

**RESERVED AFR**

**Court No. - 83**

**Case :- APPLICATION U/S 482 No. - 1621 of 2022**

**Applicant :- Mohan Singh**

**Opposite Party :- State of U.P. and Another**

**Counsel for Applicant :- Gaurav Kakkar,Rishab Agrawal**

**Counsel for Opposite Party :- G.A.,Amit Singh**

**Hon'ble Gautam Chowdhary,J.**

Heard Sri Gaurav Kakkar, learned counsel for the applicant, Sri Amit Singh, learned counsel for the opposite party no.2, Sri Rajeshwar Singh and Sri Rakesh Chandra, learned A.G.A. for the State and perused the material on record.

Brief facts of the case are that a first information report was lodged by Hardeo Singh with the averments that on Thursday i.e. 21.06.2012 due to opening of city market, his mother had gone to market to purchase some articles, on the way some quarrel was going on between Mohan Singh (applicant) and Tikki both sons of Hariya, whereupon his mother intervened in order to pacify them and had asked them to finish the quarrel, due to which, Mohan Singh accused-applicant abused and shot her, who later on died. With regard to aforesaid incident dated 21.06.2012, a first information report was lodged by the opposite party no.2 on 21.06.2012 in Case Crime No. 368 of 2012 under Section 302 I.P.C. Police Station Kosi Kalan, District Mathura. Thereafter, matter was entrusted for investigation which culminated in filing of charge sheet. Thereafter, the case was committed to the Court of Sessions, which was registered as Sessions Trial No. 573 of 2012 (State Vs. Mohan Singh) under Section 302 I.P.C. in which, statements of the witnesses were recorded, thereafter statement of the accused was recorded under Section 313 Cr.P.C. and during the pendency of the trial, the accused applicant moved an application dated 16.08.2021

under Section 233 Cr.P.C. stating therein that the prosecution may be directed to provide the blood sample of the family members of victim and be sent to Forensic Laboratory for conducting the DNA test of the blood collected from earth to ensure as to whether both are same or not, upon which objection was filed and thereafter, said application has been rejected vide order dated 11.10.2021, it is this order which is under challenge before this Court.

Learned counsel for the applicant submits that an application under Section 233 Cr.P.C. dated 16.01.2018 was filed by the applicant stating therein that on the day of incident the applicant had gone to Delhi with regard to payment of loan taken from S.R.E.I. Equipment Finance Private Limited whereafter, he had gone to Bijnor and purchased a mobile phone from CEC Computers. It has also been stated that the deceased had died somewhere else as such, the Investigating Officer had prepared wrong Naksha Nazari of the place of incident. The Investigating Officer did not send the samples of Blood stained earth (mud) with the blood stained clothes of deceased for DNA test before the Forensic Laboratory and thus prayer was made for DNA test of blood stained earth (mud) and the wearing clothes of the deceased, which application was partly allowed to the effect that the SREL Equipment Finance Private Limited shall be present along with record as well as owner of C.E.C. Computers, Nagina Road, Bijnor was summoned but so far as grievance of the applicant with respect to DNA test, the same has been rejected vide order dated 16.07.2018, which order was challenged by the applicant by way of filing Application U/s 482 No. 33291 of 2018 and the co-ordinate Bench of this Court vide order dated 05.10.2018 had quashed the order dated 16.07.2020 to the extent it denies the permission of DNA test. Pursuant to the order

dated 05.10.2018, the learned Court below ordered for DNA test of the blood stained earth with blood stained clothes of the deceased but the same could not be done as the incident is of the year 2012 and the clothes of the deceased was not possible to be traced as the same has been misplaced from *Malkhana*, as such the application was disposed of vide order dated 20.07.2021 with further direction to initiate proceedings against the concerned erring police officials. Learned counsel further submits that thereafter another application dated 16.08.2021 was moved by the applicant to direct the prosecution to provide the blood sample of family members of the victim and be sent to Forensic Laboratory for conducting the DNA test of blood stained earth to ensure that the blood of the stained earth and the blood of the family members of the victim are same, to arrive at just decision of the case and to prove the innocence of the applicant, which application has been rejected on the ground that the prosecution has not been able to provide the blood sample of the family members of the deceased as they have denied to provide the same and further directed that the applicant may adduce any documentary or oral evidence with respect to his innocence. Learned counsel for the applicant submits that since the deceased had died somewhere else and false Naksha Nazari was prepared, thus it was absolutely necessary in the interest of justice of justice to arrive a just conclusion of the trial that the blood of the earth collected from the place of incident, as alleged, and the blood of the family members of the victim are matched, which can be ascertained by way of DNA test only.

