

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Misc. Petition No.1444 of 2020****Order reserved on: 16-12-2020****Order delivered on: 15-1-2021**

Bharat Bajaj, S/o Bhawan Das, aged about 48 years, R/o
Rajendra Nagar Chowk, Police Station Civil Line, Tahsil &
District Bilaspur (C.G.)

---- Petitioner

Versus

1. State of Chhattisgarh, Through Secretary, Department of Home / Police, Mantralaya, Mahanadi Bhawan, Atal Nagar, Distt. Raipur (C.G.)
2. Superintendent of Police, Distt. Bilaspur, Bilaspur (C.G.)
3. Deputy Superintendent of Police, AJAK Police Station, Sarkanda, Bilaspur (C.G.)
4. Swati Singh, W/o Dharmendra Verma, R/o Near Mangla Chowk, Mahavir Nagar, Bilaspur (C.G.)

(Complainant)

---- Respondents

For Petitioner: Mr. Vipin Punjabi, Advocate.

For Respondents No.1 to 3 / State: -

Mr. H.S. Ahluwalia, Deputy Advocate General, on
advance copy.

Hon'ble Shri Justice Sanjay K. Agrawal**C.A.V. Order**

1. This petition under Section 482 of the CrPC is directed against the impugned order dated 18-2-2020 passed by the Special Judge, SCST (PA) Act, Bilaspur, directing DNA test of the petitioner / accused and the victim and one another at the request of the investigating officer, as Crime No.2/2019 for offence punishable under Section 376 of the IPC read with

Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, 'the SCST Act') has been registered against the petitioner.

2. The petitioner herein principally calls in question the order passed by the Special Judge on the ground that no opportunity of hearing was afforded to him while directing his DNA test and DNA test of the victim and one another, and the learned Special Judge did not apply her mind to the matter and without satisfying herself in respect of adequacy and sufficiency of material collected during investigation by the police against the petitioner, the impugned order has been passed, therefore the impugned order is liable to be set aside.
3. Mr. Vipin Punjabi, learned counsel appearing for the petitioner / accused, would submit that the learned Special Judge is absolutely unjustified in directing for DNA test of the petitioner and the victim as well and the victim's daughter holding that it is necessary for investigation of the offence under Section 376 of the IPC read with Section 3(2)(v) of the SCST Act. The impugned order was passed without affording any opportunity of hearing to the petitioner, as the investigation has not been completed and there is no adequate material on record to hold that DNA is necessary for just and proper investigation of the alleged offence in question and the order passed by the learned Special Judge runs contrary to the decision of the Supreme Court rendered in the matter of Kathi David Raju v. State of Andhra Pradesh

and another¹. As such, the impugned order deserves to be set aside.

4. On the other hand, Mr. H.S. Ahluwalia, learned Deputy Advocate General appearing for the State / respondents No.1 to 3, on advance copy, would submit that the order directing DNA test has been passed on adequate ground and in order to have proper investigation in the light of the provisions contained in Section 53A of the CrPC.
5. I have heard learned counsel for the petitioner on the question of admission of this present petition under Section 482 of the CrPC and went through the record with utmost circumspection.
6. It is not in dispute that Crime No.2/2019 for the offence under Section 376 of the IPC read with Section 3(2)(v) of the SCST Act has been registered against the petitioner and he is facing investigation and he has also been enlarged on anticipatory bail. On the report of the victim, Crime No.2/2019 has been registered for the aforesaid offence in which the victim has alleged that she came in contact with the petitioner in the year 2003 and thereafter, the petitioner on the pretext of marriage, continuously committed sexual intercourse with her and thereafter, she became pregnant and delivered a baby girl on 6-2-2011, but thereafter, the petitioner refused to marry her, as such, FIR was lodged on 29-6-2019 and aforesaid offences have been registered against the petitioner. Victim was medically examined by the medical

