* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: 27th March, 2025***
Pronounced on:1st April, 2025

\+ **CRL.M.C. 1704/2017, CRL.M.A. 6908/2017 (stay)**

NAND KISHOR
S/o Sh.Babu Lal
E-2/1, Phase I
Budh Vihar, Delhi 110086 .....Petitioner

Through: Mr. Mohd. Shamikh and Mr. Mohd. Javed, Advocates.

Versus

1. STATE .....Respondent No.1.

2. Hari Singh Yadav
S/o late Sh, Pyarelal
R/o C-2/8 Budh Vihar
Phase-I, Delhi .....Respondent No.2.

Through: Mr. Digam Singh Dagar, Ld. APP for the State with Insp. Susheel Kumar and SI Rajesh Kumar P.S. Vijay Vihar.
Ms. Babita Ahlawat, Advocate for R-2.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. Petition under Section 482 of the *Code of Criminal Procedure, 1973* ('Cr.P.C' *hereinafter*) has been filed on behalf of the Petitioner/father of the deceased to conduct the DNA test from the clothes of the deceased and of

accused Hari Singh Yadav @ M.P in case FIR No.260/2013 under Section 307/302/34 of the *Indian Penal Code, 1860* ('IPC' *hereinafter*), P.S.Vijay Nagar, Delhi.

2. It is submitted that the aforesaid FIR 260/2013 was registered on the DD No.55B dated 18.05.2013 about a person having been injured. Subsequently, on 23.05.2015 injured Vikram died and Section 302 IPC was added. The accused Hari Singh Yadav @ M.P was arrested on 19.05.2013 at the pointing out of the brother of the deceased.

3. The Charge Sheet was filed and Charges framed after which the entire Prosecution evidence has been recorded. The case is pending before the learned Sessions Judge, at the stage of final arguments.

4. At this stage of Final arguments, Application under Section 293(4)(f) Cr.P.C read with Section 45 of the *Indian Evidence Act, 1872 was filed on behalf of the Complainant (father of the deceased)* for directing the IO/Prosecution to conduct DNA test of the clothes of the deceased and from the clothes of the accused, Hari Singh Yadav seized *vide* Memo Exh.PW-24/B Exh.PW-21/D, respectively. The clothes, during the investigations, had been sent to Forensic Science Laboratory for examination, but the result was inconclusive as per Reports Exh.PW-22/A and 22/B. The blood stains on the clothes of the accused if found to belong to the deceased, would prove his presence on the spot at the relevant time. This exercise is essential for the proper and fair adjudication of the case and the DNA testing of stains on the clothes of deceased and the Accused, thus sought.

5. Reliance was placed on *State of Gujarat vs. Kishanbhai* (2014) 5 SCC 108 wherein the Apex Court had exhorted the Investigating Agency to resort to latest scientific and forensic techniques to establish the facts.

6. This Application was ***opposed on behalf of the Accused*** wherein it was contended that the Biological and Serological Reports were obtained more than three years ago. This Application is highly belated and there was no reason for waiting for so long to move the present Application. The seizure of the clothes of Accused Hari Singh has not been proved in so much as PW-9, Vikas, the younger brother of the deceased, in his testimony had denied the shirt of the accused Hari Singh was seized by the Police on 19.05.2013 or that it was stained with blood.

7. It was, therefore contended that the Application is a desperate attempt by the Complainant to fill up the lacuna and the gaps in the case of the prosecution. In view of the statement of PW9 denying the seizure of the clothes of the accused, any exercise undertaken in this regard would not serve any fruitful purpose.

8. Learned ASJ *vide* impugned Order dated 15.4.2017 observed that the provisions under which the Application was moved does not provide a foothold to the parties to get a case or ascertainment of a particular fact relevant thereto, ascertained by referring to expert examination/opinion.

9. The judgment in the case of *Raja Ram Prasad Yadav vs. State of Bihar* decided by the Apex Court on 04.07.2013, observed that the exercise of power cannot be dubbed as filling up lacuna. However, it was distinguishable on the ground that it was made in the context of Section 311 Cr.P.C. which was not applicable to the present case. It was concluded by

Ld. ASJ that since the trial was at the fag end and IO had been substantially examined in chief, resort to Section 165 of the Evidence Act, may give an inkling of Court digging out evidence for one party, which would not be appropriate. However, the Application was dismissed with the observation that the Prosecution is not precluded from proceeding under Section 173(8) Cr.P.C. in the matter.

10. ***Aggrieved by the said Order***, the Complainant has challenged this Order on the ground that the DNA evidence is crucial evidence for the adjudication of the present case. There is no eye witness to the incident and the case is based on circumstantial evidence. Therefore, conducting of DNA Testing is imperative. Considering the advancement in the forensic science Investigating Agency should have preferred to go for the DNA test to genuinely determine the culpability of the accused for fair investigation. Even if the Prosecuting agency did not prefer to get the DNA Test done, there was nothing which precluded the Trial Court from directing the State to conduct the aforementioned DNA test. Hence, it was submitted that the impugned Order be set aside and the directions be given for the DNA testing.

11. The ***Application is contested on behalf of Respondent No.2/accused*** on the ground that the delay in filing the Application itself is a ground to dismiss the Application. The statement of the accused has already been recorded and the final arguments have also been concluded.

12. Furthermore, PW9 Vikas, brother of the deceased has not supported the case of the prosecution wherein he has specifically stated that the clothes of the accused were not seized by the Police, on 19.05.2013. The

Application is intended only to fill up the lacuna in the prosecution case after gross unexplained delay.

13. The learned Trial Court has rightly dismissed the Application which has been filed merely to create pressure on the accused. It is, therefore, submitted that the present Petition is liable to be dismissed.

