

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL NO. 224 of 2012****With****CRIMINAL APPEAL NO. 863 of 2012****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE AKIL KURESHI****and****HONOURABLE MR.JUSTICE VIPUL M. PANCHOLI**

=====

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

=====

STATE OF GUJARAT....Appellant(s)

Versus

JAYANTIBHAI SOMABHAI KHANT....Opponent(s)/Respondent(s)

=====

Appearance:

MS JIRGA JHAVERI, APP for the Appellant(s) No. 1

MR UMANG H OZA, for the Opponent(s)/Respondent(s) No. 1

=====

CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI**and****HONOURABLE MR.JUSTICE VIPUL M. PANCHOLI****Date : 30/04/2015**

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. These appeals arise out of the judgement of the learned Additional Sessions Judge, Vadodara, in Sessions Case No.151/2010. The accused was charged with offences punishable under sections 376 and 506(2) of the IPC. He was convicted for the said offences. For offence under section 376, he was sentenced to rigorous imprisonment for ten years. For offence under section 506(2), he was sentenced to rigorous imprisonment for six months. Fine was also imposed. Accused has challenged his conviction in Criminal Appeal No.863/2012. The State seeking enhancement of sentence has filed Criminal Appeal No.224/2012.
2. Briefly stated, the prosecution version was that Radha, daughter of the accused and the victim studied in the same school. In the month of February 2009, the victim had gone to the house of her friend Radha for studying. The accused sent his daughter away for some errand and when he and the victim were alone, after closing the front door of the house, raped her. Victim was aged about 15 years at that time. Under the threat, she did not complain to anybody about this incident. However, nearly eight months later when her mother found out that she was pregnant, she and her mother went to the police station for lodging the FIR. Later on she also gave birth to a male child.
3. The victim girl, PW-1 was examined at exh.7. She deposed

that she lived with her mother and sister at Vadodara. Her father had left the house six years back. She studied in Government school at Gothri in 7th standard. Her sister also studied in the same school. Her sister Pooja and Radha were friends. They were studying in the same class. In the second month of 2009, she went to Radha's house in the afternoon at about 12 O' clock for studying. The accused was present at that time. He sent Radha to a shop. She also tried to join Radha, but the accused insisted that she should stay back. After that he closed the front grill, put her on a cot forcibly and raped her. Then he threatened with a knife that as it is she does not have a father, if she tells her mother, he would kill her. She went home and did not inform anybody. Later the people of the house where her mother was working started whispering. One neighbour lady told her mother that the victim was heavily pregnant. When the mother asked her about it, she revealed the incident. They then went to the police station and lodged FIR on 10.10.2009 which was produced at exh.8. She gave birth to a male child on 12.12.2009.

In the cross examination, she stated that she knew Ashok Jagdev who was her mother's nephew. Radha and her sister Pooja were in the same class. She was in a different class. On the date of the incident, she had come home after appearing in the examination. She agreed that Pooja and Radha were studying together since they were in the same class. During examination all the three of them would study together. She however, denied that on the date of the incident, Pooja was also there with her. Many people lived near the house of Radha. If she shouted, persons in

the next house could hear. She however, clarified that since the accused threatened her, she did not shout. She denied that her mother had demanded Rs.50,000/- from the accused. She also denied that she had any love affair.

4. Urmilaben Mukeshbhai Patel,PW-2, mother of the victim, was examined at exh.9. She deposed that she lived at Vadodara with her two daughters. Her husband had left the house 6 to 7 years back and was not traceable. Radha was studying in the same school as her daughters. In the month of October, when she had gone to a shop of Seemaben, she told her that her daughter was eight months pregnant. When she asked her daughter, she narrated the incident of being raped by the accused.

In the cross examination, she was asked whether the birth of the victim girl was registered. She took time and produced birth certificate at exh.10 which showed her date of birth as 30.10.1995. Though she new Ashok Jagdev, denied that he was residing with her in the same house or that the victim had love affair with him. She denied that she had demanded Rs.50,000/- from the accused. She was doing household work for living and would return in the afternoon from such work, She also worked as a helper with the caterers during marriage season during which time she would leave at 9 in the morning and come back at 5 in the evening. Her daughters would be alone at home barring school hours during such time.

