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In the Madhya Pradesh High Court

Case No : Miscellaneous Criminal Case No. 9189 of 2016

Mulayam Singh — APPELLANT

Vs

State of M.P. — RESPONDENT

Date of Decision : 05-10-2016

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 482, Section 53A
Penal Code, 1860 (IPC) — Section 376

Citation : (2017) 1 JabLJ 163

Hon'ble Judges : Anand Pathak, J.

Bench : Single Bench

Advocate : Shri Arun Pateriya, learned counsel, for the Petitioner; Shri R.K. Awasthy, learned Public Prosecutor, for the Respondent/State

Final Decision : Allowed

Judgement

Anand Pathak, J. - Heard with consent.

The present petition under Section 482 of the Code of Criminal Procedure, 1973 has been preferred by the petitioner/accused invoking extraordinary jurisdiction of this Court whereby the petitioner is seeking direction to the trial Court for conducting DNA test of the present petitioner/accused who is facing the charge of Section 376 of IPC before the trial Court. He is further aggrieved by the order dated 22-05-2015 whereby the application preferred by the present petitioner for DNA test of himself has been rejected on the ground that the case has not been committed before the competent Court. He is further aggrieved by the order dated 13-10-2015 whereby the Sessions Court (after committal of case to the Sessions Court) has also rejected the application.

2. Learned counsel for the petitioner submits that petitioner is facing charge of Section 376 of IPC before the Sessions Court, Mungaoli District Ashoknagar in respect of alleged incident taken place on 17-03-2015 wherein according to prosecution, petitioner/accused has committed rape over the prosecutrix. According to him, he is innocent and has been framed by the prosecutrix/

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complainant with the help of prosecution because of previous animosity.

3. After the alleged incident, the prosecution has referred the prosecutrix for medical examination which was duly undertaken by the medical officer, Mungaoli and gave report vide Annexure P/2. Internal garment (Petticoat), pubic hair and vaginal swab have been preserved in three sets, in sealed covers.

4. Learned counsel for the petitioner through the application so preferred before the JMFC, Mungaoli, later on before the Sessions Court, Mungaoli offered himself for DNA testing/DNA profiling because according to him, he is innocent and has not committed any act for which he has been tried. Therefore, if the DNA test is conducted over the petitioner then it can be matched with the preserved material of the prosecutrix and would help all the parties concerned to reach to a logical conclusion. Counsel for the petitioner relied upon Section 53-A of the Cr.P.C. and tried to support the arguments. According to him, learned Courts below have erred in passing the orders, rejecting the application for DNA test. He is invoking the extraordinary jurisdiction of this Court for a direction to the trial Court to conduct DNA test. According to the counsel for petitioner, charge has been framed and trial is at evidence stage.

5. Per contra, learned counsel for the respondents/State opposed the prayer of the petitioner on the ground that the Magisterial Court had no authority to pass the order for DNA test because matter had to be committed to the Sessions Court. While defending the order dated 13-10-2015 passed by Sessions Court, he further submits that DNA test report is not conclusive in nature. It is not necessary that semen can be found over the person of prosecutrix as insertion of penis itself is sufficient for commission of offence of rape. Similarly, the stage of defence evidence is not reached yet, therefore, DNA test can not be conducted. Counsel for the State relied upon the order dated 13-10-2015 passed by the Sessions Court (First Additional Sessions Judge, Mungaoli) wherein the Sessions Court has dismissed the application also on the ground that at the time of defence evidence, the petitioner would be at liberty to submit the said application.

6. Learned counsel for the respondent also raised the ground in relation to insufficiency of infrastructure and inadequacy of DNA lab to conduct the said test, therefore, according to the respondent, direction for DNA test would be a futile exercise in absence of any DNA lab in the State. On these grounds, counsel for the State prayed for dismissal of the petition.

7. Heard learned counsel for the parties and perused the documents and case diary.

8. Before adverting to the legal question, it is imperative to understand the Genetics of DNA Testing Method to analysis DNA evidence. From internet and available sources as well as legal pronouncements, certain aspects of DNA testing methods were attempted to be incorporated.

