

(Suresh Chandra Jain vs. Haribai & Anr.)**18.1.2017**

Shri V.D. Sharma, counsel for the applicant.

Shri M.B. Mangal, counsel for the respondent No.1.

Shri Girdhari Singh Chauhan, Public Prosecutor for the respondent No.2/State.

This petition under Section 482 of Cr.P.C. has been filed against the order dated 16.1.2009 by which it was directed that the blood samples of the applicant be recollected in the presence of the prosecutrix as well as a lady advocate who has standing of at least 10 years of practice for the purposes of sending the same for DNA test from any lab except the State Forensic Science Laboratory, Sagar.

The necessary facts for the disposal of this application lies in a narrow compass.

The prosecutrix had filed a complaint against the applicant alleging that she was subjected to rape on 22.7.2007. An order under Section 156(3) of Cr.P.C. was passed and the police after recording FIR started the investigation. During investigation the DNA test of the applicant was conducted and a report was received from the State Forensic Science Laboratory, Sagar that the DNA of the applicant does not match with the sperms found on the Petikot as well as vaginal swab of the prosecutrix. An objection was raised by the prosecutrix that as the applicant is financially sound, therefore, he has got the DNA test report managed. Accordingly, it was prayed that a fresh DNA test be conducted.

By order dated 16.1.2009 it was directed that the blood samples of the applicant be recollected in the

presence of the complainant and a lady advocate having a standing of 10 years of practice. The said order has been challenged by filing this petition under Section 482 of Cr.P.C.

During the pendency of the petition, a report was submitted by SDO(P), Ambah, District Morena before the Court of JMFC, Ambah on 19.6.2015 in which it was mentioned that in view of the DNA report sent by State Forensic Science Laboratory, Sagar it is clear that the applicant has not committed the offence of rape. The said report was objected by the counsel for the respondent No.1 alleging that she is not satisfied with the report of the State Forensic Science Laboratory, Sagar and, therefore, a fresh DNA test be conducted and the report be summoned from any private laboratory. The said submission of the respondent No.1 was opposed by the Public Prosecutor. By the order dated 19.6.2015 it was directed that the fresh DNA test be got conducted from any State Forensic Science Laboratory except Sagar and a fresh report be submitted. On 23.12.2015, it was further directed that in compliance of the order dated 16.1.2009 since the fresh report has not been submitted, therefore, prosecution was directed to file the fresh DNA test report of the applicant.

It is submitted by the counsel for the applicant that as it is clear from the order dated 23.12.2015 that the Magistrate had directed to comply with the order dated 16.1.2009 and, therefore, it cannot be said that a fresh cause of action has arisen by order dated 19.6.2015, thus the present petition against the order dated 16.1.2009 is still maintainable.

It was submitted by the counsel for the applicant that

once a report has been given by the State Forensic Science Laboratory, Sagar to the effect that the DNA of the applicant do not match with the DNA found on the clothes and the vaginal swab of the prosecutrix, therefore, merely on the saying of the prosecutrix it would not be appropriate to direct for fresh DNA test.

Per contra, it is submitted by the counsel for the respondent that it is the case of the prosecutrix that she was subjected to rape by the applicant on 22.7.2007 and as the applicant is financially sound, therefore, he has managed to get a favourable DNA test report from the concerning Forensic Science Laboratory. Under these circumstances, in order to do complete justice, if the Magistrate has directed for conducting a fresh DNA test then it cannot be said that any illegality has been committed by the Magistrate.

Heard the learned counsel for the parties and perused the documents filed along with the petition.

During the course of argument, learned counsel for the applicant confined his arguments to the direction given by the Magistrate to the effect that the blood samples should be collected in the presence of the prosecutrix as well as one lady advocate who has a standing of atleast 10 years of practice. It was submitted by the learned counsel for the applicant that such a direction cannot be given. In support of his submissions, the counsel for the applicant has relied upon the procedure for collection and forwarding of samples for DNA fingerprinting issued by Centre for DNA Fingerprinting and Diagnostics , Hyderabad. The procedure for collection and forwarding the samples as mentioned by CDFD, Hyderabad is reproduced as under:-

“PROCEDURES FOR COLLECTION & FORWARDING OF SAMPLES FOR DNA FINGERPRINTING ANALYSIS

DNA fingerprinting technology today has made it possible to identify the source of biological samples found at scenes of crime and also to resolve disputes of Paternity and Maternity. The Laboratory of DNA Fingerprinting Services of CDFD provides services to various investigating agencies to resolve cases of Maternity/Paternity disputes, Identification of rapist(s), linking the suspects to biological evidence found at the crime scene in murder cases. Identification of mutilated remains of deceased, Identification of missing child, child-swapping cases in hospital wards. This leaflet has been prepared to disseminate information to the investigating officers/judicial authorities/medical officers about the process of evidence collection, preservation and forwarding of the samples for DNA fingerprinting analysis. The procedures described here are simple, time tested and most suitable for Indian conditions. The samples should be **collected in the way prescribed below and sent to CDFD.**

For the establishment of maternity/paternity, we require the bloodstains of the mother, disputed child and the alleged/suspected biological father.

For the identification of rapist in sexual assault cases, we require the forensic exhibits (viz. garments, vaginal swabs and slides) along with the bloodstains of the suspect(s) and victim.

