

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Ajay Kumar Gupta

C.R.R. 1709 of 2021

Sahida Laskar @ Saida Laskar
Versus
The State of West Bengal & Another

For the Petitioner : Md. Shakir, Adv.

Heard on : 27.11.2024

Judgment on : 08.01.2025

Ajay Kumar Gupta, J:

1. The present Criminal Revisional application has been filed under Section 482 read with Sections 398/401 of the Code of Criminal Procedure, 1973 assailing the Impugned Order dated 22.09.2020 passed by the Learned Additional District Judge, Special

Court under E.C. Act at Alipore, thereby, *inter alia*, rejected the prayer for DNA test filed by the petitioner in connection with Sessions Trial Case No. 1(3) of 2012 corresponding to BGR Case No. 6471/2009 arising out of Basanti Police Station Case No. 373 dated 26.12.2009 under Sections 376/417 of the Indian Penal Code, 1860 pending before the Court of the Learned Additional District Judge, Special Court under E.C. Act at Alipore.

2. The brief facts are relevant for the purpose of disposal of the present Criminal Revisional application are that the petitioner being the de-facto complainant/victim woman had lodged a complaint on 11.03.2009 in afternoon to the effect that when she went to bring her goat back at an abandoned place of her village, the accused/opposite party no. 2 committed rape upon her forcibly. The petitioner narrated the incident of rape before the family members of the opposite party no. 2, where the opposite party no. 2 admitted the same and, accordingly, his family members promised to get married her with the accused/opposite party no. 2 but later on they refused.

3. After the refusal of marriage by the accused/opposite party no. 2, the petitioner was compelled to file a petition of complaint under Section 156(3) CrPC before the Learned Additional Chief Judicial Magistrate, Alipore on 02.12.2009. Upon being satisfied, the

Learned Court below allowed the petitioner's prayer and directed the Officer-in-Charge, Basanti Police Station to lodge an FIR against the accused and his family members. Consequently, Basanti P.S. Case No. 373/2009 dated 26.12.2009 under Sections 376/120B of the Indian Penal Code, 1860 was registered. When the FIR was lodged, the petitioner was pregnant of 6 months gestational period and later on, she gave birth of a male child on 05.03.2010 named as "Master X".

4. On 22.03.2010, the Investigating Officer submitted the charge sheet before the Learned Court below and the said case was subsequently committed to the Learned Court of Sessions Judge and, later, it was transferred to the Learned Additional District Judge, Special Court under E.C. Act at Alipore for trial. Subsequently, charge was framed on 16.03.2012 under Sections 376/417 of the IPC and, thereafter, trial has been commenced.

5. During trial, at the request of the petitioner, the accused promised to have the victim and her child back to his home once the trial was concluded. However, in violation of the said promise, the opposite party no. 2 married another woman thereby depriving the petitioner and her minor son. Even after marriage, the accused/opposite party no. 2 provided maintenance to the petitioner

and her minor son for a few years. However, from the month of June, 2019, the accused stopped providing any maintenance to the petitioner and her minor son under the pressure and instigation of his second wife and later the opposite party no. 2 denied to recognize the petitioner and her minor son as his wife and son respectively.

6. In the meantime, trial proceeded and the examination of the prosecution witnesses was nearing completion. As such, the petitioner herein filed an application praying for conducting DNA test of the accused person/opposite party no. 2 in order to ascertain the paternity of the child on 25th March, 2019. However, the Learned Judge rejected the said prayer for the DNA Test.

7. It was held by the Learned Trial Court that the Section 376 of the IPC is the provision concerning rape. In case of rape, medical evidence is not always conclusive or final but medical evidence places the role of secondary evidence. If the Court finds that evidence provided by the prosecutrix is sufficient to establish the truth of prosecution case, there is a strong likelihood of conviction based solely on the evidence of prosecution.

8. Being aggrieved by the said order, the petitioner has approached before this Court by filing this Criminal Revisional

application reiterating the contentions raised before the Learned Trial Court.

9. During the course of arguments, the learned counsel appearing on behalf of the petitioner contended that the impugned order is bad in law. The Learned Magistrate, mechanically and without applying his judicious mind, dismissed the said application. The Learned Magistrate should have allowed the prayer for DNA test to uncover the truth of rape and to decide the paternity of the child. This case is fit to be considered to allow the application for conducting DNA test to determine the rape and paternity of the child but the Learned Trial Court erred both in law and facts while passing the impugned order.