9. Three methods are currently used to analyse DNA evidence. While these

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methods are very reliable, sometimes results cannot be obtained or are inconclusive if the quantity of the evidence is insufficient to analyse or if the evidence has been contaminated or improperly preserved. The technology used in analysing DNA evidence is increasing in sophistication and in its ability to distinguish individuals, so it may be possible to test evidence in the future in ways that are not possible today. The most common form of DNA analysis is called polymerase chain reaction (PCR). The development of PCR testing has greatly advanced the field of forensic DNA testing by increasing the success rate of the analysis of old, degraded, or very small biological evidentiary samples. PCR testing has allowed investigators to analyse evidence samples that previously could not be tested because the quality or the amount of starting material was insufficient for previous DNA analysis techniques. The PCR process works by taking very small amounts of DNA from biological evidence and making millions of copies of it. This process, often referred to as PCR amplification, creates enough DNA to allow a laboratory analyst to generate a DNA profile. The process also allows laboratory technicians to analyse degraded biological material. A group of 13 different locations is used for the analysis of evidentiary samples and to generate DNA profiles from convicted offenders for the CODIS database. Because of the capability of PCR testing to amplify very small quantities of DNA, extreme care must be exercised to prevent contamination when identifying, collecting, and preserving biological evidence. For this reason, investigators and laboratory personnel should always wear disposable gloves, use clean instruments, and avoid touching other objects when handling the evidence. The other two methods used to analyse DNA evidence are Restriction Fragment Length Polymorphism (RFLP) testing and PCR testing on DNA from the mitochondria of the cell. RFLP testing usually requires a sample that has 100,000 or more cells (such as a dime-sized bloodstain) and contains DNA that is not degraded or broken into smaller fragments. RFLP has been widely used since the late 1980s and is able to exclude wrongly accused individuals. PCR testing on DNA from the mitochondria of the cell is conducted on samples that are unsuitable for RFLP or PCR nuclear DNA testing (such as dried bones or teeth, hair shafts, or samples that contain very little or highly degraded nuclear DNA). Mitochondrial DNA testing is available only in a limited number of laboratories primarily because of the time it takes to perform the tests. Beside these three DNA testing methods deciphering of the same would be important for interpreting the result of DNA analysis:

Three types of Results can occur in DNA testing:

Inclusion, Exclusion, and Inconclusive Results. It is important that victim service providers, investigators, and prosecutors understand the meaning of these terms and be able to explain their implications. While conclusive results are very reliable, DNA findings can sometimes yield results that are difficult to interpret.

Inclusion When the DNA profile of a known individual (a victim or suspect) matches the DNA profile from the crime scene evidence, the individual is

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"included" as a potential source of that evidence. However, the strength of this inclusion depends, in part, on the number of DNA locations examined (up to 13 locations can be examined) and the statistic reflecting how often the particular profile would be found in the general population. A DNA profile shown to occur rarely in the population (for example, 1 time in 5 million people) would more strongly suggest that the individual is the source of the biological evidence than would a more common DNA profile (for example, 1 time in 5,000 people). Increasing the number of DNA locations tested typically results in more powerful statistics. For this reason, several DNA locations are tested whenever possible. In some cases, a DNA inclusion may provide information that is of limited value to the investigative process. For example, results from samples taken from the victim may be consistent with the DNA of the victim, such as vaginal evidence in sexual assault cases. In addition, if the suspect wore a condom during the assault, was aspermatic due to a vasectomy, or did not ejaculate after the assault, additional DNA profiles may not be obtained from the evidence. The results do not mean the suspect was not present and did not commit the crime-only that the substance tested did not come from the suspect. Additionally, inclusion does not necessarily mean a suspect is guilty.

Exclusion When the DNA profile from an individual (a victim or suspect) does not match the DNA profile generated from the crime scene evidence, the referenced individual is "excluded" as the donor of the evidence. In some cases, it may be necessary to perform additional testing to establish the source of the DNA profile in the evidence. For example, a blood sample may be requested from the husband of a sexual assault victim to determine whether the DNA profile obtained from the vaginal swab is the result of a prior consensual act and not the assault. Exclusion does not necessarily mean a suspect is innocent.