Learned counsel for the applicant submits that although the DNA test cannot be conducted where there is a violation of right to life, or privacy of a person and the same should be exercised after weighing all pros and cons and satisfying that the test is of

eminent need, whereas in the instant case by no stretch of imagination violation of right to life or any stigma would be put to privacy of the family members of the deceased and therefore in the instant case, there is eminent need of DNA test to prove the innocence of the applicant. He further submits that there would be no adversity for the informant, in case, this Court directs for DNA test of the family members of the victim with the blood stained earth, thus the informant would not face any adverse consequences. In support of his contention, learned counsel for the applicant has relied upon a decision reported in *AIR 2003 SC 3450* in the matter of *Sharda Vs. Dharmpal as well as AIR 2010 SC 2851* in the matter of *Bhabani Prasad Jena Vs. Convenor Secretary Orissa State Commission for Women* in support of his contention.

Per contra, Sri Amit Singh, learned counsel for the opposite party no.2 has submitted that the incident is of the year 2012 and we are in the year 2022, thus nothing remains in the blood stained earth and in case DNA test would be permitted, no concrete results may be ascertained due to passage of time, due to which the accused-applicant may be benefited from the same and thus the learned Court below has rightly rejected the application of the accused-applicant. He further submits that if a person refuses to undergo for DNA test, then he cannot be forced/compelled to undergo for the same as such the informant or his family members also cannot be forced to undergo for DNA test as it relates to their privacy. Learned counsel has placed reliance upon a reported Judgement of Hon'ble Apex Court in the matter of *Ashok Kumar Vs. Raj Gupta and others* passed in Civil Appeal No. 6153 of 2021 and has relied upon paragraph nos. 4, 5, 15, 16 and 17, which is quoted below:-

"4. In course of the proceedings before the learned Addl. Civil Judge (Sr. Division), Kalka, on closure of the plaintiff's evidence, when the suit was slated for the other side's evidence, the defendants filed an application on 19.4.2017 seeking direction from the Court to conduct a Deoxyribonucleic Acid Test (for short "DNA test") of the plaintiff and either of the defendants, to establish a biological link of the plaintiff to the defendants parents i.e. late Trilok Chand Gupta and Smt. Sona Devi. This application was opposed by the plaintiff with the projection that the defendants' application is an abuse of the process of law and that there are adequate evidences placed before the Court by the plaintiff to show that he is the son of Trilok Chand Gupta and Sona Devi. The plaintiff in his opposition had specifically pleaded that the mother of the plaintiff and the defendants had submitted sworn affidavit before the Municipal Committee, Kalka to transfer the Property No. 496, Pahari Bazar, Kalka in her name, mentioning the name of the plaintiff as her son. The copy of the concerned affidavit was duly placed on record in the suit proceedings. Similarly, sworn affidavits of the three defendants regarding transfer of the property No. 496, Pahari Bazar, Kalka, where again the plaintiff was admitted to be the son of late Trilok Chand Gupta and late Smt. Sona Devi, were also brought on record in the suit. With such projection of admission on his linkage to the defendants' parents, the plaintiff opposed the DNA test suggested in the defendants' application and offered to rely on the already adduced evidence to prove his case.

5. The defendants' application for conducting the DNA test for the plaintiff (at the cost of the defendants) was disposed of by the Court by referring to the fact that the CS No. 53/2013 is for declaration of ownership of property left behind by late Trilok Chand Gupta and late Sona Devi where the defendants have denied that the plaintiff is their brother or the son of their parents. The learned Judge noted that the evidence was already led by the plaintiff to prove his case and the application of the defendants was filed at that stage of the Suit when it was their turn to lay their evidence. Taking these aspects into account, the Court opined that onus is on the plaintiff to prove that he is a

*coparcener amongst the defendants by way of his birth in their family and such burden does not shift to the defendants. Since the plaintiff had refused to give the DNA sample, the view taken was that the Court cannot force the plaintiff to provide DNA sample and accordingly the defendants' application came to be dismissed by the order dated 28.11.2017 by the learned Trial Judge.*