practitioner and two vaginal slides of her private parts were prepared and same were sent to the Forensic Science Laboratory, Bilaspur on 28-12-2019, wherein the State FSL, Raipur by letter dated 20-5-2019, advised that if the victim had become pregnant with the accused then DNA test would be appropriate to bring home the charge and DNA test was advised to establish the charge and to find out the biological father of the victim's daughter pursuant to which the investigating officer filed an application on 17-2-2020 before the Special Judge (Atrocities), Bilaspur, seeking DNA of the victim, the petitioner and one another, and on the said application, the impugned order dated 18-2-2020 was passed by the learned Special Judge holding that in order to have proper investigation and in order to establish charges against the petitioner, DNA test of the petitioner, victim and victim's daughter would be necessary and directed accordingly, that has been called in question in the present petition.

7. DNA stands for Deoxyribonucleic Acid, which is the biological blueprint of every life. DNA is made up of a double standard structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines. The most important role of DNA profile is in the identification, such as an individual and his blood relations such as mother, father, brother, as so on. Successful identification of skeleton remains can also be performed by DNA profiling. DNA usually can be obtained

from any biological material such as blood, semen, saliva, hair, skin, bones, etc.. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on circumstantial evidence. (See paragraph 34 of the judgment of the Supreme Court in the matter of Dharam Deo Yadav v. State of U.P.².)

8. The Code of Criminal Procedure (Amendment) Act, 2005 (25 of 2005) was introduced by the competent Legislature in order to bring home the difficulty in conducting the examination i.e. examination of blood, blood stains and semen in case of sexual offences and Section 53A was inserted in the CrPC which deals with examination of person accused of rape by medical practitioner, which states as under: -

“53A. 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.”

9. The above stated provision was inserted by Amendment Act 25 of 2005 for detailed medical examination of the accused for the offence of rape or attempt to rape by 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.

10. Dipak Misra, J. speaking for the Supreme Court and for majority in the matter of **Mukesh and another v. State (NCT of Delhi) and others**³ defined DNA as under: -

“211. DNA is the abbreviation of deoxyribonucleic acid. It is the basic genetic material in all human body cells. It is not contained in red blood corpuscles. It is, however, present in white corpuscles. It carries the genetic code. DNA structure determines human character, behaviour and body characteristics. DNA profiles are encrypted sets of numbers that reflect a person’s DNA makeup which, in forensics, is used to identify human beings. DNA is a complex molecule. It has a double helix structure which can be compared with a twisted rope “ladder”.

216. DNA technology as a part of Forensic Science and scientific discipline not only provides guidance to investigation but also supplies the court accrued information about the tending features of identification of criminals. The recent advancement in modern biological research has regularised Forensic Science resulting in radical help in the administration of justice. In our country also like several other developed and developing countries, DNA evidence is being increasingly relied upon by courts. After the amendment in the Criminal Procedure Code by the insertion of Section 53-A by Act 25 of 2005, DNA profiling has now become a part of the statutory scheme. Section 53-A relates to the examination of a person accused of rape by a medical practitioner.”

His Lordship reviewed the entire law on the point and ultimately in paragraphs 228 and 229 held that DNA report has to be accepted unless it is absolutely dented, by observing as under: -

“228. From the aforesaid authorities, it is quite clear

that DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted.

229. In order to establish a clear link between the accused persons and the incident at hand, the prosecution has also adduced scientific evidence in the form of DNA, fingerprint and bite mark analysis.”

R. Banumathi, J. in her separate but concurring judgment defined DNA in paragraph 457 as under: -

“457. DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at the scene of crime or for identifying the source of blood found on any articles or clothes, etc. recovered from the accused or from the witnesses. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict the accused but also serves to exonerate. The sophisticated technology of DNA fingerprinting makes it possible to obtain conclusive results. Section 53-A CrPC is added by the Code of Criminal Procedure (Amendment) Act, 2005. It provides for a detailed medical examination of accused for an offence of rape or attempt to commit rape by the registered medical practitioners employed in a hospital run by the Government or by a local authority or in the absence of such a practitioner within the radius of 16 km from the place where the offence has been committed by any other registered medical practitioner.”

