

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.17751 of 2023

Arising Out of PS. Case No.-111 Year-2011 Thana- MUSRIGHRARI District- Samastipur

JITENDRA KUMAR Son of Shivjee Mahto R/V- Bathua Bujurg, P.S.-
Musrigharari Dist- Samastipur

... .. Petitioner/s

Versus

1. The State of Bihar
2. Rubi Kumari Daughter of Fulo Mahto R/V- Bishwabharapur Alouth, PS-
Musrigharari District- Samastipur

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr. Bijay Bhushan Prasad, Advocate
For the State	:	Mr. Ramchandra Sahni, APP
For the Opposite Party no.2:		Mr. Abhay Shankar Singh, Advocate Mr. Amit Kumar Mishra, Advocate

CORAM: HONOURABLE MR. JUSTICE PARTHA SARTHY
ORAL ORDER

8 02-05-2024 1. Heard learned counsel for the petitioner, learned
APP for the State and learned counsel for the opposite party
no.2.

2. The petitioner has filed the instant application
praying for quashing the order dated 9.12.2022 passed in
Sessions Trial no.249 of 2015 whereby the application dated
8.10.2022 filed on behalf of the informant-opposite party no.2
praying therein to order for conducting a DNA test of the
petitioner and her daughter Sneha Kumari was allowed.

3. A complaint was filed by the opposite party no.2 on
3.11.2011 in the Court of learned Chief Judicial Magistrate,
Samastipur making allegation of rape besides other allegations



against the petitioner. The complaint was registered as Complaint Case no.1632 of 2011 under sections 376, 323 and 504 of the Indian Penal Code and sections 3 and 4 of the Dowry Prohibition Act. On the directions of the learned Chief Judicial Magistrate, an F.I.R. being Musrigharari P.S. Case no.111 of 2011 was registered on 14.11.2011 under sections 376, 323, 504 and 34 of the Indian Penal Code and sections 3 and 4 of the Dowry Prohibition Act. After investigation, chargesheet was submitted in the case finding the case to be true. Cognizance was taken and the case was committed to the Court of Sessions. After framing of charge, the trial commenced and as of now eight out of a total of fourteen witnesses have been examined on behalf of the prosecution. It is further case of the informant that as a result of the rape committed, which led to registration of the F.I.R., a child namely Sneha Kumari was born. An application dated 8.10.2022 was filed by the informant in the learned trial Court praying therein that an order be passed for conducting DNA test of the accused petitioner Jitendra Kumar and the child Sneha Kumari who was born as a result of the act committed. A rejoinder was filed on behalf of the petitioner to the said petition, however, by order dated 9.12.2022, the learned Additional District Judge VIII, Samastipur was pleased to allow



the petition. It is against the said order that the instant application has been preferred.

4. It is submitted by learned counsel for the petitioner that the order impugned giving directions for DNA test is bad in law and not sustainable in view of the judgments of the Hon'ble Supreme Court. It is further submitted that opposite party no.2 has also filed a Maintenance Case no.162 of 2017 which is pending in the Court of learned Principal Judge, Family Court, Samastipur wherein she has claimed maintenance for herself as also for her daughter Shweta Kumari @ Sneha Kumari. The opposite party no.2 has also filed a petition in the said maintenance case for conducting a DNA test of the petitioner as well as of the child which is subjudice and is pending for consideration. It is further submitted that it is the learned Principal Judge, Family Court, Samastipur who is competent to decide the issue of paternity of the child. Learned counsel for the petitioner relies on the judgments of the Hon'ble Supreme Court in the case of ***Dipanwita Roy vs. Ronobroto Roy [(2015) 1 SCC 365]*** and in the case of ***Goutam Kundu vs. State of West Bengal & Another [(1993) 3 SCC 418]*** and submits that it has been held by the Hon'ble Supreme Court that if the direction to hold DNA test can be avoided, it should be so avoided. It has



also been held that no one can be compelled to give sample of blood for analysis. It is thus submitted that in the instant case, being one of a trial under section 376 of the Indian Penal Code besides other sections, paternity of the child not being an issue, there was no reason for the learned trial Court to have passed such an order allowing the application of the informant praying for DNA test. As such, it is prayed that the order impugned be set aside and the application be allowed.

5. Learned counsel appearing for the opposite party no.2 opposes the application. It is submitted that the Hon'ble Supreme Court has held that it is in the facts and circumstances of each case that it has to be decided as to whether DNA test is required or not. So far as the cases relied on by the learned counsel for the petitioner is concerned, the same were relating more to the issue of section 112 of the Evidence Act which provides that if any person is born during the continuance of a valid marriage between his mother and any man, it shall be conclusive proof that he is the legitimate son of that man. It is thus submitted that the judgments relied upon are not applicable in the facts and circumstances of the instant case. In any view of the matter, great stress is laid by learned counsel for the petitioner at paragraph no.17 of the petition wherein it has been



stated that it is the learned Principal Judge, Family Court who is competent to decide the issue of paternity. It is lastly submitted that so far as the decision in the instant application is concerned, if the application of the petitioner is to be allowed, the same should not prejudice the case of the opposite party no.2 in the Family Court.

6. Having heard learned counsel for the parties and having perused the material on record, it is not in dispute that the only matter arising in the case from which the instant case arises is as to whether the petitioner has committed an offence under section 376 of the Indian Penal Code besides other sections beyond all reasonable doubt.

7. At this stage, it would be relevant to refer to the judgment in the case of ***Dipanwita Roy vs. Ronobroto Roy [(2015) 1 SCC 365]***, paragraph no.16 of which reads as follows:

“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.”

8. Further, the Hon’ble Supreme Court in the case of ***Goutam Kundu vs. State of West Bengal & Another [(1993) 3 SCC 418]***, in paragraph no.26 held as follows:

“26. From the above discussion it emerges:-

(1) that courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

(4) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis.”

9. In view of the relevant portions of the decisions of the Hon’ble Supreme Court as quoted herein above, the Hon’ble



Supreme Court has categorically held that if the direction to hold DNA test can be avoided, it should be so avoided. So far as proving the case against the petitioner beyond all reasonable doubt in the criminal case pending against him under section 376 of the Indian Penal Code is concerned, in the opinion of the Court, the question of paternity of the petitioner is neither an issue nor is a necessity to be decided for proving the case against him. Thus, this Court finds substance in the submissions made by learned counsel for the petitioner.

10. In view of the facts and circumstances of the case as also the decisions of the Hon'ble Supreme Court as referred to herein above, the Court finds that the order impugned dated 9.12.2022 is unsustainable and this application is fit to be allowed.

11. The application is allowed and the order dated 9.12.2022 passed in Sessions Trial no.249 of 2015, Reg. no.140 of 2015 passed by the learned Additional District and Sessions Judge VIII, Samastipur is set aside.

12. It is made clear that the application having been set aside and the order directing for DNA test of the petitioner in the learned trial Court having been reversed, the same shall not prejudice the case of the opposite party no.2 with respect to her



prayer for DNA test of the petitioner and Sneha Kumari in the case pending in the Family Court.

13. The F.I.R. being of the year 2011 and only eight witnesses having been examined on behalf of the prosecution out of a total fourteen witnesses, the learned trial Court is directed to expedite the trial.

(Partha Sarthy, J)

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