*15. Having answered these questions, additional issue to be resolved is whether refusal to undergo DNA Testing amounts to 'other evidence' or in other words, can an adverse inference be drawn in such situation. In Sharda vs. Dharpal a three judges bench in the opinion written by Justice S.B. Sinha rightly observed in paragraph 79 that "if despite an order passed by the court, a person refuses to submit himself to such medical examination, a strong case for drawing an adverse inference" can be made out against the person within the ambit of Section 114 of the Evidence Act. The plaintiff here has adduced his documentary evidence and is disinclined to produce further evidence. He is conscious of the adverse consequences of his refusal but is standing firm in refusing to undergo the DNA Test. His suit eventually will be decided on the nature and quality of the evidence adduced. The issue of drawing adverse inference may also arise based on the refusal. The Court is to weigh both side's evidence with all attendant circumstances and then reach a verdict in the Suit and this is not the kind of case where a DNA test of the plaintiff is without exception.*

*16. The respondent cannot compel the plaintiff to adduce further evidence in support of the defendants' case. In any case, it is the burden on a litigating party to prove his case adducing evidence in support of his plea and the court should not compel the party to prove his case in the manner, suggested by the contesting party.*

*17. The appellant (plaintiff) as noted earlier, has brought on record the evidence in his support which in his assessment adequately establishes his case. His suit will succeed or fall with those evidence, subject of course to the evidence adduced by the other side. When the plaintiff is unwilling to subject*

*himself to the DNA test, forcing him to undergo one would impinge on his personal liberty and his right to privacy. Seen from this perspective, the impugned judgment merits interference and is set aside. In consequence thereof, the order passed by the learned Trial Court on 28.11.2017 is restored. The suit is ordered to proceed accordingly."*

He lastly submits that the stage of 313 Cr.P.C. stage is over and thus the application has been moved at a belated stage with intention to linger on the trial. Apart from the same, the learned Court below has rightly recorded reasons while rejecting the application vide order dated 11.10.2021, thus there is no illegality or infirmity in the impugned order which may call for any interference by this Court in exercise of powers conferred under 482 Cr.P.C. jurisdiction.

Lerned A.G.A. has supported the arguments advanced by learned counsel for the opposite party no.2.

After hearing the learned counsel for the parties and after perusing the averments made in the present application, this Court has to examine firstly whether the scientific knowledge to unearth the truth can be used ? Secondly, what would be the effect in case, DNA is directed to be conducted, thirdly whether the right to life or privacy of the informant can be violated?

Dealing with the first issue as to whether scientific knowledge can be used to unearth the truth, relevant to our discussion is the decision of the Hon'ble Apex Court in the matter of *Regina (Quantavalle) Vs. Secretary of State for Health [2003] 2 A.C. 687* wherein it has been held that the laws have to be construed in the light of contemporary scientific knowledge and in order to give effect to a plain parliamentary purpose, the statute may be held to cover a scientific development not known when the statute was passed. Notice may be taken of the

amendment of the year 1976 to Section 75 of the CPC enabling the Court to issue commissions to hold a scientific technical or expert investigation. The same is indicative of legislative intent to keep pace with scientific advancements in the matter of judicial adjudication.

Hon'ble Apex Court in the matter of *Narayan Dutt Tiwari Vs. Rohit Shekhar 2012 (12) SCC 554*, has held in paragraph no. 24 and 25 as under:-

*24. Even the Constitution of India, while laying down the Fundamental Duties by Article 51-A (h) and (j) declares it to be the duty of every citizen of India to develop a scientific temper and the spirit of inquiry and reform and to strive towards excellence, to reach higher levels of achievement. What we wonder is that when modern tools of adjudication are at hand must the Courts refuse to step out of their dogmas and insist upon the long route to be followed at the cost of misery to the litigants. The answer obviously has to be no., The Courts are doing for justice by adjudicating rival claims and unearthing the truth and not for following the age old practices and procedures when new, better methods are available.*

*25. We, in the contest find the judgement of the Court of Appeal (Civil Division) in Re G. (Parentage Blood Sample) [1977] 1 F.L.R. 360 holding that the Court should find proven forensically what the person by his refusal had prevented from being established scientifically to be apposite. It was further held therein:-*