Inconclusive Results Inconclusive results indicate that DNA testing did not produce information that would allow an individual to be either included or excluded as the source of the biological evidence. Inconclusive results can occur for many reasons. For example, even with sensitive PCR testing, the quality or quantity of DNA obtained from the biological evidence may be insufficient to produce definitive DNA typing results. Inconclusive results can also occur if the evidentiary sample contains a mixture of DNA from several individuals (for example, a sample taken from a victim of a gang rape). Even if the suspect''s DNA profile is found in the biological evidence, the presence of DNA from other sources may prohibit the establishment of an inclusive or exclusive result. If there is more than one perpetrator or if in a sexual assault case the victim recently had consensual intercourse in which semen also may have been deposited in the victim''s vaginal region, the results could contain profiles from more than one person. When this happens, it is often not possible to determine which specific types came from which donor. The suspect cannot be excluded as a possible donor of the DNA found in the evidence sample, but a more conclusive result may not be possible. These cases must be reported as inconclusive. As with all DNA results, inconclusive findings should be interpreted in the context of

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the other evidence in a case.

10. Beside above discussion, in the case of Dharam Deo Yadav v. State of Uttar Pradesh, (2014) 5 SCC 509: (AIR 2014 SC (Cri) 1124, para 34) with regard to the meaning and importance of DNA test, the Hon''ble Apex Court, has held as follows:

"36. The 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, and 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. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory. Close relatives have more genes in common than individuals and various procedures have been proposed for dealing with a possibility that true source of forensic DNA is of close relative."

(emphasis supplied)

11. The impact of DNA profile, on forensic investigation has been referred, in Anil alias Anthony Arikswamy Joseph v. State of Maharashtra, (2014) 4 SCC 69, wherein the Hon''ble Apex Court, has held as follows:

"18. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA, profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with the DNA profile of the suspect, it can generally be concluded that both the samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory."

(emphasis supplied)

12. In the case of State of Gujarat v. Kishanbhai and others, (2014) 5 SCC 108,

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with regard to the need for DNA profile by the investigating agency, on account of the advancement in scientific investigation, the Hon''ble Apex Court, has held as follows:

"12.7.5. There has now been a great advancement in scientific investigation on the instant aspect of the matter. The investigating agency ought to have sought DNA profiling of the blood samples, which would have given a clear picture whether or not the blood of the victim Gomi was, in fact on the clothes of the accused-respondent Kishanbhai. This scientific investigation would have unquestionably determined whether or not the accused respondent was linked with the crime."

(emphasis supplied)

13. In the case of Dharam Deo Yadav (supra), Apex Court, while emphasizing the necessity of promoting scientific evidence also to detect and prove crimes over and above the other evidence, has observed as follows:

"30. The criminal justice system is this country is at crossroads. Many a times, reliable, trustworthy, credible witnesses to the crime seldom come forward to depose before the court and even the hardened criminals get away from the clutches of law. Even the reliable witnesses for the prosecution turn hostile due to intimidation, fear and host of other reasons. The investigating agency has, therefore, to look for other ways and means to improve the quality of investigation, which can only be through the collection of scientific evidence. In this age of science, we have to build legal foundations that are sound in science as well as in law. Practices and principles that served in the past, now people think, must give way to innovative and creative methods, if we want to save our criminal justice system. Emerging new types of crimes and their level of sophistication, the traditional methods and tools have become outdated, hence the necessity to strengthen the forensic science for crime detection. Oral evidence depends on several facts, like power of observation, humiliation, external influence, forgetfulness etc., whereas forensic evidence is free from those infirmities. Judiciary should also be equipped to understand and deal with such scientific materials. Constant interaction of Judges with scientists, engineers would promote and widen their knowledge to deal with such scientific evidence and to effectively deal with criminal cases based on scientific evidence. We are not advocating that, in all cases, the scientific evidence is the sure test, but only emphasizing the necessity of promoting scientific evidence also to detect and prove crimes over and above the other evidence.

