



(Cr.A.Nos.1266/2019 & 1400/2019)

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.1266 of 2019

Dilesh Nishad, S/o Narayan Nishad, Aged about 22 years, Occupation Labour, R/o Village Botalda, P.S. Kharsiya, District Raigarh

(In Jail)  
---- Appellant

Versus

State of Chhattisgarh, Through Police Station Kharsiya, District Raigarh (C.G.)

---- Respondent

AND

Criminal Appeal No.1400 of 2019

Rooplal Yadav, S/o Sadhram Yadav, aged about 23 years, R/o Village Botalda, P.S. Kharsiya, District Raigarh (C.G.)

(In Jail)  
---- Appellant

Versus

State of Chhattisgarh, Through Station House Officer, Police Station Kharsiya, District Raigarh (C.G.)

---- Respondent

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For Appellant Dilesh Nishad in Cr.A.No.1266/2019: -

Mr. Badruddin Khan, Advocate.

For Appellant Rooplal Yadav in Cr.A.No.1400/2019: -

Mr. Vijay Kumar Sahu, Advocate.

For Respondent / State: -

Mr. Ashish Tiwari, Government Advocate.

For Victim / Victim's parents: -

None present.  
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**Hon'ble Shri Sanjay K. Agrawal and  
Hon'ble Shri Radhakishan Agrawal, JJ.**

Order On Board  
(17/08/2023)

**Sanjay K. Agrawal, J.**

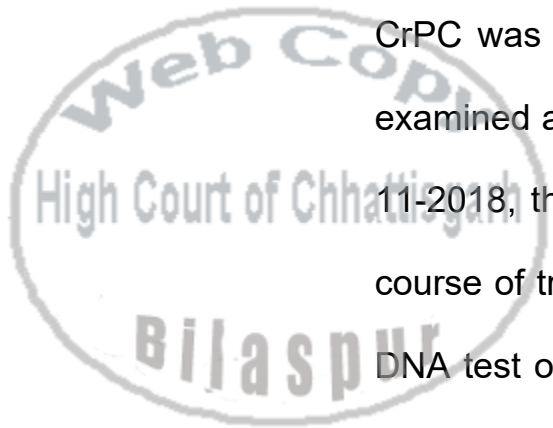
1. This order will govern the disposal of I.A.No.1/2021 that has been



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filed in both the appeals for direction for DNA test of the appellants herein and the victim including the victim's newly born baby.

2. The two appellants herein were tried by the Special Judge under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, 'the Act of 1989'), Raigarh, for commission of offences under Section 376-D of the IPC, Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'the POCSO Act') & Section 3(2)(v) of the Act of 1989, date of offence being 21-1-2018. During the course of trial, after closure of the prosecution evidence, application under Section 311 of the CrPC was filed which was allowed upon which the victim was re-examined and in the statement it was brought on record that on 25-11-2018, the victim has delivered a baby (male child). During the course of trial, the appellants herein filed application for conducting DNA test of themselves, the victim and the newly born baby which was rejected by the Special Judge by order dated 1-5-2019 holding that commission of the offence of gang rape and other allied offences can be determined without directing for DNA test of the appellants and the victim/victim's newly born baby and therefore there is no justification for directing DNA test and accordingly, the application was rejected by order dated 1-5-2019. Thereafter, after full-fledged trial, the appellants were convicted for offences under Sections 376-D of the IPC & Section 4 of the POCSO Act against which the instant criminal appeals have been filed by the two appellants herein in which also they have filed application for conducting DNA test of themselves and the victim as also the





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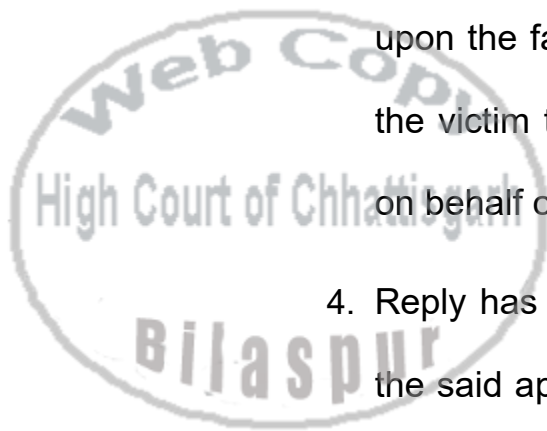
victim's newly born baby, which this Court had earlier considered and directed that the same will be considered and decided at the time of final hearing of the appeal, which was assailed before the Hon'ble Supreme Court on which their Lordships of the Supreme Court have allowed the appeal and set aside the order dated 28-4-2022 and also directed to decide the application for DNA test expeditiously pursuant to which the application for DNA test is being considered on merits.

