

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRIMINAL MISC. PETITION NO. 1312 OF 2016

Nehru Raj S/o late Ram Prasad, aged about 57 years, R/o Bada Bazar,
Chirmiri, PS Chirmiri, District Koriya.

... Petitioner

Versus

State of Chhattisgarh through PS Arjuni, District Dhamrati (CG).

... Respondents

For Petitioner	:	Ms. Sudha Bhardwaj, Advocate.
For Respondent/State	:	Shri Ashish Shukla, Govt. Advocate.
For intervenor	:	Shri Y.C. Sharma, Advocate.

Hon'ble Shri Justice P. Sam Koshy

CAV Judgment

Reserved on: 06.01.2017.

Delivered on: 02.02.2017.

1. The present is a petition by poor father whose daughter has been raped and brutally murdered in her residence on the intervening night of 27-28th April, 2015.
2. The petitioner by way of present petition seeks for a direction to the court below as well as the investigating agency under the respondent No.1 to hold a further investigation in the crime so that additional evidence can be gathered and which would be very relevant to establish the offence against the accused or against the perpetrators of the heinous crime. Alternatively, the petitioner has also sought for a direction for appointment of an independent investigating agency to take over the case and to conduct a fresh investigation.
3. True it is that the law is by now well settled by catena of decisions of the Supreme Court that the powers under Section 482 CrPC should

not be exercised by the High Court as a matter of routine. It has also been repeatedly held by the Supreme Court that extraordinary powers conferred upon the High Court under Section 482 CrPC should be exercised in the rarest of rare cases only to ensure that there is no abuse of process of the court or it can be used for ensuring the achievement of ends of justice. Normally, this court would also not have entertained the petition at the fag end of the trial when it is fixed for either final argument or for delivery of the judgment, but the nature of the offence involved in the present case and the gruesome and brutal manner in which the victim was assaulted and there were also sings of victim being raped before the incident and such nature of incidents are on the rise in the society and in case if for the weak and improper investigation, further in case if the prosecution does not lead proper evidence particularly on the forensic and scientific evidence, the advantage of the same goes to the accuse person.

4. When these lapses are brought to the notice of the court, and if the court turns a blind eye to these lapses on the part of the prosecution, such non interference by this court shall result in miscarriage of justice as also failure of doing complete justice. Once when such lapses is brought to its notice, in the opinion of this court, in the prevailing situation where every second day are such incident is reported in the media and if court does not come down heavily on the faulty and weak investigation on the part of the prosecution, the same can be a booster to the accused person. At the same time if this court directs the prosecution to conduct the inquiry more judiciously and scientific

manner and with which the trial court could ultimately reach to the conviction of the accused on the basis of such fool proof investigation and evidence and proving the case beyond all reasonable doubts, the same would be a deterrent for others and would also ensure achieving the ends of justice.

5. The facts relevant for adjudication of the instant case that would be necessary is that, the daughter of the petitioner Ms. Pingla Raj, aged about 26 years was found murdered at her rented accommodation. Immediately the matter was reported at Police Station Arjuni, District Dhamtari wherein Crime No.106 of 2015 for the offence under Section 302 and 450 IPC was registered. The dead-body was sent for postmortem and in the course of investigation the vaginal slides and cloths of the deceased were seized and sent for forensic examination. In the forensic examination report, the presence of human sperm and semen were found. Based upon which the offence under Section 376 IPC was also added.
6. Initially the offence was registered against the unknown person, but in the course of investigation it was found that the deceased was having an affair with accused person namely Rakesh Chandrakar who was also employed along with the deceased and both were known to each other for quit sometime. Since the deceased was from so called lower caste, the deceased was not acceptable to the family members of the accused. That the accused was ready and willing to marry the deceased but had put a condition that the deceased would have to cut of all sort of relationship with her parents and other family members,

on account of which there was some sort of discard between the two. Meanwhile, the accused was informed that the deceased and her family members were planning her marriage elsewhere. When this fact was known by the accused, he got annoyed and in the night he reached the house of deceased and thereafter having sexual relation with her, hit the deceased with hammer on her head and subsequently stabbed her with screw driver all over her body as a result of which she succumbed to the injuries. Now to give an impression that incident was a case of loot, the accused is said to have taken her mobile phone and some jewelery etc. from the house of deceased.