10. Learned counsel appearing on behalf of the petitioner further argued that the Learned Trial Court failed to appreciate the necessity for conducting the DNA test of the accused person though it is crucial to determine the commission of offence of rape and establish that the child was a result of such offence and thereby squarely jeopardise the fundamental rights of the petitioner and her son to live with dignity as guaranteed to them by the Constitution of India especially more particularly under Articles 14 and 21 of the Constitution of India. In case of rape or sexual offence, usually finds no eye witness to the

incident as a result of which the court has to rely on the oral evidence of the victim and supported by the medical evidence.

11. It was further submitted by the learned counsel for the petitioner that the learned Special Judge misconstrued and misunderstood the law that prayer at the stage of trial for DNA test cannot be allowed. Therefore, under the facts and circumstances of the case the DNA test is required to be conducted to prove the fact in question.

12. On the other hand, none appears on behalf of the opposite parties despite good service. As such, hearing was concluded exparte for its disposal.

DISCUSSIONS AND FINDINGS BY THIS COURT:

13. Heard the learned counsel appearing on behalf of the petitioner and upon perusal of the entire record as well as impugned order dated 22.09.2020, it appears that charge was framed under Sections 376/417 of the Indian Penal Code, 1860 and trial was commenced in the year 2012 and several witnesses have already been examined. It is an admitted fact that prior to framing of charge or during investigation, no prayer for holding DNA test was made on the part of the prosecution. The case was fixed for examination of

remaining witnesses including the Investigating Officer. The prosecution moved an application under Section 311 of the CrPC praying for holding DNA test of the accused and male child of the victim born out of the alleged commission of rape. Therefore, the primary question arises before this Court is that whether DNA test of the accused and child is necessary for the disposal of the case initiated under Sections 376/417 of the IPC?

14. The Learned Judge dismissed the said application on three-fold grounds.

Firstly, the application for a DNA test of the accused was neither filed nor conducted during the investigation. Even no prayer was made for DNA test at the time of filing charge sheet or before framing of charges.

Secondly, the Court may, at any stage of the enquiry, trial or other proceedings under the CrPC, summon any person as a witness or examine any person in attendance who was not been summoned as witness, or recall and re-examine any person already examined; and such examination of witnesses may be done if it appears to the Court that the same is especially for the just decision of the case. This provision as per Section 311 of the CrPC cannot be

used for any purpose in any manner prosecution likes i.e. prayer made for the DNA test of the accused.

Thirdly, Section 311 of the CrPC cannot be invoked to fulfil the lacuna of the prosecution case when the entire defence case has been disclosed and no attempt was made by the prosecution to hold the DNA test at the appropriate stage of investigation or trial.

15. Before deciding the aforesaid issue, this Court would like to reproduce the Section 311 of the CrPC which reads as under:

S. 311. Power to summon material witness, or examine person present. —*Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.*

16. In the present case, prosecution tried to bring some new medical evidence to improve the case of the petitioner though no such DNA test was earlier conducted or any prayer was made either during investigation or at the time of filing charge sheet. Bringing such evidence is definitely would be a

further investigation. Whether such prayer for further investigation is permissible after examination of the witnesses in trial?

17. The expressions "further investigation", "reinvestigation", and "fresh investigation" all connote different meanings and are entirely distinguishable in their scope and application.

18. The words "further investigation" find mention in Section 173(8) Cr.P.C. It is worthwhile to note that sub-section (8) in Section 173 did not exist in the Code of Criminal Procedure of 1898. It came to be inserted in pursuance of the recommendation contained in the Forty-First Law Commission Report, 1969. Although it was recommended as sub-section (7) to Section 173, it came to be added as sub-section (8). The relevant extract of the Report reads as follows:

"14.23. A report under section 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting the report under section 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the magistrate concerned. It appears, however, that courts have sometimes taken the narrow view that once a final report under section

173 has been sent, the police cannot touch the case again and cannot re-open the investigation. This view places a hindrance in the way of the investigating agency, which can be very unfair to the prosecution and, for that matter, even to the accused. It should be made clear in Section 173 that the competent police officer can examine such evidence and send a report to the magistrate. Copies concerning the fresh material must of course be furnished to the accused."

