

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRR No. 36 of 2019**Order reserved on : 16.07.2019Order delivered on : 02.08.2019

- Rakesh Kumar Sahu S/o Shri Vinod Kumar Sahu, aged 23 years, R/o village Jhalkhamariya, P.S. - Mahasamund, District - Mahasamund (C.G.)

----Petitioner**Versus**

- State of Chhattisgarh Through : P.S. Mahasamund, District Mahasamund (C.G.)

---- Respondent

For Petitioner	:	Shri Devershi Thakur, Adv.
For Respondent/State	:	Shri Anant Bajpai, P.L.

Hon'ble Smt. Justice Rajani Dubey**C A V ORDER****02/08/2019**

01. The petitioner has filed present revision being aggrieved by the order dated 27.11.2018 passed by Special Judge, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, Mahasamund, whereby the learned trial Court has rejected the application filed by the applicant seeking DNA test of the alleged child born out of the incident.

02. Before the trial Court, the petitioner herein is facing trial for the offence under Section 376 IPC. After examination of

prosecution witnesses, the petitioner filed an application seeking DNA test of alleged child of prosecutrix born out of the incident, which was rejected by the learned trial Court on the ground that it is not a matter of determination of paternity, the accused has not filed the application in time, child was adopted by someone, the father of the prosecutrix has no information whereabouts the child and it would not be appropriate to disclose the identity of adoptive parents only for the purpose of defence of accused and the future of child would also be affected. Hence, this revision.

03. Learned counsel for the petitioner submits that the impugned order passed by the trial Court rejecting the application of petitioner for DNA test is illegal, erroneous and contrary to law as after the incorporation of Section 53 (A) of Cr.P.C., w.e.f. 23.06.2006, 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. He would further submit that prior to 2006, even without the aforesaid specific provision in the Cr.P.C. the prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the accused with that found on the undergarments of the prosecutrix to make it a full proof case, but they did not do so. He would also submit that the accused/applicant had a defence to make and wanted to examine defence witness, but failure on the part of the Court to call upon the said witness

prejudiced to the accused. The right of an accused to re-examine a defence witness is a statutory right. The prosecution is adamant to deny any fair trial as the complainant Panchu Ram had replied to the application which was never supposed to be objected by him. It has been further submitted that the provision of Section 233 of Cr.P.C. provides an opportunity to the accused to examine the defence witness, is mandatory. In support of his argument, he placed reliance on the decisions of the Supreme Court in the matter of **Bhadran V. State of Kerala**¹, **Krishan Kumar Malik V. State of Haryana**², and **Mukesh V. State (NCT of Delhi)**³, judgment of Madras High Court in the matter of **P. Jayakumar Vs. State of Madras decided on 13.10.2015**, judgment of High Court of Calcutta in the matter of **Bappaditya Ghosh V. State of West Bengal and Ors** reported in **LAWS (CAL) 2016 1 29**, judgment of High Court of Punjab and Haryana in the matter of **Pinky V. Bheema and Ors.** reported in **LAWS (P&H) 2015 2 371** and judgment of Karnataka High Court in the matter of **Rudresh @ Rudrachari Vs. State of Karnataka** decided on 23.09.2014.

04. On the other hand, learned State counsel supports the impugned order passed by the trial Court.

05. Section 53-A of Cr.P.C. provides as under:-

1 1993 Cr.L.J. 1966

2 AIR 2011 SC 2877

3 (2017) 6 SCC 1

53-A 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.*

06. Before the trial Court, Panchu Ram (PW/2) grand father of prosecutrix, objected the application saying that the alleged child was given to Child Welfare Committee, Raipur for adoption, and to his information, the child was given on adoption to someone as per the order of the Family Court, Raipur, and he has no information whereabouts the child. On his reply, the learned trial Court rejected the application of the accused/applicant on the ground that the accused has not filed application for DNA test in time and because of delay on the part of the accused, the alleged child was given on adoption and only for defence of accused, it would not be appropriate to disclose the identity of parents, whom the alleged child was given on adoption, and the trial Court fixed the trial for defence evidence.

07. As far as defence evidence is concerned, Section 233 of

Cr.P.C. provides as under:-

233. Entering upon defence - (1) *Where the accused is not acquitted under Section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.*

(2) *If the accused puts in any written statement, the Judge shall file it with the record.*

(3) *If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.*

08. The accused/applicant has filed certified copy of deposition of the prosecutrix. In cross-examination, a suggestion that she was having affair with different persons, has been denied. Further, a suggestion that the accused/applicant is not a biological father of alleged child of the prosecutrix, has also been denied. The prosecutrix in her examination has stated that it is the accused/applicant who is the biological father of the alleged child, and it is the accused/applicant's defence that he is not biological father of the alleged child of the prosecutrix and in his defence he wants DNA test of the alleged child to substantiate its case. The main defence of accused in this case is that he is not the biological father of the alleged child. This issue can only be

resolved after DNA test and it is the right of every accused person to adduce defence evidence to substantiate its case. Whatever the outcome of the DNA test, the entire picture would be cleared and the trial will go on right track so as to leave any credence on the prosecution.

09. Thus, considering the overall aspect of the matter, the impugned order dated 27.11.2018 is liable to be and it is hereby set aside. The revision petition filed by the accused/applicant is allowed with the following directions:-

- (i) The trial Court to assign the task of DNA test to the concerned Superintendent of Police, who in turn, shall supervise that the whole procedure of DNA test is carried out in total secrecy and also to ensure that no inconvenience would be caused to the child and her adoptive parents.
- (ii) The adoptive parents should not be forced to come to police station or hospital, and be dealt by policeman in civil clothes.
- (iii) The trial Court may also impose additional conditions for completion of DNA test procedure without disturbing the child and the adoptive parents.

Sd/-

(Rajani Dubey)
JUDGE