
(2008) 01 CAL CK 0073
In the Calcutta High Court
Case No : C.R.R. No. 3394 of 2007

Sabur Hossain Biwas

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 10-01-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 362

Evidence Act, 1872 — Section 112

Penal Code, 1860 (IPC) — Section 375, 376, 417

Citation : (2008) 2 CHN 756 : (2008) CriLJ 1183

Hon'ble Judges : Partha Sakha Datta, J

Bench : Single Bench

Advocate : Kollol Basu and Mahinoor Rahaman, for the Appellant; Abhijit Adhya, for the Respondent

Final Decision : Allowed

Judgement

Partha Sakha Datta, J.—The learned Additional Sessions Judge, Fast Track Court No. 2 at Basirhat in the district of 24 Parganas (N) was trying the S.T. No. 3(7) of 2005 corresponding to Swarup Nagar P.S. Case No. 71 dated 6-8-2003 against the present petitioner u/s 376/417 of the IPC and after framing of charge, 14 witnesses were examined, cross-examined and discharged. Thereafter on 9-8-2007 the learned Public Prosecutor, in-charge of the case filed a petition before the learned Judge praying for DNA test of the victim girl, of the present petitioner and the child born of the girl. The learned Judge allowed the petition holding that if the DNA test is done it would almost conclusively determine the paternity or otherwise of the accused-petitioner in respect of the child and it was observed in the impugned order dated 17-8-2007 that this was the proper way of arriving at the truth. The impugned order reveals that similar petition was also filed before the predecessor of the learned Presiding Judge, but that petition was rejected on the ground that allowance of the petition would amount to interference with the investigation of the case. Since the investigation was over and trial was in progress, the learned Judge reasoned, there was no predicament

now to make an order on the prayer (sic) prosecution since renewed before him for holding the DNA test.

2. This order of the learned Judge is the subject-matter of the revisional application on the ground that the order is bad in law and without application of the judicial mind.

3. I have heard learned Advocate, appearing for the petitioner, learned advocate appearing for the de facto complainant and learned Advocate appearing for the State. It has been submitted by Mr. Kallol Kumar Basu, learned Advocate appearing for the petitioner that once a petition was rejected by the learned Predecessor in office of the present learned Judge on 21-4-2006 a contrary order on the renewed prayer was illegal.

4. The question is whether the blood test, commonly called DNA test of the petitioner, of the victim and of the child is really necessary for establishment of the charge u/s 376/417 of the I.P.C.

5. In the impugned order the learned Judge's observation that previous rejection of the prayer was on the ground that allowance of such prayer would amount to interference with the investigation does not appear to be correct because the rejection of the same prayer earlier on 21-4-2006 was only when the trial was in progress and that too after examination of as many as eight prosecution witnesses. It is not that the predecessor in office of the present learned Judge rejected the petition on the ground that the matter was at the stage of investigation. Such was the ground advanced by the defence before the predecessor of the present Judge in the forum that if DNA test was ordered in course of the trial it would amount to interference with the investigation and would have the effect of directing the Investigating Agency for further investigation and this submission found favour with the predecessor of the present learned Judge. The present learned Judge who held a contrary view by his order dated 17-8-2007 reasoned that holding of DNA test would determine conclusively almost the paternity of the child. Thus it is clear that predecessor of the present learned Judge rejected the earlier petition, rightly or wrongly on a ground, while the impugned order was passed contrary to the earlier order and both the orders were passed only during the trial of the case and not that the first order was passed at the stage of investigation. Section 362 of the Cr. P.C. clearly provides that alteration or review of the order except to correct a clerical or arithmetical error is impermissible. When an order of rejection of the prayer of the prosecution for holding DNA test was passed when eight witnesses were already examined, a contrary order on the renewal of the prayer of the prosecution is impermissible, no matter whether the reasoning of the latter Judge is more sound or whether the reasoning of the former Judge lacked reasonableness. This is one aspect of the matter that has to be taken into consideration and must not be lost sight of.