3. The victim has also been noticed and service report dated 14-7-2023 has been filed which reveals that notice has been served upon the father of the victim. But none has appeared on behalf of the victim to oppose the applications for conducting DNA test filed on behalf of the appellants.

4. Reply has been filed on behalf of the State / respondent opposing the said application stating inter alia that it is not necessary for just and proper disposal of the criminal appeal and DNA test cannot be directed as a matter of course, and relied upon the decision rendered by the Supreme Court in the matter of **Goutam Kundu v. State of W.B.**<sup>1</sup>, as such, the applications in both the appeals deserve to be dismissed.

5. Mr. Badruddin Khan & Mr. Vijay Kumar Sahu, learned counsel appearing for the appellants, would submit that DNA test is absolutely necessary for just and proper disposal of the criminal appeals, as the trial Court has previously rejected the application for DNA test and before the appellants could challenge the order

1 1993 Cr LJ 3233 (para 26) : (1993) 3 SCC 418





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dated 1-5-2019, they were convicted by the trial Court and therefore they could not challenge that order, as such, DNA test is absolutely necessary to find out the truth and to demonstrate that the appellants are innocent and they have not committed the offence of gang rape. Learned counsel have relied upon the decision of the Delhi High Court in the matter of **Kapil Kumar Beri v. State of Delhi (NCT of Delhi)**<sup>2</sup> and the decisions of the Supreme Court in the matters of **Ranu Thakur v. Dayashanker and others**<sup>3</sup> and **Brig. Sukhjeet Singh (Retd.) v. The State of Uttar Pradesh and others**<sup>4</sup> in support of their contentions.

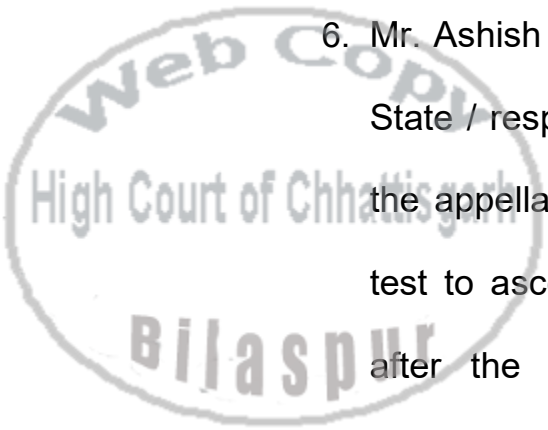
6. Mr. Ashish Tiwari, learned Government Advocate appearing for the State / respondent, would oppose the applications and submit that the appellants have essentially sought prayer for conducting DNA test to ascertain the paternity of the victim's child who took birth after the commission of offence by the accused persons / appellants herein, which has rightly been rejected earlier by the trial Court on 1-5-2019. He would further submit that DNA test is not eminently necessary, as the question of committing the offence of gang rape is not intrinsically connected to the issue of DNA test and by determining the paternity of child, conviction of the appellants would remain unaffected and as such, the applications in both the appeals deserve to be dismissed.

