

**IN THE HIGH COURT OF JUDICATURE AT PATNA  
CRIMINAL MISCELLANEOUS No.24556 of 2021**

Arising Out of PS. Case No.-23 Year-2019 Thana- SATHI District- West Champaran

Banarasi Sah, Son Of Late Jamuna Sah, resident of Village- Bhabhta, P.S.-  
Sathi, District- West Champaran.

... .. Petitioner/s

Versus

1. The State of Bihar
2. Lalbabu Sah, Son of Late Gorakh Sah, resident of Village- Bhabhta, P.S.-  
Sathi, District- West Champaran.

... .. Opposite Party/s

**Appearance :**

|                      |   |                                                                                                                      |
|----------------------|---|----------------------------------------------------------------------------------------------------------------------|
| For the Petitioner/s | : | Mr. P. K. Shahi- Sr. Advocate<br>Mr. Mukesh Kumar- Advocate<br>Mr. Sanjiv Kumar- Advocate<br>Mr. Umesh Chandra Verma |
| For the State        | : | Mr. Chandra Bhushan Prasad- A.P.P.                                                                                   |

**CORAM: HONOURABLE MR. JUSTICE SATYAVRAT VERMA  
ORAL ORDER**

2      15-12-2022                      Heard learned senior counsel for the petitioner and  
learned APP for the State.

The present application has been filed for quashing the order dated 05.11.2020 passed by the learned 7<sup>th</sup> Additional Sessions Judge-cum-the Special Judge, POCSO Act, West Champaran, Bettiah, whereby the petition dated 04.07.2020 filed by the petitioner seeking DNA test to determine the paternity of the petitioner vis-a-vis the son of the victim of Sathi P. S. Case No.23 of 2019 registered under Section 376 and 506 of the Indian Penal Code read with Section 4/ 6 of the Protection of Children from Sexual Offences Act has been dismissed.

The learned senior counsel for the petitioner submits that the factual matrix of the case, in brief, leading to the present



impugned order is that the informant alleges that he along with his son Rajesh Sah are seller of spices in retail at Darbhanga. Further, they come to their native village once in a month. It is next alleged that on 25.02.2019, he along with his son came to his village and to his shock, he came to know that his minor daughter was carrying pregnancy. It is next alleged that on enquiry, it transpired that his neighbour Banarasi Sah (petitioner) enticed her and called to his house and raped her. Further, after committing the occurrence threatened her and the minor under threat of life did not disclose the occurrence to the informant. Further, petitioner continued raping her, leading to the pregnancy. Further, on coming to know about the occurrence, the informant went to the house of the petitioner, but he fled.

The learned senior counsel for the petitioner next submits that from perusal of the F.I.R., it becomes clear that the informant (O.P. No.2) came to know about the occurrence on 25.02.2019. Thereafter, on 02.03.2019, the F.I.R. was instituted and the victim was examined by the doctors on 03.03.2019 and the victim was found carrying pregnancy of 26-27 weeks. It is next submitted that the statement of the victim was recorded on 05.03.2019 under Section 164 of the Cr.P.C. wherein she



supported the case of the prosecution and stated that the petitioner raped her in the month of *Shrawan* and she was threatened for her life including the life of her parents and when she noticed the movement of the child, she disclosed it to her mother. It is further submitted that the police after investigation submitted charge-sheet no.174 of 2019 dated 15.10.2019 under Sections 376 and 506 of the I.P.C. only and thereafter, cognizance was taken on 16.10.2019. Further, charges were framed for offences under Section 376 and 506 of the I.P.C. read with Section 4 and 6 of the POCSO Act.

