

# Investigation in Rape Cases: In India

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**Abstract:** In India heinous crime against woman aie on the rise in spite of post Nirbhya amendment in criminal law in 2013. Seeing the NCRB statics about 'Rape Cases' it appears that desired deterrent effect of stricter and harsh prolonged punishment is not percolated in the society at gross root level. 'There is need for not only creating awareness about these new provisions of law but also about improving infrastructure leading to use of modern investigation tools and techniques training of forensic medicine practitioners and investigating officers and prosecuting agencies, etc.

**Keywords:** Human Rights, Right of Accused, Indian Constitution, A Critical analysis

## I. INTRODUCTION

Obsolete and traumatic tests like 'Two Finger Test' should not be allowed to be practiced in view of pain and suffering of rape survivors, international guidelines and court directions in this regard.

There is also need to take strict action against those who are violating new provisions of the law and in doing any negligence in handling of medico legal cases of rape and like offences. Case Referred.

As held in Santosh Kumar Singh vs. State, (2010),<sup>1</sup> that the conclusions of the DNA report cannot be doubted and must be accepted as scientifically accurate as DNA finger printing is an exact science.

In Santosh the trial Court had not relied on the DNA report and held that the vaginal swabs and slides and the blood sample of the accused had been tampered with, and had relied on some text books for this purpose. The High Court and the Supreme Court however held that there was no reliable evidence for suggesting that the sample had been tampered with, and even criticized the trial Court for relying on text books which were not put to the expert.

Recently the same position regarding the value of the DNA profiling has been reiterated in Dharam Deo Yadav vs. State of U.P.,(20 I 4).<sup>2</sup> wherein, modern forensic techniques for criminal investigations such as DNA profiling have been lauded, because of reliable witnesses failing to give testimony, or turning hostile due to intimidation, though it is conceded that the DNA testing may in particular case not be cent percent accurate, as that would depend on the quality of the analysis and whether the sample collected was kept free from contamination. Thus the law report observes in paragraph

"The criminal justice system in this country is at crossroads. Many a times, reliable, trustworthy. Credible witnesses to the crime seldom come forward to depose before the court and even the hardened criminals get away from the clutches of law. Even the reliable witnesses for the prosecution turn hostile due to intimidation, fear and host of other reasons. The investigating agency has, therefore, to look for other ways and means to improve the

quality of investigation, which can only be through the collection of scientific evidence. In this age of science, we have to build legal foundations that are sound in science as well as in law.

Practices and principles that served in the past, now people think, must give way to innovative and creative methods. if we want to save our criminal justice system. Emerging new types of crimes their level of sophistication, the traditional methods and tools have become outdated, hence the necessity to. strengthen the forensic science for crime detection. Oral evidence depends on several facts like power of observation, humiliation, external influence, forgetfulness, etc. Whereas forensic evidence is free from those infirmities.

Judiciary should also be equipped to understand and deal with such scientific materials. Constant interaction of Judges with scientists, engineers would promote and widen their knowledge to deal with such scientific evidence and to effectively deal with criminal cases based on scientific evidence. We are not advocating that, in all cases, the scientific evidence is the sure test, but only emphasizing the necessity of promoting scientific evidence also to detect and prove crimes over above the other evidence."

In the aforesaid law report where the skeleton of the deceased a female from New Zealand was exhumed from the house of the appellant after a year of its burial there on the pointing out of the appellant and all the skin had even disappeared by then. it was observed that as the humerus and femur bones corresponded biologically with the blood sample of her father, it was held sufficient for establishing the identity of the deceased, looking to the specialized skill of the DNA analysts and the laboratory (CDFD, Hyderabad), which had carried out the DNA analysis in that case. In the present case also the DNA analysis was carried out by the same CDFD, Hyderabad on our orders, and no reasons were suggested by the learned counsel for the appellant for showing why the report could not be relied upon.

With this DNA affirmation that the hair of the appellant was the same as the hair found between the fingers of the deceased, this identify cannot be explained on the

<sup>1</sup> 9 SCC 747

<sup>2</sup> (2014)5 SCC 509

contradictory stances on this aspect in the defence suggestions to witnesses and in his answers given to the questions put under section 313 Cr.P.C. statements before the lower Court and this Court. It has been rightly observed in *State of U.P. vs. Krishna Master and others*, (2010)<sup>3</sup> and *State of U.P. vs. Anil* 1988)<sup>4</sup> that if the evidence read as a whole has a ring of truth, then discrepancies, inconsistencies, infirmities or deficiencies of a minor nature not touching the core of the case cannot be a ground for rejecting the evidence.

