

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.1474 OF 2019

Gorakh Baburao Pattekar,
Age : 24 years, Occupation : Labour,
R/o. Ghonsi (Khurd), Tq. Ghansawangi,
Dist. Jalna.

... PETITIONER
(Orig. Accused)

VERSUS

The State of Maharashtra
through Police Station Ghansawangi,
Dist. Jalna

[Copy of Respondent to be served on
Public Prosecutor, High Court of Bombay,
Bench at Aurangabad]

... Respondents

...

Advocate for Petitioner : Mr. Salunke Sudarshan J.
Advocate for Respondent/State: Mr. S.B. Joshi

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CORAM : MANGESH S. PATIL, J.

DATE : 09.09.2019

JUDGMENT :

Heard. Rule. The Rule is made returnable forthwith. The learned APP waives service for the respondent. With the consent of both the sides, the matter is heard finally at the stage of admission.

2. The petitioner is one of the two accused facing trial in Special Case (POCSO) No.23/2015 pending before the learned Additional Sessions Judge – 3, Jalna. He submitted application Exh.64 and requested for seeking DNA test in respect of the child born to the victim. After obtaining say from the prosecutor and hearing both the sides, the learned Additional Sessions Judge rejected the application by the impugned order dated 15.07.2019. Hence this Writ Petition.

3. The learned advocate for the petitioner submits that the accused has every right to take whatever steps through which he can make out his defence. By virtue of Section 233 of the Code of Criminal Procedure, it is only after he enters upon his defence that he was expected to move such an application and had requested for having a DNA test conducted in respect of the child delivered by the victim after the alleged incident. The learned advocate would further point out that in fact, there are two accused and the victim in her testimony has alleged about both of them having committed rape on her. Therefore, it is necessary to have such DNA test conducted to decide the paternity. The petitioner accused cannot be deprived of his right to make out his defence. If he is robbed of such a right it would result in causing a serious prejudice.

4. The learned advocate also adverted my attention to the provisions of Section 53-A of the Code of Criminal Procedure and emphasized the importance of having a DNA profiling. In support of his submission, he referred to the decision in the case of **Selvi J. Jayalalithaa and Ors. V. State of Karnataka and Ors; 2013 AIR SCW 5767** and the decisions of this Court (Nagpur Bench) in **Govind @ Hemrab s/o. Mahadeo Deolkar/Deulkar Vs. The State of Maharashtra; 2019 ALL MR (Cri) 2421** and in **Anita Keshav Parab and Anr. V. State and Ors; 2006(1) Bom. C.R. (Cri) 842.**

5. Per contra the learned APP submits that the attempt to seek DNA profiling is nothing but a step in protracting the trial. The offence was committed in the year 2015 the prosecution examined as many as 10 witnesses. Even the petitioner was examined under Section 313 of Code of Criminal Procedure and it is thereafter that the present application was filed. The attempt to have a DNA test would be nothing but a fishing inquiry. Though the importance of DNA test cannot be disputed, the prosecution case would depend upon the veracity or otherwise of the victim's testimony. The learned APP further points out that since she has been complaining about both the accused having committed rape on her, such DNA test would be inconsequential as far as the allegations of rape are concerned though that may help in deciding the paternity. Therefore when the learned

Additional Sessions Judge has by a reasoned order refused to have such DNA test conducted, no fault can be found. It would take enormous time if the test is to be resorted to hereinafter. The matter is grand old although the law prescribes a period of one year to disposal of the trial under POCSO cases. The Writ Petition may be dismissed.

6. I have carefully gone through the impugned order as well as the papers and the decisions cited by the learned advocate for the petitioner. Beginning with the application (Exh.64) filed by the petitioner before the trial court, a careful perusal of the application would clearly show that the application is too vague. After referring to the allegations, he has simply stated that it would be appropriate to have the DNA test conducted to decide paternity which would affect future of the child born to the victim.

7. If one peruses the testimony of the victim, she has stated that both the accused have committed rape on her on several occasions. If such is the state of affairs, resorting to such DNA test would though be determinative of the paternity would be inconsequential as far as the charge is concerned when she is alleging that both the accused used to ravish her frequently.

8. She is a girl aged 13 years on the date of her deposition recorded in the year 2018. The offence has been committed in the

year 2015. The request was made at the fag end of the trial. Therefore factually no fault can be found with the observation of the learned Additional Sessions Judge in observing that it was an attempt to protract the trial.

9. True it is that by virtue of Section 233 of the Code of Criminal Procedure, the accused is supposed to enter upon his defence after his examination under Section 313 of the Code of Criminal Procedure. Therefore, if and when he decides to lead some evidence he can do so only after his examination under Section 313 is over. However, it is equally important to refer to Sub-section 3 of Section 233 which lays down that the Judge may for reasons to be recorded refuse to issue any process for compelling attendance of witnesses or production of documents, if it is found that the request is being made for vexation of delay or for defeating the ends of justice.

10. It is pertinent to note that it is not that the DNA test has already been conducted. It is a matter yet to be referred for such a test so it cannot be said that it is a piece of material which the petitioner could have relied upon by way of defence and could have tendered in evidence at an appropriate stage. Therefore, it is not that he is seeking to lead some evidence in his possession and is being deprived of exercising such a right.

11. One cannot deny the importance of the DNA profiling which has been emphasized by the Supreme Court in the Case of Selvi J. Jayalalithaa (supra) and by this Court in Govind @ Hemrab Deolkar/Deulkar (Supra). So far as the decision in the case of Anita Keshav Parab (Supra) the request made by the accused there in to issue witness summons to two witness was rejected. It is in view of such peculiar facts, that it was observed that such refusal to issue witness summons had deprived the accused right to fair trial. In the matter in hand the fact situation is entirely different.

12. To conclude, it is only after as many as 10 prosecution witnesses were examined and even the petitioner was also examined under Section 313 the request was made to thereafter to seek the DNA test to decide the paternity of the child born to the victim. Apparently, the request was being made at a belated stage and would only be a fishing inquiry. It cannot be said that the right of the petitioner to lead evidence in his defence is been deprived of by the impugned order. The Writ Petition has no merit and is liable to be dismissed.

13. The Writ Petition is dismissed. The Rule is discharged.

14. At this juncture, the learned advocate for the petitioner makes a request to stay the trial to enable him to approach the Supreme Court.

15. As is observed above, already there is a delay in concluding the trial. I do not find any justifiable reason to direct the trial to be stayed. The request is rejected.

(MANGESH S. PATIL, J.)

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