11. Similarly, in the matter of Krishan Kumar Malik v. State of Haryana⁴, in a gang rape case when the prosecution did not conduct DNA test or analysis done and matching of semen of accused with that found on undergarments of the prosecutrix, their Lordships of the Supreme Court have held that after incorporation of Section 53A in the CrPC it has become

4 (2011) 7 SCC 130

necessary for the prosecution to go in for DNA test in such type of cases, and observed as under: -

“44. Now, after the incorporation of Section 53-A in the Criminal Procedure Code w.e.f. 23-6-2006, brought to our notice by the learned counsel for the respondent State, 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. Prior to 2006, even without the aforesaid specific provision in CrPC the prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences.”

12. As such, since the CrPC has suffered amendment and Section 53A has been inserted by Amendment Act 25 of 2005, DNA profiling has now become a part of the statutory scheme, it has to be undertaken during the course of investigation as it has been statutorily provided in Section 53A of the CrPC which clearly mandates examination of person accused of rape by medical practitioner. Clause (iv) of sub-section (2) of Section 53A clearly provides for medical examination of the person accused of rape giving the description of material taken from the person of the accused for DNA profiling. Blood samples can be taken for detection of the offence of rape wherein the investigating agency has to establish its case beyond reasonable doubt. As such, during the course of investigation of the offence of rape, as statutorily required, the sample has to be taken by the medical practitioner for DNA profiling as provided in Section 53A(iv) of the Code. The

report of DNA, if any, will necessarily be supplied to the petitioner and he will have an opportunity to take stand against the DNA profiling report as per law and the said report will be considered by the concerned Court only after supplying the copy of the same along with charge-sheet and proving by prosecution in accordance with law, and at the stage of investigation, when only direction has been made by competent court in furtherance of statutory scheme under Section 53A of the Code, for DNA test of the petitioner and two others, the petitioner cannot claim opportunity of hearing before passing the impugned order. As such, the submission made in this regard deserves to be rejected.

13. The next submission of learned counsel for the petitioner is that without duly investigating the alleged offence in question, application for DNA test was made and that has been granted.
14. In order to consider the plea it would be appropriate to notice the application filed by the investigating officer as Annexure P-11 in which it has been clearly stated by the investigating officer that vaginal slides of the victim were sent to the State FSL and the laboratory has advised him to go for DNA test of the petitioner accused to establish the charges and thereafter, he considered the matter and thought it fit in order to establish the charges and to find out the biological father of the victim's daughter said to be born out of the cohabitation of the petitioner and the victim, DNA test of the victim, the accused and the daughter is necessary, decided to file an

application for DNA profiling. As such, it cannot be said that without investigation such an application for DNA profiling has been made by the investigating officer which has been granted by the Special Judge (Atrocities). The decision cited by Mr. Punjabi, learned counsel for the petitioner / accused, in this regard in Kathi David Raju (supra) is not helpful to the petitioner. In that case, it has been held by their Lordships of the Supreme Court that without conducting any substantive investigation, the investigating officer has made application for DNA test which cannot be directed and same was set aside by their Lordships giving liberty to consider the request for conducting DNA test on there being sufficient materials on record. As such, the decision of the Supreme Court in Kathi David Raju (supra) is clearly distinguishable on facts of the case, as in this case, pursuant to the substantive investigation and on the basis of suggestion / advise made by the State FSL, such a request was made by the investigating officer which was accepted by the learned Special judge. Therefore, I do not find any illegality or perversity in the impugned order directing for DNA test. I do not find any merit in this petition, it deserves to be and is accordingly dismissed.

15. Before parting with the record, a note of caution is necessary to the Special Judge (Atrocities) as well as for the investigating officer. Section 228A of the IPC states as under:

“228A. Disclosure of identity of the victim of certain offences etc.—(1) Whoever prints or publishes the name or any matter which may make known the

identity of any person against whom an offence under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is—

(a) by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or

(b) by, or with the authorisation in writing of, the victim; or

(c) where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim:

Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation.