7. During the course of investigation it is submitted that the accused had admitted his guilt by way of making a memorandum statement and at his behest the mobile phone of the deceased was also recovered from a far away place near the Rudri Anicut (Bairaz) where the stolen property belonging to the deceased was thrown by the accused person. Subsequently, the charge sheet was also filed based upon the memorandum statement of the accused under 27 of the Indian Evidence Act. Seizure of the Car belonging to the accused, his bloodstained clothes, mobile phone, mobile phone belonging to the deceased etc. were recovered. Further, during the investigation the call detail records from the mobile phone of the accused it was found that the location of the mobile phone which the accused was using was found to be near the place of incident which becomes an incriminating factor against the accused.

8. The call details also reveals that the two i.e. the accused and the deceased were in conversation just a few hours preceding. It has been also reflected from the charge sheet that the finger prints of the articles at the site of incident such as jewelery box and also the other places have been collected. It has been informed that the police authorities requested the jail authorities to get the finger prints from the accused so that the same can be matched from the finger prints that were there in the articles at the place of incident. The accused is said to have refused to provide his finger prints. After the refusal of the accused in providing the finger print, no efforts have been made by the police authorities to collect the finger print of the accused, thus the police seems to be casual in their approach and is supporting the accused person. That the forensic report showed semen to be found on the undergarment and in the vagina of the deceased establishing the sexual intercourse, but the police authorities have not gone for the DNA profiling of the accused and getting the DNA test conducted of the semen and blood collected during the course of investigation which could enable to identify the person who participated in the act of sexual intercourse. It could also establish in ascertaining whether accused was the person who had committed rape with the deceased.
9. Though the forensic laboratory has given a report that the sample collected during the course of the investigation is not adequate for serum scientific analysis but it is not clear as to why adequate sample could not be collected at the first instance and why the same cannot be sent to a better laboratory with more specialized testing facilities for

obtaining the report. Neither has the police authorities shown any interest in the collection of sperm or semen from the accused which could also be sent for DNA testing.

10. The grievance of the petitioner in the instant case is that right from the initial stage he had been insisting upon the police authorities as well as prosecuting agency for a proper, thorough and detailed investigation with a sole intention of establishing the offence against the accused person and he has been repeatedly making an approach before the higher authorities to intervene in the matter so that the shortcomings in the investigation could be improved upon and the accused person may not get the advantage of the lacuna and loopholes in the investigation resulting in an acquittal of the accused person. It is also the contention of the petitioner that after the memorandum statement of the accused was recorded, the police had recovered the Car he was driving on the fateful day and in the course of search, the seat cover, steering wheel, handle and dashboard of the Car were also found with blood. The cloths of the accused was also seized in which also bloodstains were found. These articles when sent for forensic examination. Report of same was received that samples so collected were degraded and it cannot be established of which blood group it belongs, but it was established that it was human blood.
11. It is submitted by the petitioner that the investigating agency under some influence have deliberately and systematically left out certain vital evidence with which the accused could have been inculpated.

That, it is with this intention that the petitioner has filed the present petition so that this court in exercise of its extraordinary discretionary power conferred upon it under Section 482 CrPC can order for further investigation in the case so that in case if the act has been done by the accused who has been charged for the offence of rape and murder of his daughter, his case can be established fool proof. That in case if he has not committed the said offence then the police authorities can look for other clues and for other suspected persons. According to the petitioner, with the available documents on record as they are in the case diary, the prosecution has not been able to lead a positive evidence so far as forensic report which has been received pertaining to the blood that was found on the dashboard, seat cover, steering wheel of the Car and from the bloodstained cloths of the accused and the benefit of which would go to the accused.