19. As per the Code, the stage referred to in Section 173(8) Cr.P.C. comes into effect after a Report under Section 173(2) Cr.P.C. is forwarded by the police officer to the concerned Magistrate upon completion of the investigation. This provision empowers the police officer to carry out further investigation if he obtains further additional evidence, oral or documentary, and to thereafter forward a further report regarding such evidence. Ordinarily, a police officer should inform the Court and seek formal permission to conduct further investigation when fresh facts come to light [Refer: Ram Lal Narang (Supra)].

20. The word "further" would mean additional, more, or supplemental. "Further investigation", therefore, would mean continuation of the earlier investigation. The Supreme Court has shed

light on the expression "further investigation" in the case of ***Amrutbhai Shambhubhai Patel (Supra)*** where it was observed as under:

"38. ...further investigation was a phenomenon where the investigating officer would obtain further oral or documentary evidence after the final report had already been submitted, so much so that the report on the basis of the subsequent disclosures/discoveries by way of such evidence would be in consolidation and continuation of the previous investigation and the report yielded thereby...."

21. The law regarding occasion to undertake further investigation was propounded by the Supreme Court in the case of ***Kishan Lal v. Dharmendra Bafna and Another*¹**, wherein it was held as follows:

"22. The investigating officer may exercise his statutory power of further investigation in several situations as, for example, when new facts come to its notice; when certain aspects of the matter had not been considered by him and he found that further investigation is necessary to be carried out from a

¹ (2009) 7 SCC 685

different angle(s) keeping in view the fact that new or further materials came to its notice. Apart from the aforementioned grounds, the learned Magistrate or the superior courts can direct further investigation, if the investigation is found to be tainted and/or otherwise unfair or is otherwise necessary in the ends of justice. ..."

(Emphasis added)

22. Section 173(8) Cr.P.C. makes it clear that further investigation is permissible, however, reinvestigation or fresh investigation is prohibited. The Supreme Court distinguished **“further investigation”** from **“reinvestigation”** and **“fresh investigation”** in its decision in the case of ***K. Chandrasekhar v. State of Kerala and Others***², where it was observed as follows:

"24..... Further investigation therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether. In drawing this conclusion, we have also drawn inspiration from the fact that sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to forward to the

² (1998) 5 SCC 223

Magistrate a "further report or reports - and not fresh report or reports" - regarding the further evidence obtained during such investigation."

23. The difference between the three concepts in the aforementioned terms was reiterated by the Hon'ble Supreme Court in the case of ***Rama Chaudhary v. State of Bihar***³ where it held as follows:

"17.... "Further investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether."

24. Later, the Hon'ble Supreme Court in the case of ***Vinay Tyagi (Supra)***, while reading into Section 173(8) Cr.P.C. the powers of a Magistrate to direct "further investigation", clarified that the Magistrate has no power to direct "reinvestigation" or "fresh investigation" (de novo) in a case initiated on the basis of a police report and such power is available only with Constitutional Courts. It was further observed:

³ (2009) 6 SCC 346

"22. *“Further investigation is where the investigating officer obtains further oral or documentary evidence after the final report has been filed before the Court in terms of Section 173(8). This power is vested with the executive. It is the continuation of previous investigation and, therefore, is understood and described as 'further investigation'. The scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as “supplementary report”. Supplementary report would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a “reinvestigation” “fresh or de novo investigation”.*

23. However, in the case of a “fresh investigation” “reinvestigation or de novo investigation” there has to be a definite order of the court. The order of the court unambiguously should state as to whether the previous investigation, for reasons to be recorded, is incapable of being acted upon. Neither the investigating agency nor the Magistrate has any power to order or conduct “fresh investigation”. This is primarily for the reason that it would be opposed to the scheme of the Code. It is essential that even an order of “fresh/de novo investigation” passed by the higher judiciary should always be coupled with a specific direction as to the fate of the investigation already conducted. The cases where such direction can be issued are few and far between... xxx

43. At this stage, we may also state another well-settled canon of the criminal jurisprudence that the superior courts have the jurisdiction under Section 482 of the Code or even Article 226 of the Constitution of India to direct “further investigation” “fresh or de novo” and even “reinvestigation”. “Fresh de novo and reinvestigation” are synonymous expressions and their result in law would be the same. The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. of course, it is also a settled principle that this power has to be

exercised by the superior courts very sparingly and with great circumspection."