Explanation.—For the purposes of this sub-section, “recognised welfare institution or organisation” means a social welfare institution or organisation recognised in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in sub-section (1) without the previous permission of such Court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

Explanation.—The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this section.”

16. Though Section 228A of the IPC is not applicable to the court proceeding, yet the Supreme Court in various pronouncements has clearly indicated that name of the victim (rape) should not be indicated in the judgment(s) / order(s) of the court, but yet in the impugned order, twice, name of the victim has clearly been spelt out by the learned Special Judge which is impermissible in law.

17. This issue has been a matter of discussion before the Supreme Court time to time and imperative directions have been issued by their Lordships in this regard. Some of them may be noticed herein profitably.

18. In the matter of **State of Punjab v. Gurmit Singh and others**⁵, the Supreme Court while emphasizing that victims of sexual abuse or assault need to be treated with sensitivity during investigation and Courts should avoid disclosing the name of the prosecutrix in their orders to save her from embarrassment, made the following observations:

"24. ... It would enable the victim of crime to be a little comfortable and answer the questions with greater ease in not too familiar a surroundings. Trial in camera would not only be in keeping with the self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in an *open court*, under the gaze of public. The improved quality of her

evidence would assist the courts in arriving at the truth and sifting truth from falsehood. ... The Courts should, as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained as far as possible throughout. In the present case, the trial court has repeatedly used the name of the victim in its order under appeal, when it could have just referred to her as the prosecutrix. We need say no more on this aspect and hope that the trial courts would take recourse to the provisions of Sections 327(2) and (3) CrPC liberally. Trial of rape cases *in camera* should be the rule and an *open trial* in such cases an exception."

19. In the matter of Bhupinder Sharma v. State of Himachal Pradesh⁶, the Supreme Court while referring to Section 228A of the IPC, held as under:

"2. We do not propose to mention the name of the victim. Section 228-A of the Indian Penal Code, 1860 (in short "IPC") makes disclosure of the identity of victims of certain offences punishable. Printing or publishing the name or any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is, the restriction does not relate to printing or publication of judgment by the High Court or the Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of a High Court or a lower court, the name of the victim should not be indicated. We have chosen to describe her as "victim" in the judgment."

20. Similar proposition has been rendered by the Supreme Court in the matters of State of Punjab v. Ramdev Singh⁷ and State

⁶ (2003) 8 SCC 551

⁷ (2004) 1 SCC 421

of Karnataka v. Puttaraja⁸.

21. In the matter of **Nipun Saxena and another v. Union of India and others**⁹, their Lordships of the Supreme Court considered the object, applicability and scope of Section 228-A of the IPC and further considering the exceptions to the said prohibition, held that Section 228-A prohibits not only the publication of the name of the victim but also the disclosure of any other matter which may make known the identity of the victim. It was pertinently held as under: -

“11. Neither IPC nor CrPC define the phrase “identity of any person”. Section 228-A IPC clearly prohibits the printing or publishing “the name or any matter which may make known the identity of the person”. It is obvious that not only the publication of the name of the victim is prohibited but also the disclosure of any other matter which may make known the identity of such victim. We are clearly of the view that the phrase “matter which may make known the identity of the person” does not solely mean that only the name of the victim should not be disclosed but it also means that the identity of the victim should not be discernible from any matter published in the media. The intention of the law-makers was that the victim of such offences should not be identifiable so that they do not face any hostile discrimination or harassment in the future.”