- 12.** Likewise, the report of the forensic department so far as the presence of human sperm and semen at the vagina of the deceased and also on her undergarment is not going to lead to a conclusion or establish that those matches with the sperm and semen of the accused and the advantage of which again would go to the accused person. Likewise, there are finger prints available at the site of the incident, but unless those finger prints are matched with the finger prints of the accused, the offence against the accused cannot be said to be established beyond reasonable doubt. According to the petitioner, the trial which has been conducted and the documents which have come on record most of the independent witness examined have turned hostile. The

departmental witness are not keen to strongly connect the case against the accused with the chemical report which has been received from the forensic laboratory all these have been purposefully done with an intention that the accused may get advantage of it. This, according to the petitioner, is nothing but a grave miscarriage of justice. It is with this intention that the petitioner has filed the present petition seeking for the indulgence of this court at this juncture of trial so that the loopholes and laches in the investigation can be rectified and improved in case if an order of re-investigation or further investigation is ordered.

- 13.** According to the petitioner, the entire prosecution case and the manner in which the trial was being conducted seems to be an empty formality so that the court below can reach to the a logical conclusion and that this could only lead to an order of acquittal of the accused in the given factual matrix of the case.
- 14.** Per contra, learned counsel appearing for the State submits that the present petition is nothing but an act on the part of the petitioner to drag on the trial for quite sometime more. The present petition has been filed by the petitioner at the fag end of the trial and thus, it should not be entertained with. According to him, nothing prevented the petitioner in approaching the court both either the trial court or before this court on an earlier occasion with the grievance that he is now raising. Thus, the petition which suffers from delay and laches should be rejected on this ground alone.

15. It is further submitted by the State counsel that it is a case where all the prosecution witnesses have already been examined. The police authorities have already done its duty and that most of the averments made by the petitioner have already been looked into by the police authorities. However, during the course of evidence, certain independent witnesses have not supported the case of the prosecution and have turned hostile and for which the prosecution cannot be held liable or responsible. It is also submitted that at the fag end of the trial, if further investigation is ordered, it would amount to re-opening of the entire case and that can further delay the ongoing trial.
16. Even if the couple of independent witnesses have turned hostile, yet there are other circumstantial evidence available and which have been brought on record during the course of evidence which is sufficient to implicate the accused in the commission of the offence. State counsel referring to call details submits that call detail records on verification has established that it was used from the location near to the incident site. It has also come in the call records that the accused and the deceased had been in conversation just the period preceding the time of incident. The prosecution did make efforts for getting the finger prints of the accused but since there was non cooperation on his side inasmuch as he has refused to provide the finger prints, the same could not be obtained and matched.
17. According to the State counsel, there are sufficient materials which have been collected during the course of investigation which are

sufficient to draw an inference against the accused Rakesh Chandrakar and that there is all likelihood of his being convicted for the offence. The petitioner should not have any apprehension in his mind that the prosecution case has not been conducted sufficiently for convicting the accused.

18. Learned counsel appearing for the intervenor-accused in the instant case submits that it is a case where the complainant was fully aware about the development of the trial all along and that he was also fully aware of the materials which were collected during the course of investigation. Therefore, there was no reason why the petitioner could not have filed the application for a further investigation and why did he choose to move this petition at this belated stage when the matter is fixed for judgment before the trial court. Thus, it shows that the intention of the petitioner is for prolonging the trial which would be detrimental to the accused. According to him, in case if this petition is allowed, then the intervenor-accused who is languishing in jail would further have to remain in jail for a considerable period of time till the further investigation is not complete.
19. According to invtervenor, it is a case where the investigating agency has infact collected all relevant material documents during the course of investigation and only because the petitioner feels that these materials are not sufficient for establishing a case against the accused person itself should not be a ground for entertaining the request as it would literally amount to reopening of the trial and would be prejudicial to the interest of the intervenor-accused as he would be languishing in

jail for a further considerable period of time. Thus, prayed for rejection of the petition.

- 20.** Having heard the rival contentions put forth on either side and on perusal of record, what is necessary to appreciate at this juncture is whether it would be relevant, proper, justified and legal for this court in exercise of its power under Section 482 CrPC to order for a further investigation of the case particularly when the trial otherwise has reached at its fag end.
- 21.** So far as power of the High Court under Section 482 CrPC is concerned, it is by now well settled by series of judgments of Supreme Court as also by the various High Courts that the High Courts under Section 482 CrPC enjoys certain inherent powers which it could make as may deem necessary to give effect to any order under the Code to prevent the abuse of the process of any court or otherwise to secure the ends of justice. The inherent powers are in the nature of extraordinary powers to be used sparingly for achieving the object mentioned in this section. The High Courts have been invested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose. Ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the legislature.
- 22.** Though the High Court has inherent powers and its scope is very wide, it is a rule of practice that it will only be exercised in exceptional cases. Section 482 is a sort of reminder to the High Courts that they