The learned senior counsel further submits that on 04.07.2020, a petition was filed by the petitioner seeking DNA Test for determining the paternity of the petitioner vis-a-vis the child of the victim, whom the victim claims to be son of the petitioner as she conceived on account of rape. The learned senior counsel submits that the child was kept by the Child Welfare Committee and the learned trial Court after receiving the reply from the side of the prosecution, heard the parties and rejected the petition dated 04.07.2020 by the order impugned dated 05.11.2020. The learned senior counsel next submits that from perusal of the impugned order, it would manifest that the learned trial Court while rejecting the petition dated 04.07.2020,



held that when the child was born and handed over to the Child Welfare Committee, at that time itself the petitioner ought to have filed an application. Further, the F.I.R. was instituted on 02.03.2019, charge-sheet submitted on 15.10.2019, cognizance taken on 16.10.2019, but no such application came to be filed. It was only when the bail application of the petitioner was rejected by the Hon'ble High Court with a direction that the trial be concluded expeditiously, thereafter, the present petition came to be filed. Further, the child after completing all legal formalities has been given in adoption and once a child is given in adoption, then in accordance with the law, no information with regard to the child is to be given and made public, as such, the belated petition filed by the petitioner is nothing but a ploy to delay the trial, accordingly, it was rejected.

The learned senior counsel assails the order impugned on the ground that the learned trial Court completely failed to appreciate the fact that the F.I.R. itself disclosed that the child in the womb of the daughter of the opposite party no.2 was fathered by the petitioner. Further, the victim in her statement under Section 164 of the Cr.P.C. also admitted this fact. Thus, the paternity of the child was not disputed either in the F.I.R. or in the statement of the victim in her statement under Section 164



of the Cr.P.C. It is thus submitted that if DNA Test would have been allowed, then perhaps the entire controversy would have come to an end. It is also submitted that when there is no other way to prove the charges, then DNA becomes imperative.

The learned senior counsel next relies on certain judgment of different Hon'ble High Courts and the Hon'ble Supreme Court. The learned senior counsel submits that the *Nagpur Bench of the Bombay High Court in the case of Ganesh Pralhad Sontakke vs. State of Maharashtra (Cr. Appeal No.545 of 2005)* set aside the judgment of conviction on the ground that the Investigation Officer ought to have conducted DNA Test of the girl child born to the prosecutrix for ascertaining her paternity as clear proof against the appellant would only have been DNA Test, which was not conducted in the present case.

The learned senior counsel next relies on the judgment of *Nagpur Bench of the Bombay High Court in the case of Ganesh Pralhad Sontakke vs. State of Maharashtra (Cr. Appeal No.545 of 2005)* in which the Hon'ble High Court was pleased to set aside the judgment of conviction by order dated 25.07.2018 taking note of the Judgment of the Hon'ble Supreme Court in the case of *Mukesh and another vs. State (NCT of Delhi)- (2017) 6 Supreme Court Cases 1*.



Thereafter, the learned senior counsel relies on a case of *Vikas Bhaskar Bhalerao vs. State of Maharashtra (Cr. Appeal No.885 of 2015)* decided by the Hon'ble Bombay High Court on 18.03.2020 wherein also the Hon'ble Court was pleased to set aside the judgment of conviction of the appellant on the ground that the DNA Test and reports of DNA created doubt with regard to the genuineness of the evidence and even the medical reports were not supporting the case of the prosecution and not establishing paternity of the fetus with the accused. It is submitted that in this case, there was a delay of seven months in lodging an F.I.R. Thereafter, the doctor examined the prosecutrix and stated that prosecutrix was carrying pregnancy of 21 weeks and for nearly seven months, it was not possible for the mother or sister of the prosecutrix not to notice the pregnancy of the prosecutrix for such a long period, as such, it was presumed that some other person might have been involved in making the prosecutrix pregnant when the prosecutrix had instituted the case alleging that accused used to come to the house of prosecutrix's sister-in-law in the afternoon and when she used to be alone, he used to commit forceful sexual intercourse for 6-7 months repeatedly against her and at the time of occurrence, she was 14-15 years.



