation of Article 20 of Constitution of India as per the contentions of learned Assistant Public Prosecutor and there is force in support of it from perusal of the CrI.M.P. No.1470 of 2012 at the crime stage for DNA examination where Court dismissed as the victim was carrying child in the womb and it is danger to the child at that point of time before delivery. The accused could be asked to give blood sample by the Court in the course of enquiry or trial and Section 53-A Cr.P.C also enables the same for sending the blood sample to DNA test in issuing the order as sought by prosecution including in the committal proceedings/ enquiry and the Supreme Court upheld the power of the Court in directing the accused at the instance of prosecution to conduct DNA test in Krishna kumar supra referring to Section 53-A Cr.P.C on 23.06.2006 which provision came into force and as such and from similar direction already given by Supreme Court even later in N.D.Tiwari vs CBI, repelling the contention of same is offending Article 20 (3) of Constitution of India and thereby held that, permission can be granted to direct the accused for the DNA examination.

4) The same is impugned in the present petition to quash the said order with contentions in the grounds of quash petition, same to the counter contentions raised in opposing the petition before the committal Court, by further submitting that Section 53 and 53-A and 54 as per the Cr.P.C amendment were introduced to determine the guilt of the accused for the alleged offence of rape and nowhere applicable to determine the civil rights of the parties that too when legitimacy and paternity of the child is not subject matter of the crime for the Court so to direct DNA examination for the mere requesting and thereby it is nothing but fill the gaps of the prosecution and the petition is liable to be dismissed but allowed by the lower Court, that too even de facto complainant and accused earlier were subjected to medical examination and

the material objects preserved were sent to APSFL, Vijayawada and the reports received even not supporting any involvement of the accused to the alleged crime, thereby it cannot be allowed to fill up the lacuna by directing for DNA examination for the same nowhere established the alleged offence of rape that establishing the ingredients of the averments by clear evidence of prosecution and as such allowing the application tantamounts to abuse of process of law and is liable to be set aside.

5) Heard learned counsel for the petitioner/ accused as well as the 2nd respondent—de facto complainant—victim and 1st respondent—State represented by learned public prosecutor and perused the material including legal position.

6) Section 53-A is amended by incorporating the explanation to it to serve Section 53-A is inserted newly and also by amending Section 54 by Cr.P.C; The amended Act 25 of 2005 vis-à-vis Act 5 of 2009 show the examination was including the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case. The tests mentioned in Explanation (1) are of bodily substances, which are examples of physical evidence of non-testimonial character. By aid of principle of ejusdem generis test which are of testimonial character cannot be read in words “and such other tests” in the explanation to Section 53.

7) Section 53 deals with examination of accused by medical practitioner at request of police officer and Section 53-A speaks of such examination of person accused of rape by medical practitioner and Section 53-A sub Section (2) clause (4) speaks such examination include the DNA profiling from the material taken from the accused of a crime also and such examination can be made even during arrest of the accused person by medical practitioner, equally even later for any contingency.

8) The subscribing of blood or other sample for DNA examination or collecting from accused cannot be regarded as self incrimination under Article 20 (3) of Constitution of India as the Apex Court’s constitution bench of 11 judges in **State**

of Bombay vs Kathi Kalu Oghad wayback in the year 1961 by considering the same held that, if that sample to be subscribed is not directly being used in evidence but for examination through analysis for ultimate result to use in evidence, it does not amount to self incrimination, to be a witness against himself. Therefrom by insertion of the provisions in the Criminal Procedure Code, the said cloud is further cleared of same noway hit by Article 20 or 21 of Constitution of India, irrespective of what is laid down earlier in **Goutham Kundu vs State of West Bengal**.