7. None appeared on behalf of the victim to oppose the applications filed by the appellants. No representation is made.

2 (2019) 256 DLT 415 : (2019) 5 RCR (Criminal) 345

3 (2015) 2 RCR (Criminal) 153

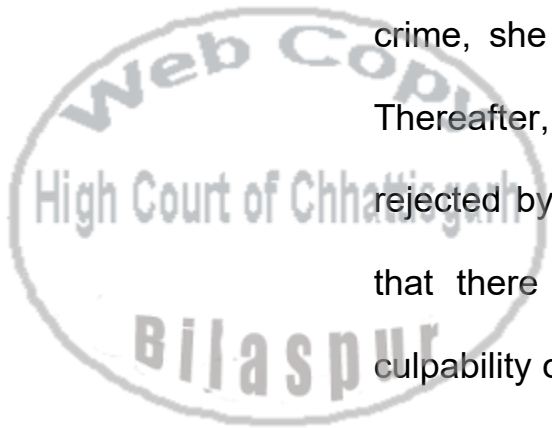
4 2019 SCC OnLine SC 72





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8. We have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
9. The two appellants herein were subjected to trial for commission of offence under Section 376-D of the IPC, Section 4 of the POCSO Act & Section 3(2)(v) of the Act of 1989 for committing gang rape with the victim on 21-1-2018. The victim has been examined as PW-1 and she has categorically deposed the commission of gang rape upon her by both the appellants one by one and during her re-examination on 26-12-2016, she deposed that due to the incident of crime, she has conceived a child who took birth on 25-11-2018. Thereafter, the application for DNA test was filed which was rejected by the trial Court relying upon the statement of the victim that there is no eminent need to direct for DNA test, as the culpability of the appellants herein in appeal can be decided without directing for DNA test.
10. 'DNA' stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made-up of a double stranded structure consisting of a deoxyribose sugar and phosphate backbone, cross-lined 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 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,





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semen, saliva, hair, skin, bones, etc.. (See: **Dharam Deo Yadav v. State of U.P.**<sup>5</sup>.)

11. 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. (See: **Anil @ Anthony Arikswamy Joseph v. State of Maharashtra**<sup>6</sup>.)

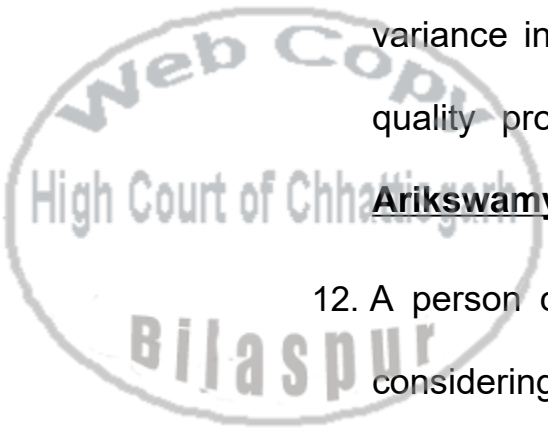
12. A person can be compelled to provide sample for DNA only by considering principle of proportionality. DNA is unique to an individual (barring twins) and can be used to identify a person's identity, trace familial linkages or even reveal sensitive health information. Whether a person can be compelled to provide a sample for DNA in such matters can also be answered considering the test of proportionality. (See: **Ashok Kumar v. Raj Gupta and others**<sup>7</sup>.)

13. It is also well settled as held by the Supreme Court in **Goutam Kundu** (supra) that Courts cannot order blood test as a mater of course.

5 (2014) 5 SCC 509

6 (2014) 4 SCC 69 (para 18)

7 (2022) 1 SCC 20





14. In the matter of **Bhabani Prasad Jena v. Orissa State Commission for Women**<sup>8</sup>, the Supreme Court has emphasized that a direction to use DNA profiling technology to determine the paternity of a child, is an extremely delicate and sensitive aspect. Therefore, such tests must be directed to be conducted only when the same are eminently needed. DNA profiling 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.

15. Thereafter, recently, in the matter of **Inayath Ali and another v. State of Telangana and another**<sup>9</sup>, the Supreme Court relying upon its earlier decision in **Ashok Kumar** (supra) held as under: -

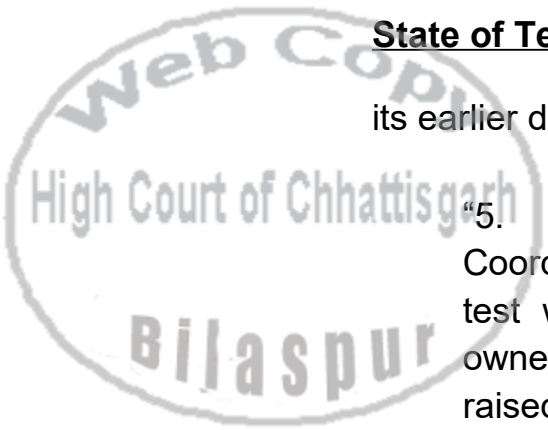
“5. In *Ashok Kumar v. Raj Gupta*<sup>7</sup> decided by a Coordinate Bench, sparing use of the DNA fingerprint test was opined. This was a suit for declaration of ownership of certain property and the defendants had raised the plea that the plaintiff was not the son of the original owner thereof, from whom he claimed to have derived the title. In that case also, plea was made for conducting a DNA test. The Coordinate Bench of this Court held, referring to, inter-alia, Section 112 of the 1872 Act:-