The learned senior counsel next relies on the judgment of Hon'ble Supreme Court in the case of *Dipanwita Roy vs. Ronobroto Roy* reported in (2015) 1 SCC 365 and draws the attention of the Court to Paragraph-16 and 17 of the judgment:-

*“16. It is borne from the decisions rendered by this Court in Bhabani Prasad Jena (supra), and Nandlal Wasudeo Badwaik (supra), that depending on the facts and circumstances of the case, it would be permissible for a Court to direct the holding of a DNA examination to determine the veracity of the allegation(s) which constitute one of the grounds, on which the concerned party would either succeed or lose. There can be no dispute, that if the direction to hold such a test can be avoided, it should be so avoided. The reason, as already recorded in various judgments by this Court, is that the legitimacy of a child should not be put to peril.*

*“17. The question that has to be answered in this case is in respect of the alleged infidelity*



*of the appellant-wife. The respondent-husband has made clear and categorical assertions in the petition filed by him under Section 13 of the Hindu Marriage Act, alleging infidelity. He has gone to the extent of naming the person who was the father of the male child born to the appellant-wife. It is in the process of substantiating his allegation of infidelity that the respondent-husband had made an application before the Family Court for conducting a DNA test which would establish whether or not, he had fathered the male child born to the appellant-wife. The respondent feels that it is only possible for him to substantiate the allegations levelled by him (of the appellant-wife's infidelity) through a DNA test. We agree with him. In our view, but for the DNA test, it would be impossible for the respondent-husband to establish and confirm the assertions made in the pleadings. We are therefore satisfied, that the direction issued by the High Court, as has been extracted hereinabove, was fully justified. DNA testing is the most legitimate and scientifically perfect means, which the husband could use, to establish his assertion of infidelity. This should simultaneously be taken as the most authentic, rightful and correct means also with the wife, for her to rebut the assertions*



*made by the respondent-husband, and to establish that she had not been unfaithful, adulterous or disloyal. If the appellant-wife is right, she shall be proved to be so.”*

Thus, submits that even the Hon’ble Supreme Court had allowed the DNA Test and had not interfered with the order of the Hon’ble High Court.

The learned senior counsel next relies on Section 53A of the Cr.P.C. and submits that it was the duty of the police to ensure that the DNA Test of the petitioner vis-a-vis the child ought to have been done in order to establish the allegation as alleged by the victim rather it is also submitted that the petitioner was not required to file an application seeking DNA Test vis-a-vis the child to prove his innocence.

The learned Additional P. P. vehemently opposes the quashing application and submits that there is no infirmity in the order impugned and the reasoning assigned by the learned trial Court cannot be faulted. It is next submitted that the petitioner is only trying to delay the trial and is trying to scuttle the issue. It is next submitted that the present trial is with regard to the issue whether rape was committed by the petitioner on the victim or not and paternity of the petitioner vis-a-vis child is not an issue. It is submitted that the prosecution has to establish whether



offence of rape was committed by the petitioner or not and for that the child in question is not an evidence, nor is a party to the proceedings. It is further submitted that had the victim refused DNA Test of the child vis-a-vis the petitioner, then an adverse inference could have been drawn against her, but the prime allegation in the present case is of rape which led to pregnancy.

The learned Additional P.P. next submits that from perusal of the pleadings made in the quashing application, it can be safely culled out that the petitioner for the first time on 04.07.2020 filed a petition seeking DNA Test. It is next submitted that the pleadings are completely silent with respect to the fact whether the petitioner at the time of framing of charge had raised the present issue or not. It is submitted that the question which the petitioner raises in the present proceeding ought to have been raised at the earliest, more particularly, when the child was in the care of Child Welfare Committee. It is next urged that the prosecution before the learned trial Court had rightly submitted that once the adoption of the child in accordance with law was given, then the same could not have been made public, this amply demonstrates that the petitioner was aware of the law and thus, filed the present petition dated 04.07.2020 knowing fully well that now DNA Test after



adoption would be an impossibility.