5. Pooja Mukeshbhai Patel,PW-3,exh.11, sister of the victim girl was examined to corroborate the version of the victim

to the limited extent that the two sisters studied in the same school and Radha also studied with her.

In the cross examination, she agreed that she and Radha were in the same class and, therefore, studied together. Occasionally victim would also join them at Radha's house. She denied that Ashok Jagdev lived with them but agreed that he would visit her house. During the work with the caterers; her mother would return sometimes as late as at 8 O' clock at night.

6. Dr. Ami Mahendrabhai Patel, PW-5, exh.13 had examined the victim girl and certified that she was at an advanced stage of pregnancy.
7. The Investigating officer Mahendrasinh Amarsinh Kher, PW-13 was examined at exh.32. He narrated the steps taken for carrying out the investigation. He had sent the samples of the accused and the child of the prosecutrix for DNA testing.
8. Kanjibhai Bhurabhai Damor, PW-14, exh.45, was the ASI posted at J.P. road police station at the relevant time. He had recorded the FIR of the victim girl which was produced at exh.8. He had forwarded the various samples for forensic analysis and produced DNA report at exh.47.
9. From the record, it emerges that along with letter exh.42, the police authorities forwarded to the Forensic Science Laboratory, Gandhinagar, the blood samples of the accused, the victim and her child. Under communication

exh.43, three specific queries were raised by the police to FSL as under :

- 1) Whether the accused was the father of the child to whom the victim had given birth?
- 2) Whether the accused had committed rape on the victim girl?
- 3) Whether the child of the victim was borne out of the pregnancy resulting from the rape?

10. The Forensic Science Laboratory in its DNA report exh.47 concluded as under :

“AUTOSOMAL STR ANALYSIS

1. One of the alleles of the amplified loci of DNA Profile of blood sample Ex-B1(of the child) matches with one of the respective allele in the DNA Profile of blood sample Ex-C1(of the mother Purviben Patel).
2. Non-maternal alleles of the amplified loci of DNA Profile of blood sample Ex-B1(of the child) are not present in the DNA Profile of blood sample Ex-A1(of the Alleged father Jayantibhai Khant).

Y-STR ANALYSIS

1. The 16 alleles of the Y chromosome loci of the child (S/O-Purvi M. Patel) (source of exh.B1-blood sample) does not match with those of the alleged father Jayantibhai Khant (Source of exh.A1-blood sample)

Inference :

It concludes that the child (source of exh.B1-blood sample) is not genetically related to the alleged father and is not patrilineal relative of the alleged father (Source of exh.A1-blood sample).

Conclusion : From the above observations, (autosomal and Y STR analysis) it is concluded that DNA profiles of Jayantibhai Somabhai Khant (source of Ex-B1: blood sample); child of Purviben Patel (source of Ex-C1: blood sample)."

11. This in the nutshell is the evidence on the record. Learned trial Judge accepted the testimony of the victim girl and discarded the DNA results observing that "Further the DNA test which is produced at exh.47 is not positive, however, in my opinion, that by itself would not mean that the testimony of the victim should not be believed."

12. Having perused the evidence on record and having heard the learned counsel for the parties, it clearly emerges that in the form of oral evidence, we have only the testimony of the victim girl who deposed before the Court that about eight months before the lodging of the FIR, she had gone to the house of a friend to study. There the accused first sent his daughter away and taking advantage of being alone with the victim at home, closed the front door and then raped her. Out of fear the victim did not reveal this to her mother or to anyone including her friend. FIR was lodged nearly eight months later when the mother found out that the victim was pregnant. The defence suggested that in fact, the victim was having relations with one Ashok Jagdev. The mother would be away from home

for long hours during marriage season and would therefore, not know the precise movement of the daughters or visitors in her absence. It was highly improbable that pregnancy could be hidden by the victim from her mother till eight months stage. The mother had tried to knock out money from the accused. Having failed, belated FIR falsely implicating the accused was filed.