For the identification of deceased, we require the bloodstains of the nearest relatives (viz. Mother, father, brother, sister and children) along with the material objects of the deceased like teeth, post-mortem blood, muscle tissue, bone, hair with root and other material relevant to the case.

The bloodstains can be made using lancet on bloodstain cards being sent by us, in the presence of Hon'ble Court Authorities. These stains should be air-dried and sent to us. The blood samples of the concerned persons can be collected on the bloodstains cards (stains have to be put within the two circles of the bloodstain card). The bloodstains of the concerned persons can be collected by any qualified Medical Officer in the presence of Hon'ble Judicial Magistrate and sent to CDFD, along with the specimen seal for comparison. The procedure for collection and shipment

of bloodstains on bloodstain cards are given in the annexure.

The forensic exhibits should be sent as mentioned below:	
Bloodstains	Wrapped with a dry paper or cloth
Muscle tissue	About 100 grams of muscle tissue should be sent in a clean glass bottle/plastic container with 0.9% DNS (normal saline sold in medical shops) on ice or in crystal salt (sodium chloride) as a preservative. Tissue samples should not be preserved in formalin.
Vaginal swabs	The dry cotton swab should be placed in a clean dry glass vial/bottle.
Teeth, Hair with root and Bones (intact)	Wrapped with a dry paper or cloth Company burnt bones, pieces of bones and decomposed tissue are not useful for analysis
All the samples should be properly collected and sealed and sent to CDFD under certification along with specimen seal for comparison. The samples should reach CDFD between 10:00 am to 5:00 pm on any working day (Monday to Friday).	

On request, necessary blood collection material kit (blood lancet and bloodstain cards) and prescribed formats (Identification forms and forwarding note) will be provided by CDFD to the concerned authorities.

The prescribed formats needs to be submitted duly filled-in along with the samples. An extra attested passport size photograph of each individual, whose bloodstains are being forwarded, should be sent along

with the identification form.

The charge for the DNA fingerprinting analysis for each blood sample/bloodstains sent on bloodstain card is Rs. 5,700/- (Rupees five thousand and seven hundred only). For each non-blood forensic sample (viz. Bones, hair, muscle tissue, stained garments, teeth, slides, swabs, etc.), the charge is Rs. 11,400/- (Rupees eleven thousand and four hundred only), which is inclusive of service charge (@ 14% applicable from 01.09.2015) as levied by Government of India. Payment has to be paid in advance, in the form of a crossed demand draft **(which is to be valid for at least three months from the date of its receipt at CDFD)** drawn in favour of "Director, CDFD" payable at Hyderabad.

The DNA typing report will be submitted on receipt of the DNA testing charges and fulfilling of all the official formalities.

The following conditions have to be fulfilled for the appearance of the DNA expert from CDFD for deposing evidence in the Hon'ble Court of Law:

1. Personal security of the experts has to be ensured from the time of his/her arrival till his/her departure.
2. TA/DA would be paid as per Government of India rules and entitlement.
3. The experts should befrom and to the railway station/airport and accommodated in a guesthouse or in a best available hotel.
4. The payment is to be made to the experts before his/her departure from the Hon'ble Court. In all cases forwarded by the investigative agencies the above payment would have to be reimbursed by the investigative agencies and not the Hon'ble Courts.
5. ODFD may kindly be provided with a copy of the judgment of the Hon'ble Court, if any pertaining to this case.
6. In order for the CDFD to comply with audit requirements, you are requested to kindly issue a certificate of attendance clearly indicating about the payment to the DNA examiner to TA/DA by your office or otherwise.
7. This letter and the accompanying DNA Profiling Report will be despatched by the Laboratory of DNA Fingerprinting Services after all payments due in this case have been received by CDFD.

Please note that no telephonic enquiries will be entertained regarding case reports.”

It is apparent from the procedure as suggested above by the CDFD, Hyderabad, it is desirable that the blood samples of the concerning person may be collected by the qualified Medical Officer in the presence of Judicial Magistrate.

From the plain reading of this procedure, it is clear that the procedure suggested by the CDFD, Hyderabad is merely directory in nature and not mandatory in nature. In order to avoid mis-sampling of blood samples of the concerning person, it is mentioned that the blood samples can be collected in the presence of any of the authority of the Court. The basic purpose of this procedure is to rule out the possibility of any manipulation at the stage of collection of blood samples of the concerning person. Therefore, it cannot be held that in all the cases where the DNA is proposed, the blood samples should be collected in the presence of the Judicial Magistrate.

Thus, in the light of the procedure as suggested by the CDFD, Hyderabad it is directed that in order to avoid any manipulation at the time of collection of blood samples of the applicant, the Magistrate may direct that the blood sample of the applicant may be collected by any qualified medical officer in the presence of the prosecutrix as well as any authority. It is for the Magistrate to decide that in the presence of which authority the blood samples should be collected. Accordingly, it is directed that the JMFC, Ambah, District Morena shall direct the qualified medical officer to collect the blood samples of the applicant in the presence of the prosecutrix as well as an authority so appointed by the

Magistrate. Since it is a case instituted upon the police report, therefore, it is the duty of the prosecution to get the DNA test conducted. Under these circumstances, the prosecutrix cannot be saddled with the expenses which are required to be incurred for getting the DNA test conducted.

Accordingly, this petition is **disposed off** with the above mentioned observations.

(G.S. Ahluwalia)
Judge

(alok)