are not merely courts of law, but also courts of justice and possess inherent powers to remove injustice. The inherent powers have been conferred upon the High Court for the proper discharge of functions and duties imposed upon them by law. The law so far as inherent powers are concerned, it is also clear by now that all Courts, whether civil or criminal, possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in the course of administration of justice.

- 23.** Though wide powers have been conferred upon the court under Section 482 CrPC, but it has to be exercised sparingly, carefully and with caution and only when such exercise would stand justified by the tests specifically laid down in the section. The inherent power is to be exercised *ex debito justitiae*, to do real and substantial justice, for administration of which alone Courts exist. The court must be careful to see its decision in exercise of its power is based on sound principles. Inherent power should not be exercised to stifle a legitimate prosecution. The High Court can exercise the power under Section 482 CrPC either to prevent the abuse of process of the court or otherwise to secure the ends of justice. Exercise of such powers would depend upon the facts and circumstances of each case. The High Court can exercise its inherent jurisdiction under this section only when it finds that the non interference shall result in abuse of the process of the court or failure of justice. It can also be exercised where grave injustice is shown to have been caused.

24. The case in hand is initiated at the hands of the petitioner whose grown up daughter aged about 26 years, on the fateful night i.e. intervening night of 27-28th April, 2015 was brutally murdered. During the course of investigation of the body of the deceased i.e. daughter of the petitioner, it was also found that she was also sexually assaulted before her murder and the prosecution has given it a picture of blind murder. In the course of investigation, the prosecution collected certain clues particularly from the telephonic conversation that the deceased had with the accused. It was also reflected in the course of investigation particularly from the mobile phone of the accused of him having being in constant touch and also having long conversation with the deceased immediately before the incident. Later the intimacy between the two was detected. The motive was also detected that of the deceased planning to marry a person other than the accused in spite of fact that the deceased had an intimate relationship with the accused for quite sometime. That, because of the caste difference between them and the accused being reluctant to accept the family members of the deceased, differences arose and the deceased thought of settling down in her life with some other person drew the annoyance of the accused-intervenor and because of this it is alleged that he has committed the offence. Certain recoveries were made at his instance and these recoveries were quite incriminating but the investigating agency as also the prosecution have not taken care of proving these factors for establishing the offence against the accused

person with cogent proof which would be beyond all reasonable doubts.

- 25.** Another aspect which cannot be brushed aside is the fact that the petitioner became apprehensive on account of the fact that certain independent witnesses in the instant case have not supported the case of the prosecution and have turned hostile. The only incriminating materials now available with the prosecution with which the conviction could have been established is the materials seized/recovered at the instance of accused on the basis of his memorandum statement. Along with other articles which were seized were the mobile phone of the accused, cloths which the accused was wearing on the fateful night, the vehicle belonging to the accused, undergarment of the accused, presence of sperm and semen on the vagina of the deceased. Likewise, finger prints on the articles at the incident site also have been collected. In addition, another vital factors which have been recovered at the instance of the accused is the blood stains on the vehicle belonging to the accused as also his cloths.
- 26.** Now for pinning down the accused person and to verify whether accused person who is being prosecuted for the offence is infact the real culprit, the articles which have been seized or collected during the course of investigation has to be properly, technically and scientifically put to chemical analysis. In addition, the latest procedure which is adopted for ascertaining the identity of the accused is by way of DNA profiling of the suspected accused. These sort of evidence also have

to be scientifically proved. In the absence of proper cogent evidence, the benefit of which shall go to the accused person.