13. In view of such facts, obviously the medical evidence was not going to be of any assistance. When the incident had admittedly taken place eight months before the filing of the FIR, the examining doctor was unlikely to find any evidence which would either support or conflict with the version of the victim. Had the oral deposition of the victim along with her mother and sister's deposition being the sole evidence on record, we would have certainly examined it minutely and assessed the same with the aid of well established legal principles. Serious questions such as the improbability of a pregnancy not being noticed by the mother for eight months would be one of the factors which would go into our consideration. The defence also established through the testimony of the victim that upon missing her mensuration, she along with her mother visited the doctor but apparently did not follow up though obviously she would have missed many more mensuration cycles. The suggestion of the defence that there was another young male distant relative of the family who was a frequent visitor and the mother often being away for long hours during marriage season, the possibility of some other person involved in making the girl pregnant, would also require serious consideration. However, this lengthy

discussion is completely futile since the victim gave birth to a child allegedly borne out of the episode of rape. It is not the case of the prosecution that other than the alleged rape by the accused, the victim girl voluntarily or otherwise had sexual intercourse with any other man. In that view of the matter, the second and third questions raised by the investigating agency to the Forensic Science department in communication exh.44 were redundant. In any case, it was not the duty or expertise of the FSL to answer these questions. These questions, we may recall were, whether the accused had committed rape on the victim girl? And whether the child of the victim was borne out of the pregnancy resulting from the rape?

14. Answers to these questions cannot be found in DNA analysis. In any case, when as per the prosecution the child was born out of the pregnancy resulting from rape by the accused, this accusation of rape against the accused must succeed or fail on the basis of DNA analysis. We have reproduced the conclusion of the DNA expert. The report indicates that Organic Extraction method was applied to extract DNA from samples A1, B1 and C1 which were the blood samples of the accused, the child and the prosecutrix respectively. These DNA extracts were subjected to comparison of fifteen STR loci. Further the male DNA profiling using Y filer were also matched between the accused and the child. The report was conclusive and unequivocally opined that the prosecutrix was the mother of the child but the accused was not his father.
15. Unfortunately, the trial Court brushed aside such

emphatic findings of highly sophisticated scientific technology which would destroy the entire prosecution case by simply suggesting that mere negative report of DNA would not mean one should discard the oral testimony of the prosecutrix. This conclusion was not backed by any discussion on scientific methodology or judicial pronouncements.

16. The DNA technology over a period of time has made significant progress and achieved sophistication to the extent that the Courts world over with increasing level of confidence, have been relying on the DNA testing. Scientific literature suggests that subject to genuineness of the samples and the laboratory analysing the samples following scientific protocols, the DNA results would be unquestionable and may lead conclusively either to involvement or exoneration of the accused in certain cases. In a recent judgement in case of **State of Gujarat v. Mohan Hamir Gohil and others** (Criminal Confirmation Case No.1/2012), Division Bench of this Court after referring to various authorities on DNA technology, different methodology used for testing and the scientific advancements made world over, noticed that over a period of time the Courts across the world including in India have been placing heavy reliance on DNA results. It was observed as under :

“33. From the above literature, it can be seen that over a period, the technology of DNA testing has made great strides and achieved sophistication leading to results which can often times be used either for inclusion or exclusion of the accused. DNA of a person is considered

unique to himself (except in cases of identical twins) and can be traced from smallest quantity of blood, saliva, semen, root of hair, skin, nail and such like. Subject, of course, to the laboratory analyzing the sample following the scientific protocols, the DNA result becomes absolutely unquestionable.

34. Let us now see how the courts have viewed the advancement in DNA technology. Section 53A of the Criminal Procedure Code was introduced by Amendment Act 25 of 2005 with effect from 25.3.2006. Sub-section (1) section 53A, provides that a 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 to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose. Consent of the accused thus in giving blood sample, etc. is no longer necessary. Sub-section (2) of section 53A provides that such medical practitioner conducting the examination shall without delay, examine such person and prepare a report of his examination giving various details including the description of the material taken from the person of the accused for DNA profiling. This provision came up for consideration before the Supreme Court in the case of **Krishan Kumar Malik v. State of Haryana**, 2011 Cri.L.J. 4274, in which it was observed as under:

45. Now, after the incorporation of Section 53 (A) in the Criminal Procedure Code, w.e.f. 23.06.2006, brought to our notice by learned counsel for the Respondent-State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in the Cr.P.C. 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 foolproof case, but they did not do so, thus they must face the consequences.