25. Again, in the case of ***Dharam Pal v. State of Haryana and Others***⁴, the Supreme Court, while considering the issue of transfer of investigation and the powers of Constitutional Courts, observed as under:

"25. ...The power to order fresh, de novo or reinvestigation being vested with the constitutional courts, the commencement of a trial and examination of some witnesses cannot be an absolute impediment for exercising the said constitutional power which is meant to ensure a fair and just investigation. ... It is the bounden duty of a court of law to uphold the truth and truth means absence of deceit, absence of fraud and in a criminal investigation a real and fair investigation, not an investigation that reveals itself as a sham one. It is not acceptable. It has to be kept uppermost in mind that impartial and truthful investigation is imperative. ..."

⁴ (2016) 4 SCC 160

(Emphasis added)

26. Now I proceed to analyze the facts of the present case in light of the exposition of law outlined hereinabove. Can it be said that the impugned order of dismissal of application for DNA test is erroneous on the facts and circumstances of the Present case?

27. The prosecution filed an application under Section 311 of the CrPC for DNA test of the accused at the stage when the evidence of prosecution is at the verge of completion. Neither the investigation was defective nor lacking. The Investigating Officer had not come across any additional, more or supplemental material. There was no subsequent disclosure or discovery of any new or additional material whatsoever. By filing the application, the prosecution was only trying to bring additional evidence. In the peculiar facts and circumstances of this case, this Court is of the view that the impugned order of dismissal of application praying for DNA test at this advance stage of trial should not be permitted when the additional evidence is not required for the final conclusion of the proceedings. Even the sole evidence of prosecutrix is sufficient to convict a person, if found guilty without reasonable doubt. The flavour of the present case is

criminal act punishable under Section 376/417 of the Indian Penal Code.

28. Examining the issue from another point of view that whether by passing of the impugned order, any prejudice is caused to the petitioner. The answer is in negative for the reason that it is not the case deciding the paternity of the child.

29. In response to the submission of the learned counsel for the petitioner, this court of the opinion that the order of the trial court for rejecting the prayer for DNA test is correct because in the case of ***Sisu Bhaban vs Joy Yohannan***⁵, the question regarding the necessity of DNA test in a rape trial was considered.

30. The court held that the cardinal issue to be addressed in a rape trial is whether there was sexual intercourse against the will and without the consent of the victim. If the sexual intercourse was with the consent of the victim, the question is whether the consent was obtained under circumstances falling under clauses **thirdly, fourthly and fifthly** of Section 375 IPC.

31. The court further observed that merely because there was an allegation by the prosecution that pursuant to the sexual intercourse

⁵ (2008) 4 KLT 550

which the accused had with the victim her child was born, the question of paternity of the child which has absolutely no nexus with the alleged offence of rape, cannot arise. Whether the accused is proved to be the biological father or not was wholly irrelevant about the fact in issue in the trial.

32. The present case is at the advanced stage of the trial as such there is no need to conduct DNA test as because conviction can be awarded only on the basis of sole witness i.e. prosecutrix herself and other surrounding facts and circumstanced and there is no need for corroboration of medical evidence, which is secondary evidence.

33. In the case of ***Afan Ansari vs State of Jharkhand***⁶ and ***Dilesh Nishad vs State of Chhatishgarh***⁷. In both the cases, it was held that for deciding the case under Section 376 IPC, paternity of the child is not relevant and therefore, there is no need to held DNA test to prove the charge.

34. Considering the submission of the learned counsel for Petitioner and under the said facts and circumstances of the case, it is apt to rely on some decisions of the Hon'ble Supreme Court as follows:

⁶ (2022) SCC online JHAR 1649

⁷ (Manu/CG/1664/2023)

35. In the case of ***Bhabani Prasad Jena v. Orissa State Commission for Women***⁸ the Hon'ble Supreme Court enunciated the test of the "eminent need" while considering a prayer for DNA test of the child. It was a case where in a family dispute, the paternity of a child was disputed. The State Commission for Women, Orissa issued orders directing DNA test of a child. The matter reached to the High Court in a writ petition. The High Court also issued an order directing that the DNA test of the child shall be conducted. The Supreme Court considered the question whether the High Court and the State Commission for Women were justified in ordering a DNA test of the child. The Supreme Court, after appreciating the rights entitled to the child, especially the right to privacy, held thus:

"21. In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an

⁸ (2010) 8 SCC 633

individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.

22. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of "eminent need" whether it is not possible for the court to reach the truth without use of such test."

36. In the case of ***K.S. Puttaswamy v. Union of India***⁹ the Hon'ble Supreme Court declared that the Right to Privacy is a fundamental right enshrined within the Right to Life and Liberty

⁹ [(2017) 10 SCC 1]

under Article 21 of the Constitution of India. The Supreme Court laid down the threefold test of Reasonableness while elevating the right to privacy to the stature of a fundamental right. As per the test, an action must fulfil the following three prongs to be considered a reasonable restriction imposed by the procedure established by law:

Legality: Such an action must be supported by the existence of a law that warrants such action to be taken in the given circumstances.

Necessity: There must be a legitimate State aim. The action must be one that is pertinent and requisite in the light of the circumstances that prevail to achieve the aim of the State.

Proportionality: The parameter of proportionality shall be fulfilled on the establishment of a rational nexus between the objects and the means adopted to achieve them.

37. In the case of *Ashok Kumar v. Raj Gupta*¹⁰, the Hon'ble Supreme Court applied the test of "eminent need" and the doctrine of proportionality. In *Ashok Kumar (supra)* the defendants (in a title suit) denied the claim of the plaintiff that he is the son of Sri. T.C.

¹⁰ [(2022) 1 SCC 20]

Gupta and Sona Devi and filed an application seeking direction to conduct DNA test of the plaintiff. The Hon'ble Supreme Court held that where other evidence (the presumption of legitimacy as provided in Section 112 of the Evidence Act) is available to prove or dispute the relationship, the Court should ordinarily refrain from ordering blood tests as such tests impinge upon the right of privacy of an individual and could also have major societal repercussions.

38. In the case of **Ashok Kumar (supra)**, the Hon'ble Supreme Court further observed thus:

*"15. DNA is unique to an individual (barring twins) and can be used to identify a person's identity, trace familial linkages or even reveal sensitive health information. Whether a person can be compelled to provide a sample for DNA in such matters can also be answered considering the test of proportionality laid down in the unanimous decision of this Court in **K.S. Puttaswamy (Aadhaar-5 J.) v. Union of India, [(2019) 1 SCC 1]**, wherein the right to privacy has been declared a constitutionally protected right in India. The Court should therefore examine the proportionality of the legitimate aims being pursued i.e. whether the same are not arbitrary or discriminatory, whether they may have an adverse*

impact on the person and that they justify the encroachment upon the privacy and personal autonomy of the person, being subjected to the DNA test."

39. In ***Aparna Ajinkya Firodia v. Ajinkya Arun Firodia***¹¹ was a case wherein the parents were fighting in divorce proceedings. DNA was sought for. The Supreme Court held that only in exceptional and deserving cases, where such a test becomes indispensable to resolve the controversy, the Court can direct such a test.

40. In view of the aforesaid legal propositions, it is quite vivid that the baby child of the victim is neither party in the instant Criminal case nor his status/paternity is required to be examined in this criminal petition filed by the petitioner herein as such ascertaining the paternity of the victim's child is not at all required to be determined in this criminal petition relating to aforesaid Criminal offence as alleged filed by the petitioner and directing for DNA test to determine the child of the accused would violate the privacy right of the infant which is a constitutionally protected right as declared by the Hon'ble Supreme Court in ***K.S. Puttaswamy (supra)***. In that view of the matter, I do not find any merit in this criminal revisional application filed by the petitioner for DNA test of the

¹¹ [2023 SCC OnLine SC 161],

accused/opposite party no. 2 and accordingly, the prayer of the petitioner, rejected by the Learned Trial Court, requires no interference.

41. Accordingly, **CRR No. 1709 of 2021** is **dismissed**.
Connected applications, if any, are also, thus, disposed of.

42. Let a copy of this Judgment be sent to the Learned Trial Court for information.

43. Case Diary, if any, is to be returned to the learned counsel for the State.

44. Interim order, if any, stands vacated.

45. Urgent photostat certified copy of this Judgment, if applied for, is to be given as expeditiously to the parties on compliance of all legal formalities.

(Ajay Kumar Gupta, J)