- 27.** In the instant case, the counsel for the State submits that so far as the location of the mobile phone belonging to the accused is concerned, it has been reflected that it was found to be near the place of incident. However, the report from the forensic laboratory is not supporting the case of the prosecution sufficiently with which the accused could be convicted as report is that the sample of bloods which were collected and sent for chemical analysis were not sufficient enough and it is very surprising as to why the police authorities did not collect the blood sample enough with which the forensic serum scientific analysis could have been done.
- 28.** It is a case where admittedly, the police authorities had reached the place of incident promptly and there were enough blood which flowed from the body of the deceased and if the police authorities would have seriously conducted the investigation, it would have easily collected sufficient blood from the place of incident as also from the vehicle seized at the instance of the accused where also there were blood all over the vehicle.
- 29.** Another aspect which cannot be brushed aside is the fact that forensic report received on 08.05.2015 which is enclosed in this petition as Annexure P/4, shows that the slide which was prepared of the deceased as well as undergarment of the deceased were found positive of semen, but the sample collected from the undergarment

were not adequate for serum scientific analysis. Under such circumstances, the only course available for the investigating agency was to get the DNA profile of the accused person done with which it could be easily ascertained whether it matches with that of the accused. For the reasons best known, the investigating agency have not shown any interest for the same. Further, it is also reflected that though there is a refusal on the part of the accused in providing finger print, but the investigating agency also has not shown any keen interest to collect the finger prints of the accused by any other means particularly when the investigating agency had collected large number of finger prints from the place of incident.

30. What is paramount to be seen by this court in its powers under Section 482 CrPC is whether the extraordinary discretionary powers which has been conferred upon this court could be exercised for the purpose of issuance of a direction to the police authorities for further investigation of the matter when the case itself has been subjected to trial and has almost reached to its fag end stage.
31. At this juncture, it would be relevant to refer to decision of Orissa High Court in case of Thogorani alias K. Damayanti Vs. State of Orissa and Others, reported in 2004 CrLJ 4003, wherein dealing with the powers upon the police authorities under criminal procedure code particularly Sections 53 and 173(8) CrPC in paragraphs 12 to 14 of this said judgment, reproducing the two provisions has held as under :

“12. For properly appreciating the controversy raised before us, it would be appropriate to make a detail reference to the provisions of

Sections 53 and 173(8) of the Criminal Procedure Code which read as under :

"53. 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.

Explanation.--In this section and in Section 54, "registered medical practitioner means a medical practitioner who possesses any recognized medical qualification as defined in Clause (h) of Section 2 of the Indian Medical Council Act. 1956 (102 of 1956) and whose name has been entered in a State Medical Register.

173 Report of Police officer on completion of investigation.--

xxx xxx xxx xxx (8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under Sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of Sub-section (2) to (6) shall, as far as may be apply in relation to such report or reports as they apply in relation to a report forwarded under Sub-section (2)."

Section 53 of the Criminal Procedure Code makes a provision for the examination of the person of the accused by a registered medical practitioner at the request of a police officer not below the rank of Sub-Inspector in order to ascertain the fact which may afford evidence and also to use such force as is reasonably necessary for that purpose. This is a part and parcel of the process of investigation. "Investigation" has been defined in Section 2(h) of the Cr. P.C. In the following terms :

"2(h). "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police

officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf."

This definition includes all the proceedings under the Code for the collection of evidence by a police officer who after completion, of investigation is expected to submit a report under Section 173 of the Code. Sub-section (8) of Section 173 was introduced in the Criminal Procedure Code in 1974 and the true import of this sub-section was considered by the Supreme Court in *Ram Lal Narang v. State (Delhi Administration)*, AIR 1979 SC 1791 : (1979 Cri LJ 1346). The Supreme Court in the said case after referring to decisions of various High Courts and the report of the Law Commission observed that further investigation is not all together, ruled out merely because the Court has taken cognizance of the case. Defective investigation coming to the light during the course of trial may be cured by further investigation if circumstances permit it. In paragraph 22 of the said decision the Supreme Court has held as follows :--

"As observed by us earlier, there was no provision in the Code of Criminal Procedure, 1898 which, expressly or by necessary implication barred the right of the police to further investigation after cognizance of the case had been taken by the Magistrate. Neither Section 173 nor Section 190 lead us to hold that the power of the police to further investigate was exhausted by the Magistrate taking cognizance of the offence. Practice, convenience and preponderance of authority, permitted repeated investigations on discovery of fresh facts. In our view, notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted under Section 173 of the 1898 Code, the right of the police to further investigate was not exhausted and the police could exercise such right as often as necessary when fresh information came to light. Where the police desired to make a further investigation, the police could express their regard and respect for the Court by seeking its formal permission to make further investigation."