9) The learned counsel for petitioner placed reliance on the expression of this Court (by another bench) in **Davu Gopal Lunani vs Siva Gopal Lunani and another** which arises out of the family Court matter where the paternity of the child is in dispute in the suit filed for declaration of status, where DNA examination sought, the Court observed referring to earlier expression of Apex Court in Goutham Kundu supra, **Sharada vs Dharmpal, Renubala Moharana and another vs Mina Mohanty and others Ramkanya Bai vs Bharatram Banarsi Dass vs Tekku Dutta, Bhabani Prasad Jena vs Convenor Secretary Orissa State Commissioner for Women and another** in its conclusion that DNA test undoubtedly offers credible material for establishing the paternity of a person. In Goutham Kundu supra, it was held that there must be a strong prima facie case for ordering blood test of accused, in Sarada supra, the three judge bench held that no doubt Goutham Kundu supra is, therefore not an authority for the proposition that under no circumstances the Court can direct that blood tests be conducted. Having regard to the future of the child, has, of course, sounded a note of caution as regards mechanical passing of such order..." and in Banarsi Dass supra, it was held DNA test may not be enough to escape from the conclusive presumption under Section 112 Evidence Act, wherein in **Ramkanya Bai vs Bharatram** the entire law once again reviewed in Bhabani Prasad Jena supra, saying that it will be competent for the Court to pass an appropriate order for eminent need and in accordance with law and therefrom on facts held the order is at the initial stage before commencement of trial and before produced any basic evidence ordering for DNA examination, hold is not correct on the facts.

10) This decision is not an authoritative to say DNA test would not be conducted but for at best to say the prosecution has to seek such relief after basic evidence during trial. The other decision placed reliance by accused is of ***S.Swarnalaxmi vs State of Andhra Pradesh and another***, in the petition for DNA examination of rape accused sought under Section 53-A and 164 Cr.P.C and Section 45 of the Evidence Act, it was observed that in the Sessions case for the offences under Sections 376, 493, 373 and 417 IPC earlier the de facto complainant filed Crl.P. No.1442 of 2013 before this Court and the Court directed the learned Sessions Judge, to dispose of the same by trial Court therefrom numbered as Crl.M.P No.62 of 2013 and same was ended in dismissal from which criminal revision when carried, it was observed that the prosecution has to establish that accused by playing deception and fraud and under a promise to marry the de facto complainant, had sexual intercourse with de facto complainant, if the prosecution succeeds in proving the same and where the accused is the biological father of the child born after the occurrence to the de facto complainant would be only a piece of evidence, for that itself cannot establish any offence of rape and already the Investigating Officer during the course of investigation took blood samples and sent to APFSL, Hyderabad and obtained report where it was stated accused was not the biological father of the child and now the complaint says the DNA report was obtained by accused by manipulation, but for bold allegation there is no valid reasons assigned even to order second DNA examination from the first report is in favour of the accused, though such second ordering of DNA examination is not a bar if first report is shown as manipulated as held in ***Halappa vs State of Karnataka***. Even this decision shows in an offence of rape, the paternity of the child born after the occurrence is a corroborative piece of evidence and not a conclusive evidence and it can be ordered under Section 53-A but for on facts holding for first report found in favour of accused, in the absence of proving cogently of first report is a manipulated one, second time DNA test examination directing the accused to undergo cannot be as a matter of course. Thereby, said decision also no way helpful to the accused.

11) In fact the above propositions one way shows it is within the power of the Court under Section 53-A to order DNA examination. The Apex Court in ***Ritesh Sinha vs State of Uttar Pradesh and another*** in dealing with the directing of the

accused to submit to examination cannot be called as offending the protection against self incrimination or standing as witness against himself. However stated referring to Sections 53, 53-A, 54 and 54-A Cr.P.C of DNA profiling etc., can be ordered in directing the accused to submit for such examination within the power of the Court by interpreting the scope of the provisions. The learned two judges deferred respectively in so far as voice examination concerned, for the difference of opinion is from the wording of the provision supra and anywhere under Cr.P.C and Evidence Act, there is no provision specifically to bring within the scope of Section 53 Cr.P.C for one view in saying not within its scope for not specifically worded despite Law Commission suggested in recommendation for voice sampling, that is not incorporated by any statutory amendment thereby no way enable the Court to read in the absence of specific provision as per the divergent conclusions referring to first opinion of another judge of the two judge bench. From this the law is clear of DNA examination is permissible, but for voice test under Sections 53, 53-A and 54 of Cr.P.C read with 45 of the Evidence Act.