22. Apart from this, in the present case, the police officer while conducting investigation and while making application for DNA profiling, in several places, has mentioned the name of the victim, which is also clearly impermissible. In **Nipun Saxena** (supra), their Lordships, in this regard, clearly indicated the procedure to be followed by the police officer as

⁸ (2004) 1 SCC 475

⁹ (2019) 2 SCC 703

under: -

“13. Sub-section (2) of Section 228-A IPC makes an exception for police officials who may have to record the true identity of the victim in the police station or in the investigation file. We are not oblivious to the fact that in the first information report (for short “FIR”) the name of the victim will have to be disclosed. However, this should not be made public and especially not to the media. We are of the opinion that the police officers investigating such cases and offences should also as far as possible either use a pseudonym to describe the victim unless it is absolutely necessary to write down her identity. We make it clear that the copy of an FIR relating to the offence of rape against a women or offences against children falling within the purview of POCSO shall not be put in the public domain to prevent the name and identity of the victim from being disclosed. The Sessions Judge/ Magistrate/Special Court can for reasons to be recorded in writing and keeping in view the interest of the victim permit the copy of the FIR to be given to some person(s). Some examples of matters where her identity will have to be disclosed are when samples are taken from her body, when medical examination is conducted, when DNA profiling is done, when the date of birth of the victim has to be established by getting records from school, etc. However, in these cases also the police officers should move with circumspection and disclose as little of the identity of the victim as possible but enough to link the victim with the information sought. We make it clear that the authorities to which the name is disclosed when such samples are sent, are also duty-bound to keep the name and identity of the victim secret and not disclose it in any manner except in the report which should only be sent in a sealed cover to the investigating agency or the court. There can be no hard-and-fast rule in this behalf but the police should definitely ensure that the correspondence or memos exchanged or issued wherein the name of the victim is disclosed are kept in a sealed cover and are not disclosed to the public at large. They should not be disclosed to the media and they shall also not be furnished to any person under the Right to Information Act, 2005. We direct

that the police officials should keep all the documents in which the name of the victim is disclosed in a sealed cover and replace these documents by identical documents in which the name of the victim is removed in all records which may be scrutinised by a large number of people. The sealed cover can be filed in the court along with the report filed under Section 173 CrPC.”

23. In view of the aforesaid legal position, criminal courts manning the offence of rape are not to mention the name of the victim in their order or judgment, but yet in several places of the impugned order which is in two pages, the name of the victim has been mentioned. Such a practice is deprecated. Similarly, the investigating officer during the course of investigation as well as in the application filed before the Court seeking DNA profiling has mentioned the name of the victim despite having been deprecated by their Lordships of the Supreme Court in the aforesaid judgments and not followed the procedure to be followed i.e. keeping the name of victim in sealed cover.

24. In view of the above, it is directed that let a copy of this order be brought to the notice of the judicial officers (with the leave of Hon’ble the Chief Justice) manning the cases of sexual offences so that in future, they should not mention the name of the rape victim in their order or judgment. It is further directed that let a copy of this order be sent to the Director General of Police and the Principal Secretary (Home) for onward circulation to the Superintendents of Police of all districts to strictly comply with the directions in this regard given by their Lordships of the Supreme Court in the

aforesaid judgments (supra).

25. With the aforesaid observations and directions, the petition stands dismissed.

Sd/-
(Sanjay K. Agrawal)
Judge

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HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Misc. Petition No.1444 of 2020****Bharat Bajaj****Versus****State of Chhattisgarh and others****Head Note**

Criminal courts trying offence under Section 376 IPC should not mention the name of victim in the order / judgment. Similarly, police officer investigating and filing charge-sheet for offence under Section 376 should follow the procedure of sealed cover qua the name of victim laid down by the Supreme Court in the matter of Nipun Saxena v. Union of India.

भारतीय दंड संहिता की धारा 376 के अंतर्गत अपराध का विचारण करने वाले दांडिक न्यायालय के द्वारा आदेश / निर्णय में पीड़ित के नाम का उल्लेख नहीं करना चाहिए। इसी प्रकार पुलिस अधिकारी जो धारा 376 के अंतर्गत अपराध का अन्वेषण एवं अभियोग पत्र प्रस्तुत कर रहा है, उसे वैसी सीलबंद करने की प्रक्रिया का पालन करना चाहिए जैसी प्रक्रिया सर्वोच्च न्यायालय द्वारा पीड़ित के नाम के लिए निपुण सक्सेना विरुद्ध भारत सरकार में अधिकथित है।