13. This being the position prior to amendment of the Code and before Sub-section (8) of Section 173 of the Code was introduced, in our view, the new provision, i.e. Section 173(8) of the Code of Criminal procedure has clarified this position. This subsection confers such an express and specific power upon the Investigating Officer.

14. In this view of the matter, though Section 53, Cr. P.C. refers only to examination of the accused by medical practitioner at the request of a police officer, there is no reason why the Court should not have a wider power for the purpose of doing justice in criminal cases by issuing a direction to the police officer to collect blood sample from the accused and conduct DNA test for the purpose of further investigation under Section 173(8) of the Code."

- 32.** The Supreme Court in case of Sharda Vs. Dharam Pal, reported in 2003(4) SCC 493, in a very categorical term has held that there must be sufficient materials before the court to enable it to exercise its discretion. The court must arrive at a finding that the petitioner has established a strong prima facie case for seeking such an order. In the same judgment, the Supreme Court has further held that in case if a person refused to submit himself to such medical examination inspite of an order by the court, the strong case for drawing an adverse inference would have to be made out under Section 114 of the Indian Evidence Act.
- 33.** In the instant case, if we look at the prima facie case which has been brought on record by the petitioner and also the material which has been brought before the court, it would reveal that the present is a case where the body of young girl aged about 26 years was found murdered at her residence. The body was also found in a naked condition. During the course of examination it was found that there was human semen found on the private parts of the deceased as also on her undergarment. In addition, the other incriminating factors which were found during the course of investigation was the large amount of bloodstains on the vehicle of the accused. On further investigation of the location of the mobile phone belonging to the accused also revealed that it was found to be near the place of incident during the time when the incident occurred. Further, the finger prints were also collected from the spot and when the police authorities sought to

match the same from the accused, he refused to co-operate in this regard.

- 34.** The Orissa High Court in case of Thogorani (Supra) further while dealing with the issue whether the collection of blood samples would infringe upon the rights of individual under Section 20(3) and 21 of the Constitution of India in paragraphs 21 to 23 held as under:

“21. With regard to the right guaranteed under Article 20(3) of the Constitution of India which says that "no person accused of any offence shall be compelled to be a witness against himself" it would be seen from the case of State of Bombay v. Kathi Kalu, AIR 1961 SC 1808 : (1961 (2) Cri LJ 856), the phrase "to be a witness" was interpreted to mean 'imparting knowledge in respect of relevant facts by means of oral statement or statements in writing by a person who has personal knowledge of the facts to be communicated to a Court or to person holding an enquiry or investigation. The Supreme Court has pointed out that the hand-writing or finger impression could not change their intrinsic character and, therefore, even 'though the taking of finger impression or specimen hand-writing may amount to furnishing evidence in the larger sense, but they could not be included within the expression to be a Witness'. It was further observed that the Constitution makers may have intended to protect an accused from the hazards of self-incrimination, but they could not have intended to put obstacles in the way of efficient and effective investigation into a crime and of bringing criminals to justice. The majority Judges in the said decision came to the finding that taking specimen writing or thumb impressions etc. did not amount to 'testimonial compulsion'.

22. The only restriction according to us for issuing a direction to collect the blood sample of the accused for conducting DNA test would be that before passing such a direction, the Court should balance the public interest vis-a-vis the rights under Articles 20(3) and 21 of the Constitution in obtaining evidence tending to confirm or disprove that the accused committed the offence concerned.

23. In balancing this interest, consideration of the following matters would be relevant:

- (i) the extent to which the accused may have participated in the commission of the crime;
- (ii) the gravity of the offence and the circumstances in which it is committed;

(iii) age, physical and mental health of the accused to the extent they are known;

(iv) whether there is less intrusive and practical way of collecting evidence tending to confirm or disprove the involvement of the accused in the crime;

(v) the reasons, if any, for the accused for refusing consent (See Paper prepared by Hon'ble Mr. Justice R.K. Abichandani, Judge of Gujarat High Court, titled "(Impact of New Biology on Justice Delivery System -- The Gene Age--A Legal Perspective)").