31. Scientific evidence encompasses the socalled hard science, such as physics, chemistry, mathematics, biology and soft science, such as economics, psychology and sociology. Opinions are gathered from persons with scientific, technical or other specialised knowledge, whose skill, experience, training or education may assist the Court to understand the evidence or determine the fact in issue. Many a times, the Court has to deal with circumstantial evidence and scientific and

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technical evidence often plays a pivotal role....."

(emphasis supplied)

14. Against this factual backdrop, this Court has to see the case in hand with the legal provisions. Earlier in Cr.P.C., Section 53 has contemplated the examination of accused by medical practitioner at the request of police officer. With the growing menace of Lust, driven with Rage, in the society, a new sub-section has been incorporated in the form of Section 53 (A) of Cr.P.C. by Section 9 of Act No.25 of 2005 w.e.f. 23-06-2006. Newly incorporated Section 53 (A) of Cr.P.C. reads as under:

"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-

1. the name and address of the accused and of the person by whom he was brought,

2. the age of the accused,

3. marks of injury, if any, on the person of the accused,

4. the description of material taken from the person of the accused for DNA profiling, and".

5. 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."

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With the same objective and to include scientific evidence into the cases of rape, Section 164 (A) has also been incorporated by Section 17 of the same Act of 2005.

15. Provisions of Section 53 (A)(2)(iv) as well as Section 164 (A) (2) (iii) of Cr.P.C. deal in respect of some procedure but Section 53 (A) of Cr.P.C. refers DNA profiling from the person of the accused whereas Section 164 (A) of Cr.P.C. deals in respect of DNA profiling from the person of the woman (prosecutrix). Object of the incorporated Section 53 (A) and 164 (A) is obvious.

16. The Apex Court had occasion to consider the scope of Section 53 (A) of the Code in the case of Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130 and has mandated as under:

"Now, after the incorporation of Section 53 (A) in the Criminal Procedure Code, w.e.f. 23.06.2006, brought to our notice by 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 the Cr.P.C. 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."

17. Similarly, the Karnataka High Court had occasion to consider the constitutional validity of Section 53-A of Cr.P.C. and while considering the necessary contours of the controversy has upheld the constitutional validity of Section 53-A of Cr.P.C. The said judgment as reported in the case of Shreemad Jagadguru Shankaracharya v. State of Karnataka, 2015 CriLJ. 1858 can be profitably referred to.

18. Coming back to the instant case, the objections of the respondent are two fold; one is that petitioner/accused cannot resort to DNA testing at the stage of prosecution witness, he can resort to DNA when defence evidence is started. Other objection of the respondent/State is that for committal of offence of rape, only penetration is sufficient and it not necessary that semen of accused may be found over the person or clothes of the prosecutrix.

19. So far as the first objection regarding maintainability of the application is concerned, Section 53 (A) of Cr.P.C. is clear in this regard which reveals that at the time of arrest of the person on a charge of commission of offence of rape or attempt to commit rape, the police officer not below the rank of Sub Inspector can compel such person to undertake such examination.

20. Only the subjective satisfaction of the said police officer is necessary wherein he believes that examination of the person would afford evidence as to commission of such offence and nothing else. It means that at any stage of investigation, the person can be compelled to undertake such examination. In

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the very Section 53 (A) of Cr.P.C., authority has been given to the said police officer to use such force as is sufficiently reasonable and necessary for such purpose. Therefore, sufficient discretion is available before the police authority.

21. Besides that, Section 233 of Cr.P.C. over which the Sessions Court has resorted to deal in respect of entering upon the defence. Section 233(3) of Cr.P.C. deals in respect of attendance of any witness or the production of any document or things in his defence. If DNA test is conducted and report is kept with the police authority then it can be produced thereafter by the prosecution at the request of defence. The provisions of Section 233 of Cr.P.C. nowhere restricts the scope of conduction of DNA test. Therefore, DNA test can be conducted prior to the stage of Section 233 (3) of Cr.P.C. and it can be produced by the prosecution at the time of Section 233 as referred in Section 233 (3) of Cr.P.C.