In the case of **Raghuvir Dessai v. State**, 2007 Cri.L.J. 829, learned Single Judge of the Bombay High Court observed as under:

..... The clinching evidence has come from the Senior Scientific Officer Shri Sathian PW 15 who carried out the DNA test on the basis of the material forwarded to him and which was collected by Dr.Sapeco/PW 5. He has confirmed that the accused is the contributor of the semen which was collected by Dr.Sapeco in the form of vaginal swab. DNA (Deoxyribonucleic acid) is found specially in cell nuclei which are the foundation of heredity. **DNA is the genetic blue print for life and is virtually contained in every cell. NO two persons, except identical twins have ever had identical DNA. DNA testing can make a virtually positive identification when the two samples match. It exonerates the innocent and helps to convict the guilty (See page 249 of Jhala and Rajus Medical Jurisprudence Sixth Edition). The DNA testing hits the nail on the head of the accused and is the last and clinching piece of evidence which shows that it is the accused and the accused alone who committed the rape of the victim/PW11.**

In the case of **Sanjay Singh v. State of Delhi**, 2007 Cri.L.J. 964, a Division Bench of the Delhi High Court observed as under:

Dr.A.K.Sharma has held that while conducting post-mortem on local physical examination of private parts, it was noticed that black, curly, non-matted pubic hair and

hymen intact, no tearing present, admitting one finger only. He has also given his opinion that the deceased has not been subjected to sexual intercourse. **However, it is the DNA test conducted on the vaginal swabs, vaginal slide and underwear of the deceased compared with the blood sample of the accused that the experts have come to the conclusion that there is sperm present in the vaginal swabs and the DNA of the sperm so found present, matches with DNA of the accused obtained from his blood sample.**

XXXX

48. The next question that engages us is whether the DNA test conducted was proper? It is in evidence of Dr.Lalji that the method used and the test conducted in determining and arriving at the conclusion were done as per standard practice as also per scientific technology suitable for such tests. The trial Court has elaborately introduced its learning based on literature which, to a large extent, was never even put to the expert witness and even otherwise there is no positive evidence on record to show that the test so conducted by the experts were perverse and/or not in keeping with the standard scientific methodology. We may make useful reference to judgments of the Supreme Court in AIR 1954 SC 28 : (1954 Cri LJ 257); Sundar Lal v. State of Madhya Pradesh, AIR 1957 SC 580 : (1957 Cri LJ 889); Bhagwan Das v. State of Rajasthan wherein it has been held by the Supreme Court that findings of an expert witness can not be set aside by a Court by making a reference to some literature/book without confronting the expert with them and directing his opinion on it. In another case decided by the Honble Supreme Court in AIR 1982 SC 1157 : (1982 Cri LJ 1243): Gambhir v. State of Maharashtra, it was held that the Court should not usurp the function of an expert by arriving at its own conclusions contrary to the one given by the expert witness. There has

been great effort made by counsel for the accused to discredit the test conducted as such by referring to either possibility of contamination and/or with reference to snippets of replies given by the experts in cross-examination but we find that at no stage has any of the expert witness said that the tests conducted by them have given a wrong result or there is a possibility that the test so conducted by them would have given a wrong result. On the contrary, they have categorically ruled out any such possibility of contamination and/or erroneous results.

In the case of **Thogorani v. State of Orissa**, 2004 Cri. L.J. 4003, a Division Bench of the Orissa High Court observed as under:

11. Before answering the above contentions raised by the learned counsel for opponent No.3 it would be apt to note that the DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at scene of crime. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict but also serves to exonerate. The sophisticated technology makes it possible to obtain conclusive results in case win which the previous testing had been inconclusive. Moreover, DNA sampling may also impinge on familial privacy where information obtained from one persons sample provides information regarding his or her relatives.