12) Further the Apex Court in ***Nandlal Wasudeo Badwalk vs Lata Nandlal Badwalk and another*** held that DNA test report provides scientifically correct proof. Report of DNA test stating husband is not a biological father of the child is sufficient, after it is negative, to draw even the presumption under Section 112 of the Evidence Act on legitimacy as Section 112 provides for presumption on a fact and not on a legal fiction, which the husband can prove having been disputed by showing through DNA test conducted and the Court got absolute power so to direct and the same can be a cogent evidence suffice to rebut even the presumption under Section 112 of Evidence Act even in so ordering under Cr.P.C in case of a dispute including for maintenance case of the child under Section 125 Cr.P.C.

13) The expression clearly says under Cr.P.C, in any enquiry, DNA test can be directed against respondent or accused and the report is a cogent and scientific proof, including to rebut any presumption under Section 112 of Evidence Act, by differing to the conclusions in ***Kanthi Devi vs Posh Ram*** by referring to ***Goutham Kundu spura, B.P.Jena (supra)*** which referred other earlier expressions including Banarsi Dass supra, Sarada supra, Renubala supra. Thus the law as it stands as on the date is in any enquiry or proceedings or trial in Cr.P.C apart from in a civil

proceeding, the Court got power to direct even respondent/ accused for DNA examination and the same cannot be called as self incrimination or contrary to Articles 20 and 21 of Constitution of India and infact that it is within the purview of Sections 53, 53-A, 54 of Cr.P.C. Further in another expression of the Apex Court in ***Dharam Deo Yadav vs State of U.P*** in a Criminal Case for the offences under Sections 302 and 201 IPC, held that Court can direct under Section 45 of Evidence Act also for DNA examination which can be relied as a basis, which was no doubt in directing DNA examination of the skeleton of deceased for such scientific examination in saying the evidentiary value is more reliable than any other ocular evidence. Even in another expression of the Apex Court on the allegation of adulterous life of wife, raised by the husband, including on disputed paternity of son born in their wedlock for the offence under Section 497 IPC, it was while directing DNA examination held same is not violative of Articles 19 (1) (a) or 21 of the Constitution of India and that once DNA test establishes paternity or not one of the parties to the lis in the Crime for the offence alleged of adulterous relationship that has bearing in deciding the issue. In fact it is the settled law that any failure to comply as observed in para No.18 of the said latest expression in its conclusion that adverse inference can be drawn under Section 114 of the Evidence Act in saying for the issue on adultery, the paternity of child also undisputedly involved to determine. Even such inference can be drawn against the accused of a crime including by invoking Section 106 Evidence Act by shifting burden on accused.

14) This Court also in a maintenance matter under Section 125 Cr.P.C referring to Section 45 of Evidence Act and Section 53-A Cr.P.C held to determine the paternity of the child in dispute DNA test is the solid proof of truth or otherwise of the dispute of paternity. It was also observed that while sitting in revision against the order granting the relief for DNA examination by lower Court, the Superior Court must be slow to interfere unless the order is perverse or unsustainable. In fact, another bench of this Court also in the latest expression in CrI.P. No.7049 of 2012 dated 13.11.2014 impugning the order of the Magistrate for DNA examination allowed under Sections 53 and 161 (2) Cr.P.C and Section 45 of Evidence Act by negating the contention of such a direction is offending the right under Articles 20 and 21 of the Constitution of India by referring to the expression of Apex Court in ***Selvi vs State of Karnataka*** held the protection under Article 20 (3) and 21 does not

extend to the accused from being compelled to give sample of his blood etc., or in directing to appear for DNA profiling including in relation to offence under Section 376 IPC vide ***Kodi Satish Naidu vs The State of A.P.***

15) From the above expressions coming to the impugned order though the claim is to prove the paternity and the order is to prove the paternity of the child, when it is the contention that the child born is outcome of the sexual intercourse had with the victim a minor girl is not when immaterial and when it constitutes the offence and the paternity of the child also, thereby has a direct bearing on the issue, thereby as held by the expressions referred supra, when the Lower Court did not commit any wrong in ordering the DNA examination by directing the accused to submit, for this Court while sitting against it, even by invoking under Section 482 Cr.P.C, there is nothing. Thus, the order is upheld to subserve the ends of justice.

16) Accordingly and in the result, the Criminal Petition is dismissed. There is no order as to costs.

17) Miscellaneous petitions, if any pending in this Criminal Petition, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 25.11.2015

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HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

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