The learned Additional P. P. next submits that DNA Test is not for mere asking but can be resorted to in deserving matters only as it helps in preventing destitution, vagrancy and bastardization. The purpose is to preserve the legitimate paternity of the child and this is in consonance with the constitutional principles *ex aequaet bono* i.e. equity and good conscious. It is further submitted that in the present case, the child already in accordance with law has been adopted, as such, the issue of paternity does not arise, since the legitimacy of the child is not in question. It is further submitted that whether the accused/ petitioner can be put to peril by not allowing the present application is also an issue, but in the same wane submits that the conduct of the accused disentitles him from seeking relief, moreso, in peculiar facts of the case, as the child now stands adopted, as aforesaid, thus goes beyond the control of his mother and without the consent of the adopting parents who are not party to the proceedings, the Court cannot direct for DNA Test. It is next submitted that had the petitioner been really interested in proving his innocence, then nothing prevented him from resorting to Section 54 Cr.P.C. which deals with accused's examination by the medical practitioner at the instance of the



accused himself. It is thus submitted that had the accused at the earliest would have invoked the provision of Section 54 of the Cr.P.C., then some credence could have been given to his plea that he genuinely intended to vindicate himself of the allegations, but at this belated stage raising the said plea is nothing but an attempt to delay the trial, especially as aforesaid, when paternity is not an issue nor it is the case of the prosecution that the allegations of rape is to be proved with the aid of the child.

The learned Additional P. P. next relies on a judgment of the Hon'ble Supreme Court Inayath Ali and another vs. State of Telangana and another [Cr. Appeal No.1569 of 2022 (arising out of S.L.P. (Cri.) No.4946 of 2017] wherein the trial had proceeded and several witnesses were examined, when the complainant filed an application under Section 45 of the Indian Evidence Act, 1872 with a prayer for a direction for obtaining expert opinion for DNA Fingerprint Test comparing blood samples of two minor daughters of the respondent no.2 with that of the first appellant. The basis of this application was her allegation that she was forced to cohabit and develop a physical relationship with the appellant no.1 and the two children were born out of that relationship, though her complaint mainly



related to dowry allegation as well as harassment and physical violence committed on her by her husband and in laws.

The trial Court allowed her application and the High Court of Telangana dismissed the revisional application filed by the appellant holding that DNA Fingerprint Test was permitted under Sections 53, 53-A and 54 of the Criminal Procedure Code, 1973.

The learned Additional P.P. submits that the Hon'ble Supreme Court allowed the appeal filed by the appellant and draw the attention of the Court to Para-9 of the judgment:-

*“9. The substance of the complaint was not related to paternity of the children of the respondent no.2 but the question was whether the offences under the aforesaid provisions of the 1860 Code was committed against her or not. The paternity of the two daughters of the respondent no.2 is a collateral factor to the allegations on which the criminal case is otherwise founded. On the basis of the available materials, in our opinion, the case out of which this proceeding arises could be decided without*



*considering the DNA test report. This was the reasoning which was considered by the Coordinate Bench in the case of Ashok Kumar (supra), though that was a civil suit. Merely because something is permissible under the law cannot be directed as a matter of course to be performed particularly when a direction to that effect would be invasive to the physical autonomy of a person. The consequence thereof would not be confined to the question as to whether such an order would result in testimonial compulsion, but encompasses right to privacy as well. Such direction would violate the privacy right of the persons subjected to such tests and could be prejudicial to the future of the two children who were also sought to be brought within the ambit of the Trial Court's direction."*

The learned Additional P. P. in the same breath submits that in the present case also, the child now stands adopted and is in the lap of his adopted parents and must be



leading a happy and a blissful life and now subjecting him to DNA Test will leave a deep scar on his life irrespective of the result of the DNA Test, as allowing the application will bring the child in public domain which definitely will breach his right to privacy as well. Learned A.P.P. submits that none of the cases cited by the learned Senior counsel applies to the facts of the present case. It is next submitted that the judgment of the Hon'ble Bombay High Court and Nagpur Bench of Bombay High Court may have persuasive value but does not bind this Court. It is further submitted that the judgments in the case of Ganesh Prahlad Sontakke vs State of Maharashtra (supra) was passed after the trial was over on the premise that the prosecutrix alleged that she was raped twice by the appellant leading to pregnancy and the child born on account of the said occurrence was available for DNA test and the appellant had taken a plea that child was not his, but still the police did not think it necessary to conduct DNA test, but in the present case, the appellant filed an application at a belated stage when child was not available for the DNA test as aforesaid, further, neither the prosecution is relying on the child as an evidence for proving its case. Thereafter, the learned A.P.P. submits that even the judgment in the case of Vikas Bhaskar Bhalerao vs The State