In the case of **Pantangi Balarama Venkata Ganesh v. State of A.P.** 2003 Cri.L.J. 4508, a Division Bench of the Andhra Pradesh High Court described DNA as a perfect science and observed as under:

Thus, the evidence of DNA expert is admissible in evidence

as it is a perfect science. In the cross-examination P.W.46 has deposed as under:

If the DNA fingerprint of a person matches with that of a sample, it means that the sample has come from that person only. The probability of two persons except identical twins having the same DNA fingerprint is around 1 in 30 million world population.

It means that DNA test gives the perfect identity. It is very advanced science.

In the case of **Sajeera v. P.K.Salim**, 2000 Cri. L. J. 1208, learned Single Judge of the Kerala High Court observed that DNA fingerprinting test has been much advanced and resorted by the courts of law to resolve the dispute regarding paternity of the child. It was observed as under:

15. It has been held in several cases that blood test is an important piece of evidence to determine the paternity of the child. Though by a blood test it cannot positively establish the paternity of the child, it can certainly exclude certain individual as the father of the child. Therefore, while the negative finding in a blood test is definite, the positive finding only indicates a possibility. **Now the DNA finger-printing test has been much advanced and resorted to by the Courts of law to resolve the dispute regarding paternity of the child. It is true that without the consent of the person blood test cannot be conducted and there is no law in India enabling the Court to compel any person to undergo blood test as available in England.**

35. From the above, it can be seen that several courts in India over a period of time have accepted DNA analysis as

totally reliable, of course, as long as, the laboratories employ sufficient skill and care in doing so. DNA analysis is employed by various countries for criminal investigation and prosecution. Various countries have created data banks of DNA profile of the persons who are already convicted which can be matched with DNA profile of the samples collected from crime scene. We are aware that creating such data-base has several legal and constitutional issues. We are, however, in the present case, neither required nor called upon to enter such arena. We are only trying to demonstrate effectiveness of the DNA technology and that when properly done its results are infallible.

36. We are not unmindful of a decision of this Court in the case of **Premjibhai Bachubhai Khasiya v. State of Gujarat**, 2009 Cri. L.J. 2888 wherein a Division Bench of this Court observed that if the DNA report is the sole piece of evidence, even if it is positive, cannot conclusively fix the identity of the miscreant, but if the report is negative, it would conclusively exonerate the accused from the involvement or charge. It was observed that science of DNA is at a developing stage and it would be risky to act solely on a positive DNA report. This decision was rendered more than four and a half years back. Science and Technology has made much advancement, and world over DNA analysis technology is being relied upon with greater confidence and assurance. We do not think that the Indian Courts need to view the technology with distrust. Of course, subject to the laboratory following the usual protocols, DNA result can be of immense value to the investigators, prosecutors as well as courts in either including or excluding a person from involvement in a particular act. The said decision of this Court must be viewed in the background of the facts in which it was rendered. It was a case where the accused were charged with offence under sections 363, 366, 376 read with section 114 of the Indian Penal Code. All important

witnesses including the prosecutrix herself had turned hostile and did not support the prosecution. Despite which, the trial Court handed down conviction primarily on the basis of DNA report which opined that the DNA profiling of the foetus matched with that of the appellant original prime accused. It was in this background while reversing the conviction, the above noted observations were made. It can thus be seen that mere establishment of the identity of the father of the foetus in any case would not be sufficient to record conviction of the accused for rape and gang-rape under section 363, 366 and 376 of the Indian Penal Code. The said decision, in our opinion, therefore, cannot be seen as either rejecting the reliability of the DNA technology or laying down any proposition that in every case the DNA result must be corroborated by independent evidence before the same could be relied upon.”

17. In view of clear and emphatic conclusion of the DNA report, the accused must be acquitted
18. In the result, Criminal Appeal No.863/2012 is allowed. Conviction of the accused under section 376 and 506(2) of the Indian Penal Code is set aside. Judgement of the trial Court is reversed. The accused shall be released forthwith if not required in any other criminal case. Criminal Appeal No.863/2012 is disposed of accordingly.

Resultantly, State's appeal for enhancement being Criminal Appeal No.224/2012 is dismissed.

R&P be sent back to the concerned trial Court.

(AKIL KURESHI, J.)

(VIPUL M. PANCHOLI, J.)

raghu