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**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

**BEFORE
HON'BLE SHRI JUSTICE VISHAL MISHRA
ON THE 9th OF DECEMBER, 2022**

MISC. CRIMINAL CASE No. 52891 of 2022

BETWEEN:-

**DURGESH, S/O SUKKAN DHURVE, AGED ABOUT 20
YEARS, OCCUPATION: LABOUR, R/O VILLAGE
KHAMARIYA KACCHI, POLICE STATION ADEGAON
DISTRICT SEONI (MADHYA PRADESH)**

.....APPLICANT

(BY SHRI MANISH TIWARI - ADVOCATE)

AND

**THE STATE OF MADHYA PRADESH, THROUGH POLICE
STATION ADEGAON, DISTRICT SEONI (MADHYA
PRADESH)**

.....RESPONDENT

(BY SHRI PRAMOD KUMAR THAKRE - GOVERNMENT ADVOCATE)

.....
*This application coming on for admission this day, the Court passed
the following:*

ORDER

Shri Praveen Dhurve, Inspector, Police Station Adegaoon, District Seoni
is present in person.

In compliance of order dated 25.11.2022 an explanation was filed on
03.12.2022, the same is taken on record.

This is the second bail application filed by the applicant under Section
439 of the Cr.P.C. for grant of bail. The first application was dismissed on
merit vide order dated 11.02.2022 passed in M.Cr.C. No.7020 of 2022.

The applicant has been arrested on 23.11.2021 by Police Station-

Adegaon, District Seoni (M.P.) in connection with Crime No.363/2021 for the offence punishable under Sections 376, 376 (2) (N), 363 and 506 of IPC and Sections 7 and 8 of the POCSO Act.

It is pointed out that this application has been filed on the ground that the statements of prosecutrix as well as her mother have been recorded before the trial Court and they have turned hostile. The FSL report is negative. It is further submitted that the applicant is the first offender and is in custody since 23.11.2021. There is no further requirement of custodial interrogation of the present applicant. He is ready to abide by all terms and conditions that may be imposed by this Court while considering this bail application. On these grounds, he prays for grant of bail.

Per contra, learned counsel appearing for the State has vehemently opposed the contentions and submitted that the victim was minor at the time of commission of offence. It is submitted that the DNA profile was not sent by the Police Authorities for examination owing to the fact that the FSL was found to be negative. He has placed reliance upon the judgments of the Hon'ble Supreme Court in the case of **Veerendra Vs. State of Madhya Pradesh, (2022) 8 SCC 668** and in the case of **Chotkau Vs. State of Uttar Pradesh, 2022 SCC OnLine 1313** and the order passed by the Coordinate Bench of this Court on 04.05.2016 in M.Cr.C. No.6476 of 2016 (Raja Burman @ Rahu Vs. The State of Madhya Pradesh) wherein the Police was directed that if the doctor preparing the MLC of the prosecutrix prepares vaginal slides and clothing, which upon test by the FSL confirms the presence of human sperm then such slides must be sent for DNA verification with the blood sample of the suspect. He further submits that the authorities are not sending the samples for DNA once the FSL is found to be negative considering the judgment passed by

the Coordinate Bench of this Court in M.Cr.C. No.6476 of 2016 (**Raja Burman @ Rahu Vs. The State of Madhya Pradesh**). However, he could not dispute the fact that the applicant is the first offender as per the case diary record.

Considering the over all facts and circumstances of the case and keeping view the custody period of the applicant, coupled with the fact that the prosecutrix and her mother have turned hostile, the FSL report was found to be negative and no sample was sent to DNA, without expressing any opinion on the merits of the case, this Court deems it appropriate to allow this application. Accordingly, subject to the verification of the fact that the applicant is the first offender, this application is allowed. The applicant is directed to be released on bail and on furnishing surety bond of Rs.50,000/- (Rupees Fifty Thousand Only) with one solvent surety in the like amount to the satisfaction of trial Court. It is also directed that the applicant shall comply with the conditions as enumerated under Section 437(3) Cr.P.C.

In view of the outbreak of 'Corona Virus disease (COVID-19)' the concerned jail authorities are directed to follow the directions/guidelines issued by the Government with regard to 'COVID-19' before releasing the applicant.

This order shall remain effective till the end of the trial but in case of bail jump and breach of any of the pre-condition of bail, it shall become ineffective and cancelled without reference to this Bench.

Application stands allowed.