Applying the said test, to the facts of the present case, we are of the view that taking blood sample of the accused-opp. party No. 3, in the instant case, will not amount to the accused becoming a witness against himself and thus a direction if issued to collect blood sample from the accused-opp. party No. 3 for conducting DNA test would not in any way take away his rights enjoyed under Article 20(3) of the Constitution."

35. The Division Bench of the Delhi High Court in case of Rohit Shekhar Vs. Narayan Dutt Tiwari & Another (FAO(OS) No.547 of 2011, decided on 27.04.2012) in paragraph 34 while deciding the issue whether police force can be used for collecting blood sample for DNA testing has held as under:

"34. We may highlight that as per the dicta of the Supreme Court noticed by the learned Single Judge also, a direction for DNA testing can be issued only after the test of eminent need is satisfied. The order dated 23 rd December, 2010 directed DNA testing of the respondent no.1 only after holding the said test to be satisfied in the facts of the present case. The impugned judgment though also holding that the test of eminent need is satisfied has declined to enforce the order. It is thus not as if the order for DNA testing is made or has been made in the present case on the asking or in a routine manner for the consequence only of adverse inference to flow from non-compliance thereof. We find inherent contradiction in the Court on the one hand holding eminent need for such a test and in the same breath allowing the need to remain unsatisfied. We also find the drawing of adverse inference from refusal to comply with the direction for medical examination to be not sufficient to satiate the need found by the Court. A legal fiction under Section 114 of the Evidence Act, as adverse inference is, is not reality but which the said provision requires the Court to accept as reality. The Court is not bound to or obliged to draw such adverse inferences (see

Emperor v. Sibnath Banerjee AIR 1943 FC 75, Dhanvantrai Balwantrai Desai v. State of Maharashtra AIR 1964 SC 575 and Fakir Mohd. (Dead) by LRs v. Sita Ram AIR 2002 SC 433). A presumption is not in itself evidence but only makes a prima facie case for parties in whose favour it exists (see Sodhi Transport Co. v. State of U.P. (1986) 2 SCC 486). As far back as in Damiseti Ramchendrudu v. Damiseti Janakiramanna AIR 1920 PC 84 it was held that presumption cannot displace adequate evidence. The Supreme Court also in Mohanlal Shamji Soni v. Union of India 1991 Supp (1) SCC 271 held that it is the rule of law in evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue and the Court ought to take an active role in the proceedings in finding the truth and administering justice. Recently in Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria (Dead) 2012 (3) SCALE 550 it was reiterated that the truth is the guiding star and the quest in the judicial process and the voyage of trial. The trend world over of full disclosure by the parties and deployment of powers to ensure that the scope of factual controversy is minimized was noticed. We are therefore of the opinion that adverse inference from non-compliance cannot be a substitute to the enforceability of a direction for DNA testing. The valuable right of the appellant under the said direction, to prove his paternity through such DNA testing cannot be taken away by asking the appellant to be satisfied with the comparatively weak “adverse inference”.

- 36.** The Supreme Court in case of Bhabani Prasad Jena Vs. Convener Secretary, Orissa State Commission for Women, reported in AIR 2010 SC 2851, also upholds the principles of law so far as whether a direction can be given to the court against a person to undergo DNA test. The Supreme Court has further held that there is no violation of the right to life, or privacy of a person, in directing a DNA test to be undergone by him. To undergo such test is not an intervention of his right to life. While affirming the power of the court to direct a DNA test, it had cautioned that said power should be exercised only after weighting all “pros and cons” and also after being fully satisfied that the “test of eminent need”.