of Maharashtra (supra) was passed after the appellant was convicted in the said case, the appellant was the brother-in-law of the victim and the complainant alleged that prior to alleging the FIR on 29.11.2012, the prosecutrix had pain in her stomach and hence she was taken to the doctor where she disclosed that since last six to seven months, the appellant used to come to her house in the afternoon when she used to be alone and used to commit forcible sexual intercourse against her wish and on account of close relationship and apprehension of defamation, the prosecutrix kept mum. Further, it is also alleged that the appellant had threatened her of dire consequences if she discloses about him. Further, after examination, the doctor advised the complainant to take her to the government hospital, it is next alleged that the appellant continued forcible sexual intercourse for six to seven months repeatedly. Accordingly, the FIR was instituted, the appellant was arrested and his blood samples for the purposes of DNA test was obtained and the sample of the prosecutrix were also collected and were sent for chemical analysis. In the said case, the DNA test profile of the appellant did not match with the foetus in question in view of the negative report of the DNA medical analyzer report and thus did not support the prosecution case establishing paternity of the



foetus qua the appellant when the case is based on the charge that due to forcible sexual intercourse by the appellant, the victim was impregnated.

The High Court interfered in the judgment of conviction on the ground that the Trial Court brushed aside such emphatic findings of highly sophisticated scientific technology which would destroy the entire prosecution case by simply suggesting that mere negative report of DNA do not mean one should discard the oral testimony of the prosecutrix and the said conclusion was not backed by any discussion on scientific methodology or judicial pronouncements.

Learned A.P.P. submits that in the present case, no such DNA sample was collected either by the police or the appellant when he was arrested initially asked for a DNA test when the child was available, but at a belated stage, the application came to be filed which gives an impression that the appellant was well aware of the fact that after adoption of the child by his adoptive parents, the DNA test would be an impossibility.

It is further submitted that in the case of Dipanwita Roy vs. Ronobroto Roy (supra) the issue was completely different as the husband had filed a divorce case under Section



13 (1) (I) of Hindu Marriage Act, 1995 on the ground of adulterous behavior of his wife, alleging therein that wife was having an extra marital relationship with one d and had given birth to a son as a result of cohabitation with d and in order to substantiate his said claim the husband was seeking a DNA test of the himself and the son born to the wife, as such, the Hon'ble Supreme Court while deciding the issue recorded that the respondent rightly feels that it is only possible for him to substantiate the allegations levelled by him through a DNA test, further but for the DNA test, it would be impossible for the respondent to establish and confirm the assertion made in the pleadings, as such, the order of the Hon'ble High Court directing for DNA test was affirmed by the Hon'ble Supreme Court and the appeal of the appellant was dismissed.

Learned A.P.P. submits that in the nature of allegation as alleged in the aforesaid case, the Hon'ble Supreme Court did not interfere with the order of the Hon'ble High Court directing for a DNA test but the present case stands on a different footing as the case of the prosecution for proving the charges of rape against the appellant does not rest on the fact that a child was born on account of the occurrence as the child is not a part of the case of the prosecution, the case of the



prosecution will succeed or fail based on the materials collected during the course of investigation.

The learned Additional P.P. while concluding the submission at the cost of repetition again submits that paternity is not an issue in the present case, nor the prosecution relies on the child to prove its case, rather the case of prosecution shall succeed or fail based on the evidence collected sans the child.

Considering the submissions made by the learned Additional P.P., the Court comes to a considered conclusion that the present quashing application is devoid of merit and thus, fails.

The quashing application is dismissed.

**(Satyavrat Verma, J)**

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