22. Another objection of respondent/State was that for committal of offence of rape only penetration is sufficient and it is not necessary that there may be availability of male semen over the person/clothes of the prosecutrix. No doubt, the said argument is in confirmation with the definition of rape enumerated under Section 375 of Cr.P.C. For ready reference, Section 375 of Cr.P.C. is reproduced below:

"375. Rape.?A man is said to commit "rape" if he-

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person, or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person, or

(c) manipulates any part of the body of a woman so as to cause penetration into vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-

(First)? Against her will.

(Secondly) ?Without her consent.

(Thirdly)? With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly)?With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(Fifthly)? With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or

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through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly)? With or without her consent, when she is under eighteen years of age.

Seventhly ? When she is unable to communicate consent.

Explanation 1.? For the purpose of this section; "vagina" shall also include labia majora.

Explanation 2. -Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Explanation 1. -A medical procedure or intervention shall not constitute rape.

Explanation 2. -Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

Therefore, it is made clear that it is not necessary that rape is said to be committed only when semen is found at the internal garments or the person of prosecutrix. Similarly, DNA test and absence of semen over the person of prosecutrix do not entail acquittal necessarily. Accused can still be held guilty on the basis of other independent evidence (and the witnesses) beside DNA test. The said view of this Court is further fortified by the mandate of the Hon''ble Supreme Court in the matter of Krishan Kumar Malik (supra) and Sunil v. State of M.P. 2016 SCC Online SC 604.

23. The positive/conclusive result of DNA would certainly constitute a clinching evidence against the accused, however, the result of the test if comes in negative i.e. favouring the accused then other material/evidence and witnesses on record will have to be considered by the trial Court.

For better investigation and effective prosecution in a case where semen is found over the person/clothes of prosecutrix, the investigating authority must resort to Section 53 (A) of the Code and must put the accused to DNA test so as to have a clinching evidence against the accused. It is equally applicable over the cases where false implication is apparent and writ large. In a case where an innocent has been implicated, Section 53 (A) of Cr.P.C. would be a provision advancing Fair Trial.

24. It is made clear that DNA test may not be conclusive evidence, rather corroborative evidence in those cases where DNA test comes in negative, therefore, result of DNA test and its interpretation would always be dependent upon individual facts and circumstances of the case. The manner and methodology adopted by the accused in the given circumstances are always to

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be seen beside the result of DNA test.

In some rare instances, specially in the cases of Rave Parties wherein while inducing a woman under the influence of drugs and thereafter wearing a condom, Rape can be committed. In this situation, neither the semen nor any injury would be found over the person of the victim. Even then the corroborative circumstances, evidence and witnesses may implicate the offender.

25. Sigmund Freud and Carl Gustav Jung the famous Neurologist and Psycho-analyst would have suffered sleepless nights if they would have followed the wanton pursuits of human perversity of the present day times. New dimensions including sadistic pleasure have been added in human sexual behaviour and perversity.

26. In the present case; when petitioner accused himself asking for DNA test would be in the interest of justice if a direction is given to the prosecution/ investigating agency to conduct DNA test over the petitioner/accused as per the procedure adopted in this regard and in accordance with law. Recently, the Coordinate Bench of this Court in M.Cr.C. No. 6476/2016 vide order dated 04-05-2016 has issued the direction to the prosecution to conduct DNA test of the accused at the time of investigation.

27. The anxiety of counsel for the State in respect of insufficiency of infrastructure is misplaced. This Court does not intend to issue any direction to the State Government in this regard; under the present jurisdiction, but certainly, it can be expected from the State to make available the necessary resources for establishing such laboratory/laboratories; wherein DNA test and other scientific examination/investigation related to the police investigations can be carried out.

Time has come when the Rule of law has to be treated as one of the essential components of Infrastructure.

28. In view of the above discussion, petition is allowed. The orders dated 22-05-2015 and 13-10-2015 are hereby set aside. The petitioner/accused is given liberty to move a fresh application before the trial Court for DNA test on which appropriate directions would be given by the trial Court while taking into consideration the relevant provisions, pronouncement of Hon''ble Supreme Court and direction of this Court.

29. Resultantly, petition stands allowed.

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