- 37.** In the opinion of this court, in case if the investigating agency is now directed to hold DNA test of the accused and also in addition match the semen found in the private part of the prosecutrix as well as in her undergarment with that of the accused, it would be a strong proof for the prosecution case while deciding whether the accused had in fact been involved in the commission of the offence or not. This court is also of the opinion that in case if such exercise is not carried out, the shortcomings, irregularities and lapses on the part of the prosecution in the course of investigation could prove fatal to the prosecutions case and it would be to the advantage of the accused.
- 38.** Under the given facts and circumstances of the case, this court is of the opinion that since the trial has not been concluded, at this juncture, the accused should not be permitted to have an advantage of the faulty/weak investigation on the part of the prosecution particularly taking into consideration the gruesome act resulting in the murder of the deceased in the most brutal manner.
- 39.** So far as power under Section 482 CrPC is concerned, it has been the consistent view of the Supreme Court vide series of judgments that the power under Section 482 CrPC has to be exercised sparingly with circumspection and in the rarest of rare cases. Exercise of power under this section is not the rule but it is an exception. The exception has to be applied only when it is brought to the notice of the court that grave miscarriage of justice would be committed if the trial is allowed to proceed.

- 40.** In the instant case also when we look into the facts of the case, if we allow to proceed with the trial in the given factual matrix of the case, the lacunas which has been pointed out by the petitioner on its face value itself is going to give advantage to the accused person and there is all possibility of the benefit of doubt going in favour of the accused.
- 41.** If the investigating agency would have conducted the investigation in all seriousness on the allegations levelled by the petitioner and would have also collected the evidences and at the same time if the investigating agency would get the valuable evidence examined in its proper perspective so far as forensic science and scientific evidence is concerned, as also as regards the technological evidence relating to telephonic conversation and the location of mobile phone used by the accused at the relevant point of time and also the DNA profiling of the blood and semen which was collected from the place of incident and match the same with the DNA profile of the accused, the case of the prosecution so also the evidence against the accused could be better established and would have also assisted the court in a better manner to reach to a conclusion as to whether it was the accused himself who has committed the crime or he has been falsely implicated in the case.
- 42.** Taking into consideration the entire factual matrix of the case, this court is of the strong view that the apprehension which has been brought to the notice of the court by the petitioner through the present petition cannot be brushed aside holding that the power of the court under Section 482 CrPC is not to be exercised at this stage of trial.

We should be sensitive to the situation and also take into consideration the brutal attack that was made on the victim, the manner in which she was sexually exploited at the first instance and then she was also murdered and when the investigating agency has collected and are also in possession of certain evidence, it is the bounden duty of the investigating agency to ensure that the evidence which are in their possession is carefully analyzed, examined and also proved scientifically. It should also be ensured that the evidence which is collected is also judiciously proved before the court with which the court below conducting the trial also could reach to a fair conclusion while deciding whether the accused person is the real offender or is innocent.

- 43.** Therefore, at this stage, while this court has already ordered stay of the further proceeding of the case, this court further directs the investigating agency at this juncture to get the blood samples, the finger prints collected from the scene of occurrence, the sperm collected from the vagina of the deceased and match all these with that of the accused person and can also get the DNA profiling of the accused done in this regard so as to further confirm the involvement of the accused person in the commission of offence. If required, the assistance of the police/jail authorities be also taken for taking the finger prints and blood samples of the accused for the DNA profiling.
- 44.** It is also directed that the investigating agency should also not shy away of its responsibilities of getting the scientific/chemical analysis of the blood sample collected or which are in their possession, likewise

the vaginal swab in their possession as also the DNA profile being conducted or examined from an institute which can do these tests with the available quantity/quality of samples, even if the institute is outside the State of Chhattisgarh. The investigating agency should not leave any stone unturned in conducting fool proof investigation.

- 45.** Since the trial itself has been stayed, it is expected that the investigating agency shall get the further investigation as directed at the earliest on priority basis so that the trial does not get further delayed. The State authorities are also directed to ensure that further investigation part which is purely on the technical side, be entrusted to a person who otherwise is not assigned any other routine nature of job which would help in getting the investigation done faster. The Superintendent of Police, Dhamtari, shall personally look into the issue and ensuring compliance of this order in all seriousness and get the necessary further investigation at the earliest.
- 46.** It is further directed that immediately on getting the test reports from the institution, the same shall be brought before the trial court by way of supplementary charge sheet and the trial court thereafter shall proceed further with the matter in accordance with law and try to conclude the trial as expeditiously as possible giving priority to the case taking into consideration the nature of crime.
- 47.** With the aforesaid directions, the petition stands allowed.

Sd/-
(P.Sam Koshy)
Judge