6. The victim claimed before the learned Judge in her evidence that she was

raped on a certain night against her consent and at the material time she was 14 years old. There was allegedly an assurance of marriage made by the petitioner who later backed out when the victim conceived and gave birth to a child. The issue before learned Judge was not whether the child was fathered by the petitioner. The issue was whether the accused committed rape upon the victim within the meaning of Section 375 of the I.P.C. If the girl was minor as she claimed then in view of Gurcharan Singh Vs. State of Haryana, and also in terms of the statute existence of consent if any, would be immaterial.

If on the other hand the victim is not found to be minor then the legal position would be different which has been explained in the decisions in Deelip Singh @ Dilip Kumar Vs. State of Bihar, ; Uday Vs. State of Karnataka, ; Hari Majhi Vs. The State, Bablu Pramanik v. State of West Bengal reported in (2001) C Cr LR (Cal) 166; Shri Shamsad Ali v. State reported in 2004 C Cr LR (Cal) 216; Krishna Pada Mahato v. State of West Bengal reported in 2004 C Cr LR (Cal) 945. Dilip Singh's case has clearly laid down that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry the girl will vitiate the consent.

7. Therefore, the point for consideration is whether the holding of the DNA test is necessary for determination of the charge under Sections 376/417 of the IPC levelled against the petitioner. The issue before the learned trial Court while holding the trial under Sections 376/417 of the IPC will not be whether the child was authored by the present petitioner or not. It is not a case of maintenance sought for on behalf of the minor child by the victim. It is a case where allegedly the petitioner committed rape upon the victim girl said to be under 16 years of age with the assurance of marriage. The trial Court will not be considering the question as to whether the child was fathered by the present petitioner. Therefore, holding of DNA test will not be relevant to the consideration of the charge. The leading decision on this point is the decision in Goutam Kundu Vs. State of West Bengal and another, where their Lordships of the Supreme Court held that no person can be compelled to give sample of blood for analysis against his or her will and no adverse inference can be drawn for such refusal. At paragraph 26 of the judgment their Lordships held as follows:

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 u/s 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.

8. This decision was followed in *Shri Banarsi Dass Vs. Mrs. Teeku Dutta and Another*, where their Lordships of the Supreme Court held again that the DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given, as was noted in *Goutam Kundu* case. In the decision reference has been made to a decision of the Hon'ble Supreme Court in *Smt. Kanti Devi and Another Vs. Poshu Ram*, where their Lordships referred to the decision in *Goutam Kundu* (supra) as also *Smt. Dukhtar Jahan Vs. Mohammed Farooq*, . In this decision i.e. *Kamti Devi* (supra) their Lordships held that though the result of genuine DNA test is said to be scientifically accurate, that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act. It has been held further that if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. Their Lordship held "this may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the law of what is meant by access or non-access as delineated above." The aforesaid decisions of the Supreme Court particularly *Goutam Kundu* have clearly laid down the law. Even it is assumed for the sake of argument that the DNA test becomes favourable to the petitioner that would not amount to absolving him of the charge u/s 376 of the IPC because the trial Court will have to consider the charge on the basis of the evidence of the prosecutrix and of other witnesses, if any and if the evidence of the prosecutrix and/or of any other witnesses supporting in the prosecutrix are found by the trial Court sufficient to indicate that offence u/s 376 of the IPC has been committed by the petitioner then the result of the DNA test by itself would be of no avail. Contra, if the oral evidence of the witnesses including that of prosecutrix are found to be not sufficient to hold the petitioner guilty of the charge of rape, then the result of the DNA test even if it would go to establish the paternity will equally be of no avail. Therefore it is not a deserving case where DNA test should be held.

9. Accordingly, I allow the revisional application and set aside the order dated 17-8-2007 passed by learned trial Court. Urgent xerox certified copies of this order, if applied for, be given to the parties as expeditiously as possible.