“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-5J.) v. Union of India*<sup>10</sup>, wherein the right to privacy has been declared a constitutionally protected right in India. The Court should therefore examine the proportionality of the

8 (2010) 8 SCC 633

9 2022 SCC OnLine SC 1867

10 (2019) 1 SCC 1





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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.”

16. Thereafter, their Lordships further held in **Inayath Ali** (supra) that direction for blood sampling of the children who were not parties to the proceeding, more particularly when their status was not required to be examined, was totally unwarranted. Their Lordships also held that direction for examination of paternity of a child would violate the privacy right of the persons subjected to such tests and could be prejudicial to the future of the children, and observed as under: -

“6. In the present proceeding, we are taking two factors into account which have been ignored by the Trial Court as also the Revisional Court. The Trial Court allowed the application of the respondent no.2 mechanically, on the premise that the DNA fingerprint test is permissible under the law. High Court has also proceeded on that basis, referring to different authorities including the case of *Dipanwita Roy v. Ronobroto Roy*<sup>11</sup>. The ratio of this case was also examined by the Coordinate Bench in the decision of *Ashok Kumar*<sup>7</sup>.

7. The first factor, which, in our opinion, is of significance, is that in the judgment under appeal, blood sampling of the children was directed, who were not parties to the proceeding nor were their status required to be examined in the complaint of the respondent no.2. This raised doubt on their legitimacy of being borne to legally wedded parents and such directions, if carried out, have the potential of exposing them to inheritance related complication. Section 112 of the Evidence Act, also gives a protective cover from allegations of this nature. The said provision stipulates:-

“Birth during marriage, conclusive proof of legitimacy.  
—The fact that any person was born during the





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continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.”

8. In our opinion, the Trial Court as also the Revisional Court had completely ignored the said factor and proceeded as if the children were material objects who could be sent for forensic analysis. The other factor, in our opinion, which was ignored by the said two Courts is that the paternity of the children was not in question in the subject-proceeding.

9. The substance of the complaint was not related to paternity of the children of the respondent no.2 but the question was whether the offences under the aforesaid provisions of the 1860 Code was committed against her or not. The paternity of the two daughters of the respondent no.2 is a collateral factor to the allegations on which the criminal case is otherwise founded. On the basis of the available materials, in our opinion, the case out of which this proceeding arises could be decided without considering the DNA test report. This was the reasoning which was considered by the Coordinate Bench in the case of *Ashok Kumar*<sup>7</sup>, though that was a civil suit. Merely because something is permissible under the law cannot be directed as a matter of course to be performed particularly when a direction to that effect would be invasive to the physical autonomy of a person. The consequence thereof would not be confined to the question as to whether such an order would result in testimonial compulsion, but encompasses right to privacy as well. Such direction would violate the privacy right of the persons subjected to such tests and could be prejudicial to the future of the two children who were also sought to be brought within the ambit of the Trial Court’s direction.”

17. Bearing in mind, the principles of law laid down by their Lordships of the Supreme Court in **Ashok Kumar** (supra) and **Inayath Ali** (supra), it is quite vivid that the baby child of the victim is neither a





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party in the instant criminal appeals nor his (baby child) status / paternity is required to be examined in these criminal appeals filed by the two appellants herein, as such, ascertaining the paternity of the victim's child is not at all required to be determined in these criminal appeals filed by the appellants and directing for DNA test of the baby child of the victim would violate the privacy right of the infant, which is a constitutionally protected right as declared by their Lordships of the Supreme Court in **K.S. Puttaswamy** (supra).

18. In that view of the matter, we do not find any merit in the two applications filed by the appellants herein for DNA test (I.A. No.1/2021 in both the appeals) and they are accordingly rejected.

Sd/-  
(Sanjay K. Agrawal)  
Judge

Sd/-  
(Radhakishan Agrawal)  
Judge

Soma