As far as not sending the sample for DNA verification particularly in rape cases the Hon'ble Supreme Court has considered the aforesaid aspect in the case of Chotkau (supra) and has held as under:-

III. Failure to conduct medical examination.

70. Despite the fact that it was a shocking case of rape and murder of a six year old girl, the prosecution did not care to subject the accused (appellant herein) to examination by a medical practitioner. There were two documents which formed part of the records submitted along with the final report, but which were not exhibited. One of them appears to be a Memo signed by PW-5, the Doctor who conducted the post-mortem. This Memo is dated 09.03.2012 addressed to the Senior Pathologist, District Hospital, Bahraich. The Memo reads as follows:

"Vaginal smear prepared in two slides from the body of Km. Uma D/o Chhedam Lal, R/o Sengadha, PS Ikauna, Dist: Shravasti."

71. The second is a Report dated 10.03.2012. It reads as follows:-

"Report-In microscopic examination of supplied specimen, no spermatozoa seem alive or dead. No (unclear) seen."

72. Despite the fact that the author of the Memo dated 09.03.2012 was examined as PW-5, he never spoke about this. The Report of the Forensic Sciences Laboratory, to whom the salwar was forwarded, was also not obtained by the Investigating Officer.

73. Section 53(1) of the Code enables a police officer not below the rank of Sub-Inspector to request a registered medical practitioner, to make such an examination of the person arrested, as is reasonably necessary to ascertain the facts which may afford such evidence, whenever a person is arrested on a charge of committing an offence of such a nature that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence. Section 53(1) reads as follows:

"53. Examination of accused by medical practitioner at the request of police officer. (1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such

circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose."

74. *By Act 25 of 2005, a new Explanation was substituted under Section 53, in the place of the original Explanation. The Explanation so substituted under Section 53, by Act 25 of 2005 reads as follows:*

Explanation. In this section and in sections 53A and 54,

(a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) "registered medical practitioner" means a medical practitioner who possess any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register.

75. *Simultaneously with the substitution of a new Explanation under Section 53, Act 25 of 2005 also inserted a new provision in Section 53A. Section 53A reads as follows:*

"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."

76. Even in a case where the victim of rape was alive and testified before the Court and the accused was also examined

by a doctor, this Court found in *Krishan Kumar Malik vs. State of Haryana* (2011) 7 SCC 130 that the failure to obtain the report of the Forensic Sciences Laboratory was fatal. Paragraph 40 of the said decision reads as follows:

"40. The appellant was also examined by the doctor, who had found him capable of performing sexual intercourse. In the undergarments of the prosecutrix, male semen were found but these were not sent for analysis in the forensic laboratories which could have conclusively proved, beyond any shadow of doubt with regard to the commission of offence by the appellant. This lacuna on the part of the prosecution proves to be fatal and goes in favour of the appellant."

77. On the scope of the newly inserted Section 53A, this Court said in *Krishan Kumar Malik* (*supra*) as follows:

"44. Now, after the incorporation of Section 53A in the Criminal Procedure Code, w.e.f. 23.6.2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, 8 (2011) 7 SCC 130 facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in CrPC the 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 fool proof case, but they did not do so, thus they must face the consequences."

78. It is true that a three member Bench of this Court indicated in *Rajendra Pralhadrao Wasnik vs. State of Maharashtra* (2019) 12 SCC 460 that Section 53A is not mandatory. It was held in paragraphs 49 and 50 of the said decision as follows:

"49. While Section 53-A CrPC is not mandatory, it certainly requires a positive decision to be taken. There must be reasonable grounds for believing that the examination of a person will afford evidence as to the

commission of an offence of rape or an attempt to commit rape. If reasonable grounds exist, then a medical examination as postulated by Section 53-A(2) CrPC must be conducted and that includes examination of the accused and description of material taken from the person of the accused for DNA profiling. Looked at from another point of view, if there are reasonable grounds for believing that an examination of the accused will not afford evidence as to the commission of an offence as mentioned above, it is quite unlikely that a charge-sheet would even be filed against the accused for committing an offence of rape or attempt to rape.

50. Similarly, Section 164-A CrPC requires, wherever possible, for the medical examination of a victim of rape. Of course, the consent of the victim is necessary and the person conducting the examination must be competent to medically examine the victim. Again, one of the requirements of the medical 9 (2019) 12 SCC 460 examination is an examination of the victim and description of material taken from the person of the woman for DNA profiling."