*"Justice is to be best served by truth. Justice is not served by impeding the establishment of truth. No injustice is done to him by conclusively establishing paternity. If he is the father, his position is put beyond doubt by the testing, and the justice of his position is entrenched by the destruction of the mother's doubts and aspersions. If he is not the father, no injustice is done by acknowledging him to*



*be a devoted step father to a child of the family. Justice to the child, a factor not to be ignored, demands that the truth be known when truth can be established, as it undoubtedly can. Whilst, therefore, I do not in any way wish to undermine the sincerity of the father's belief that contact is of a continuing good to the child and that it will be reduced if the mother's beliefs prevail, that contact is the best when taking place against the reality fact, and fact can be established by these tests being undertaken;*

*Thorpe LJ in his opinion, agreeing with Waite LJ that the appeal should be allowed, said:*

*"A putative father may seek to avoid his paternity which science could prove; alternatively to cling on to a status that science could disprove. In both cases selfish motives or emotional anxieties and needs may drive the refusal to co-operate in the scientific tests which the court directed."*

In view of the aforesaid, the rejection of the application for DNA test and granted an opportunity to adduce documentary or oral evidence in respect of his innocence by the court below is nothing but an old aged practice in spite of availability of scientific methods available before it and therefore scientific method must be used to unearth the truth because justice is best served by truth.

Secondly what would be the effect in case, DNA is directed to be conducted. This Court is of the opinion that at the most, the following result may be obtained:-

- (A) D.N.A. may match.
- (B) D.N.A. may not match.
- (C) Disintegrated eroded test.

In case, the DNA is directed to be conducted and DNA matched, then the accused may be convicted. In case, DNA does

not match, then to arrive at just and fair decision of the case, following the settled and basic principles that no innocent be convicted else, ten culprits are left free. The contention that the applicant is innocent would be proved if the DNA samples are not matched and he is being falsely roped in the present case. Thirdly, in case, the opinion comes to the disintegrated eroded test, then the report would again be against the applicant.

Now the third question before this Court is that whether right to life or privacy of the informant is violated in case DNA is directed? The reliance of the learned counsel for the opposite party no.2 upon paragraph nos 4, 5, 15, 16 and 17 in the matter of *Ashok Kumar Vs. Raj Gupta and others* (supra) pertains to dispute between the parties with regard to parentage, whereas in the instant case, the DNA test has not been asked to be conducted to establish the relationship between the applicant and informant rather the same has been requested to prove the innocence of the applicant, therefore, there would be no impinge on his personal liberty and his right to privacy of the informant or his family members.

It is the case of the applicant that false naksha najri has been prepared to implicate him as the incident has taken place somewhere else and is shown to have occurred at the place mentioned in the FIR, it would be primary to ascertain the place of incident first so as to gain faith in the prosecution story as narrated in the FIR. The said requirement can be best served by obtaining DNA result of the blood sample of the informant or his relative with the blood stained earth recovered from the alleged place of occurrence. While making such observation, **this Court is mindful of the fact that DNA test is not to be directed as a matter of routine and in only deserving cases where strong prima facie case is made out**, such direction may be given. Since

the life of the applicant is stake as he is accused of offence under Section 302 IPC, it is must to ascertain and test the truthfulness of the prosecution case.

Considering the facts and circumstances in entirety, this Court is of the opinion that to arrive at just decision of the case and to avoid any suspicion or doubt in the prosecution case, it would be in the interest of justice that DNA test may be conducted and thus the learned Court below has committed an illegality in passing the impugned order, therefore the same is liable to be set aside.

Accordingly, the impugned order dated 11.10.2021 passed by learned Additional District Judge, Court No.8, District Mathura in Sessions Trial No. 573 of 2012 arising out of Case Crime No. 368 of 2012 under Section 302 I.P.C. Police Station Kosi Kalan, District Mathura, is set aside and the blood sample of informant or any of his family members be taken for conducting the DNA test with the blood stained earth collected from the alleged place of occurrence to unearth the truthfulness of the prosecution case.

The aforesaid exercise may be completed within a period of one month from the date of production of a certified copy of the order before the concerned court below.

The instant application is allowed.

**Order Date :- August 6, 2022**

S.Ali