14. *Formal Status Report has been filed on behalf of the State* wherein it was submitted that the clothes of the deceased and the accused had been sent to FSL, but the Expert opined that *the Blood result was inconclusive*. The case is pending before the learned Sessions Judge at the stage of final arguments.

15. **Learned Prosecutor** has contended that mere delay in moving such Application, cannot be a ground to bar the acceptance of vital evidence that may have material bearing on the outcome of the case.

16. **Submissions heard and record perused.**

17. It is pertinent to note that the Complainant, Mr. Nand Kishor, father of the deceased, who was allegedly killed by Respondent No. 2, had made a Complaint on which FIR No. 260/2013 under Section 302/307/34 IPC was registered against Respondent No. 2, who is now facing trial. The Petitioner, has sought DNA testing from the blood stains on the clothes of the deceased and that of the accused, which were seized during the investigations.

18. The question which confronts this Court is, whether the said Application should be allowed especially when the case is at the stage of final arguments.

19. The case may be at final arguments, but the objective of investigations followed by trial before the Court is, to be able to establish dispassionately on the basis of evidence whether the offence of which the accused is charged, is proved beyond reasonable doubt.

20. In the present case, the trial may have concluded and the case may be at the stage of final arguments but the interest of justice, demands that the truth must be discerned to determine the guilt of the accused; in fact if there can be any independent evidence which may help in determination of the guilt or innocence of the accused persons, must not be refused to be brought on record on the specious ground of Delay, especially when it entails such serious offence as S.302. Therefore, the contention on behalf of the Respondent No. 2 that this Application is highly belated and must be rejected, is not tenable.

21. The *second aspect* on which vehemently the Application was opposed on behalf of the Respondent No. 2, was that the seizure of clothes of the accused, have not been proved. Once the seizure of the clothes of accused itself is not established, any sampling from the said clothes done, cannot be attributed either to the accused nor can it be of any benefit in adjudication in the present case.

22. Insofar as this contention is concerned, it has no merit for the simple reason that whether the seizure of the clothes of the accused, has been proved or not, can be assessed only after considering the entire evidence, in final adjudication. At this stage, reference cannot be made to one witness in isolation to contend that the seizure of the clothes, has not been proved. This argument also does not inure to the benefit of the Respondent No. 2.

Furthermore, even if seizure of clothes of the accused in not beyond doubt, the blood sample of the accused can be taken in accordance with law, to generate the DNA.

23. Now coming to the main aspect of whether this Application has any merit, needs to be considered. First and foremost, what is sought by this Application is collection of scientific evidence.

24. In the case of *Narayan Dutt Tiwari vs. Rohit Shekhar*, 2012 (12) SCC 554, the Apex Court observed that even the Constitution of India while laying down the Fundamental Duties under Article 51-A (h) and (j), declared it to be 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 with the modern tools of adjudication available, must the Courts refuse to step out of their dogmas and insist upon the long route to be followed at the cost of misery of the litigants. The answer was obviously no. It was further stated that the Courts are adjudicating rival claims and unearthing the truth for dispensation of justice by adjudicating rival claims and unearthing the truth. The age old practices and procedures must not be insisted upon when there are new, better scientific methods are available.

25. Likewise, in the Case of *in Re G. (Parentage Blood Sample)* (1977) 1 F.L.R. 360, it was observed by the Court that the justice is not served by impeding the establishment of truth.

26. While the Evidence Act and Criminal Procedure Code were drafted more than a century back when the scientific tools were not available and the methodology of investigations was largely dependent upon the

traditional mechanisms, but it cannot be loss sight of that as and when the scientific methods of investigations have become available, suitable amendments have been made in Cr.P.C. Explanation to Section 53 was added by Act 25 of 2005 to provide that the examination of an accused by medical practitioner at the request of Police Officer, would include examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and seat, 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. Likewise, Section 53A was introduced in 2005 for examination of a person accused of rape by medical practitioner wherein also DNA profiling was stated as one of the means of examination of the accused. Similarly, Section 54 which was substituted by the Act 5 of 2009, defines the medical officer who would examine the accused as well as the victim.

27. In the present case, the offence has been committed in the year 2013 when the scientific means of DNA testing and profiling had already been emerged and had even found recognition in the amended provisions of CrPC. In this particular case, the Investigating Agency may have chosen to confine the Forensic Report to the matching of blood groups of the deceased and the accused, but with the blood samples available, the DNA testing as has been sought on behalf of father of the deceased, cannot be termed as without any justification. More so, when it is a case essentially resting on circumstantial evidence.

28. It cannot be overlooked that the conclusion of the DNA Report is an independent scientific methodology, which would help the Court in an

endeavour to reach the truth for achieving justice. The DNA testing may be in benefit of the accused and there can be no apprehension or presumption of it being in favour of the Complainant.

29. It is evident that the clothes were seized in the year 2013 and the endeavour to get the DNA Testing may or may not yield a positive result, but that in itself cannot be a ground from making at least an effort to bring on record the independent scientific evidence.

30. In the light of the aforesaid discussion, the Application of the Complainant for DNA Testing/matching from the clothes of the deceased and the accused, is allowed. It is also clarified that in case the DNA profile is generated, the Investigating Officer may seek the blood sample of the accused for the purpose of DNA Test, in accordance with law.

31. Considering that it is an old case of 2013, it is hereby directed that the clothes of the deceased and the accused/blood sample of the accused, be sent to FSL within 15 days of this Order and the FSL shall make an endeavour to give its Report within two months thereafter. The result so obtained be submitted in the Trial Court by way of Supplementary Charge-Sheet under Section 173(8) of CrPC.

32. The Petition is accordingly, disposed of. Pending Application, if any, also stands disposed of.

(NEENA BANSAL KRISHNA)
JUDGE

APRIL 01, 2025/rk/RS