79. After saying that Section 53A is not mandatory, this Court found in paragraph 54 of the said decision that the failure of the prosecution to produce DNA evidence, warranted an adverse inference to be drawn. Paragraph 54 reads as follows:-

"54. For the prosecution to decline to produce DNA evidence would be a little unfortunate particularly when the facility of DNA profiling is available in the country. The prosecution would be well advised to take advantage of this, particularly in view of the provisions of Section 53 and Section 164CrPC. We are not going to the extent of suggesting that if there is no DNA profiling, the prosecution case cannot be proved but we are certainly of the view that where DNA profiling has not been done or it is held back from the trial court, an adverse consequence would follow for the prosecution."

80. It is necessary at this stage to note that by the very same

Amendment Act 25 of 2005, by which Section 53A was inserted, Section 164A was also inserted in the Code. While Section 53A enables the medical examination of the person accused of rape, Section 164A enables medical examination of the victim of rape. Both these provisions are somewhat similar and can be said approximately to be a mirror image of each other. But there are three distinguishing features. They are:-

(i) Section 164A requires the prior consent of the woman who is the victim of rape. Alternatively, the consent of a person competent to give such consent on her behalf should have been obtained before subjecting the victim to medical examination. Section 53A does not speak about any such consent;

(ii) Section 164A requires the report of the medical practitioner to contain among other things, the general mental condition of the woman. This is absent in Section 53A;

(iii) Under Section 164A(1), the medical examination by a registered medical practitioner is mandatory when, it is proposed to get the person of the woman examined by a medical expert during the course of investigation. This is borne out by the use of the words, "such examination shall be conducted". In contrast, Section 53A(1) merely makes it lawful for a registered medical practitioner to make an examination of the arrested person if "there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence."

81. In cases where the victim of rape is alive and is in a position to testify in court, it may be possible for the prosecution to take a chance by not medically examining the accused. But in cases where the victim is dead and the offence is sought to be established only by circumstantial evidence, medical evidence assumes great importance. The failure of the prosecution to produce such evidence, despite there being no obstacle from the accused or anyone, will

certainly create a gaping hole in the case of the prosecution and give rise to a serious doubt on the case of the prosecution. We do not wish to go into the question whether Section 53A is mandatory or not. Section 53A enables the prosecution to obtain a significant piece of evidence to prove the charge. The failure of the prosecution in this case to subject the appellant to medical examination is certainly fatal to the prosecution case especially when the ocular evidence is found to be not trustworthy.

82. Their failure to obtain the report of the Forensic Sciences Laboratory on the blood/semen stain on the salwar worn by the victim, compounds the failure of the prosecution.

From the perusal of the aforesaid verdict of the Hon'ble Supreme Court it is apparently clear that the provisions of Section 53A has been incorporated in Criminal Procedure Code w.e.f. 23.06.2006 and the aforesaid provision contemplates for examination of the victim as well as the accused and the description of the material collected from the person of the accused as well as victim should be sent for DNA profiling. The authorities have failed to consider the aforesaid provisions of the Criminal Procedure Code.

Especially in the rape cases with respect to minors wherein the provisions of POCSO Act are attracted the samples collected during investigation are required to be sent for DNA examination. POCSO Act being a special enactment to see that the children were below 18 years should not indulged into illegal activities and making of physical relation even with the consent of the victim, who happens to be a minor is punishable under the POCSO Act, therefore, there are instances where a boy and a girl aged nearing above 16 years and below 18 years are indulged in physical relationship with so called consent and victim resiles from her earlier statement but as the provisions of POCSO Act are attracted in such matters, therefore, the DNA profiling is

required in the matter in terms of provisions of Section 53A of Cr.P.C. In view of the judgments passed by the Courts in cases of Raja Burman @ Rahu (supra) Director General of Police has issued a circular on 20.07.2021 for not sending the sample for DNA examination in case the FSL is found to be negative. Now, in view of the judgment passed by the Hon'ble Supreme Court in the case of Chutkau (supra) and considering the provisions of Section 53 A Cr.P.C. the samples are required to be sent for DNA examination especially in rape cases and more particularly in cases of minors wherein the provisions of POCSO Act are attracted.

Let the Director General of Police, Madhya Pradesh, Bhopal to consider the aforesaid judgment of the Hon'ble Supreme Court and issue directions/instructions for sending the samples for DNA reports.

A copy of the order be sent to the Director General of Police, Madhya Pradesh, Bhopal for necessary compliance.

Certified copy as per rules.

(VISHAL MISHRA)
JUDGE