

(2019) 03 MP CK 0172
In the Madhya Pradesh High Court
Case No : Writ Petition No. 5428 Of 2019

Harsh Gupta

APPELLANT

Vs

State Of Madhya Pradesh And Ors.

RESPONDENT

Date of Decision : 15-03-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 53A, 161, 173(8), 438
Evidence Act, 1872 — Section 112, 114
Constitution Of India, 1950 — Article 226

Citation : (2019) 03 MP CK 0172

Hon'ble Judges : G.S. Ahluwalia, J

Bench : Single Bench

Advocate : Ayush Chaurasiya, S.N. Seth

Final Decision : Dismissed

Judgement

This petition under Article 226 of the Constitution of India has been filed against the notice dated 7.2.2019 issued by the respondent No.3 seeking cooperation of the petitioner in conducting the DNA test.

The necessary facts for the disposal of the present petition in short that the respondent No.4, the wife of the petitioner has lodged a FIR in Crime No.954/2017 at police Station Dabra, District Gwalior. The application of the petitioner under Section 438 of Cr.P.C. was rejected, against which he had filed a SLP before the Supreme Court and the Supreme Court by order dated 22.3.2018 passed in SLP (Criminal) No.2264/2018 had observed as under:-

"In the meantime, the petitioner shall not be arrested. However, he shall continue to cooperate in the investigation."

It is submitted by the counsel for the petitioner that the aforesaid interim order has been made absolute by the Supreme Court. It is submitted that although the police has filed the charge sheet against other co-accused persons but the investigation against the present petitioner is still pending under Section 173(8)

of Cr.P.C. Since the wife of the petitioner in her statement under Section 161 of Cr.P.C. has alleged unnatural sexual act by the petitioner, therefore, the petitioner has been served with an impugned notice dated 7.2.2019 by the Investigating Officer, mentioning that in view of the FSL report, it is essential to conduct the DNA test and, therefore, he has been directed to appear before the Investigating Officer so that the proceeding for conducting the DNA test can be conducted.

Challenging the notice issued by the police authorities, it is submitted by the counsel for the petitioner that conducting the DNA test after a long time would not fetch any result and thus it is a futile attempt on the part of the police authorities. To buttress his contention, the counsel for the petitioner has relied upon the order dated 17.1.2019 passed by a Co-ordinate Bench of this Court in the case of Satta Khan & Ors. vs. State of M.P. & Anr. passed in M.Cr.C.No.47270/2018.

Per contra, it is submitted by the counsel for the State that the wife of the petitioner has alleged unnatural sexual act by the petitioner. The slide of the wife of the petitioner was prepared and it was sent to Forensic Science Laboratory and as per the report received from Forensic Science Laboratory, the human sperms were found in the slide. Thus, it is clear that the allegations of unnatural act are prima facie supported by a scientific evidence. Whether the human sperms are of the present petitioner or not can only be ascertained by holding the DNA test. It is submitted that at the time of medical examination of the prosecutrix i.e. on 30.12.2017 two slides from anal of the prosecutrix were prepared which were found having human sperms.

Heard the learned counsel for the parties.

DNA profile is the purpose of determining an individual's DNA characteristics, which are as unique as fingerprints. DNA profiling is a forensic technique in criminal investigations comparing criminal suspects' profiles of DNA evidence so as to assess the likelihood of their involvement in the crime. It is also used to establish immigration eligibility and in genealogical and medical research. Using PCR technology, DNA analysis is widely applied to determine genetic family relationships such as paternity, maternity, siblingship and other kinships. As per researchers, a human DNA has three billion base pairs. The half life of DNA is 521 years. A DNA profile can be extracted from a sperm. Thus in the facts and circumstances of the case, it is clear that when a human sperm was found in the slide prepared from anal of the prosecutrix, then the DNA test can be conducted. Under these circumstances, this Court is of the considered opinion that because the source for conducting the DNA test is available with the prosecution i.e. the human sperm on the anal slide of the prosecutrix/wife of the petitioner, therefore, the DNA can be extracted from the said sperm and can be compared with the DNA profile of the petitioner. In fact the DNA test proposed by the prosecution may be helpful for the petitioner also. In case if it is found that the DNA profile of the sperms found in the anal slide of the prosecutrix differs from

the DNA profile of the petitioner, then it would be an evidence in his favour.

So far as the question of violation of privacy by conducting DNA test is concerned, the Supreme Court in the case of Dipanwita Roy vs. Ronobroto Roy reported in (2015) 1 SCC 365 has held as under:-

"16. It is borne from the decisions rendered by this Court in Bhabani Prasad Jena and Nandlal Wasudeo Badwaik 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 party concerned 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.

x x x

18. We would, however, while upholding the order passed by the High Court, consider it just and appropriate to record a caveat, giving the appellant wife liberty to comply with or disregard the order passed by the High Court, requiring the holding of the DNA test. In case, she accepts the direction issued by the High Court, the DNA test will determine conclusively the veracity of accusation levelled by the respondent husband against her. In case, she declines to comply with the direction issued by the High Court, the allegation would be determined by the court concerned by drawing a presumption of the nature contemplated in Section 114 of the Evidence Act, especially, in terms of illustration (h) thereof. Section 114 as also illustration (h), referred to above, are being extracted hereunder:

"114. Court may presume existence of certain facts - The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

"Illustration (h) - that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him."

This course has been adopted to preserve the right of individual privacy to the extent possible. Of course, without sacrificing the cause of justice. By adopting the above course, the issue of infidelity alone would be determined, without expressly disturbing the presumption contemplated under Section 112 of the Evidence Act. Even though, as already stated above, undoubtedly the issue of legitimacy would also be incidentally involved."

Thus in a matrimonial dispute and in the case of rape, a direction for conducting the DNA test can be given.

Section 53-A of Cr.P.C. reads 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.]"

Thus, the Investigating Officer is well within its right to issue notice to the petitioner under Section 53-A of Cr.P.C. for directing the petitioner to undergo the medical examination. Although Section 53- A of Cr.P.C. deals with rape but in the present case also the allegations of commission of unnatural sexual act has been made and the human sperms were found in the anal slide of the prosecutrix.

Under these circumstances, this Court is of the considered opinion that once the Supreme Court has directed the petitioner to cooperate with the investigation, then he cannot raise obstructions or objections about the manner of investigation which is being done by the Investigating Officer.

The Supreme Court in the case of Romila Thapar and others vs. Union of India and others reported in (2018) 10 SCC 753 and this Court in the case of Prabal Dogra vs. Superintendent of Police, Gwalior and State of M.P. by order dated

30.11.2017 passed in M.Cr.C.No.10446/2017 have held that the accused has no right to claim that the investigation should be done in a particular manner. The investigation is the prerogative of the Investigating Officer.

Thus, it is clear that it is the statutory obligation and duty of the police to investigate into the crime and the Courts normally ought not to interfere in the investigation. It is the duty of the Investigating Officer to collect the evidence and he has to decide as to in what manner the investigation has to be done. Since the impugned notice is not beyond the jurisdiction of Investigating Officer and even otherwise, it appears that holding of DNA test is necessary to establish the truthfulness of the allegations made by the wife of the petitioner, this Court is of the considered opinion that this petition sans merits and is accordingly dismissed.