## II. ADVERSE COMMENTS ON MANNER OF INVESTIGATION AND TRIAL

Before parting however Division Bench expressed their unease with the casual manner in which investigation and trial in this case has been conducted.

Bench observed that no doubt this Court relying on the observations in *Zahira Habibullah Sheikh (5) vs. State of Gujarat*, (2006),<sup>5</sup> recommending to Courts not to act as mute spectators and mere recording machines, this Court had in the interest of justice for the accused, victim and society acted proactively and called for and examined the samples of hair of the deceased and appellant and other materials collected in this case on 29.10.13 which were thereafter sent to the C.D.F.D. Hyderabad for DNA analysis.

As mentioned above, according to the DNA report the hair of the deceased, which was cut by the doctor conducting the post mortem examination, was of the same person whose hair was found in the room and bed in possession of the appellant Also the hair, which was taken from between the finders of the deceased matched with the hair of the appellant, which has been cut in jail on the orders of this Court. The said material as we have shown above has gone a long way for establishing the complicity of the appellant in this offence.

However, Division Bench found gross negligence in the I.O. and ineptitude on part of the trial Court in not them sending the hair samples, which were collected at the place of occurrence and from the deceased, for D.N.A. examination which were crucial for establishing the complicity of the appellant in this offence. We also see negligence on part of the I.O. in not examining Dr. R.K. Singh, who had initially taken the hair samples and blood sample of the appellant and also in not keeping the sample in a proper condition causing us to find that the seal and bottle of the sample were damaged. We had therefore directed that fresh sample of hair of the appellants be cut and collected in the jail where he was lodged by the order dated 29.10.13. It is also a source of anxiety to us that in a case of such gravity as the present case, the Investigating Officer has only examined two witnesses of fact viz. P.W. 1 Baise Ali and P.W. 2 Afzal and only three other witnesses P.W. 3 Dr. Amit Kumar. P.W. 4 Constable Parul Yadav and himself PW 5 S.I. Ashok Kumar Singh.

Division Bench stated categorically that this is not the manner to prove a charge of rape and murder of a 12 year old girl, and actually if we had not ourselves sent the samples of hair of the deceased and the hair found at the place of incident which had been collected and got a fresh impel the hair of the appellant cut and got the same sent for DNA matching to the CDFD. Hyderabad, the order of conviction may have suffered from some infirmities in view of the improbabilities alluded to by the learned counsel for the appellant, and there was a risk that such a grave case of rape and murder a 12 year old girl may have resulted in undeserved acquittal, the confidence of the victim and the public in our system of justice.

## III. UNWARRANTED ACQUITTAL AND REMEDY FOR PREVENTION

It may be noted that Allahabad High Court has earlier also adversely commented against negligent investigations in cases of rape and murder of minor girls, viz. *Bhairo vs. State of U.P.* (2011) and *Chhotu @ Ajay vs. State of U.P.*, (2013)<sup>6</sup> which had ended in unwarranted acquittals DNA samples were not collected or the accused not subjected to medical examination or where witnesses did not appear or support the accused after being won over, and other grave lacunae were inadvertently or designedly left by inept or dishonest investigations.

Allahabad High Court had issued directions in those cases to the Director General of Police, U.P. to improve the process of investigations, especially in cases of rape and murder of minor girls. Which have been reiterated in the on-going PIL. *Qasim vs, State of U.P.*<sup>7</sup> where this Court has been taking steps and issuing directions for improving the techniques and procedure for investigations in the State of U.P. Division Bench mentioned that in the case of *Dayal Singh vs. State of Uttaranchal*, 2012,<sup>8</sup> where the deceased and injured were said to have been assaulted with lathies, but it appeared that the doctor conducting the post mortem examination and the investigating Officer had colluded with the accused and no blunt object injury had been shown on the deceased in the postmortem report. Also although the viscera of the deceased were preserved for sending to the Forensic Science Laboratory, it deliberately appeared not to have been sent.

The Apex Court noted with approval that the trial Court and High Court relying on the evidence of the eyewitnesses in preference to the medical report had held the accused guilty.

The trial Court had even recommended action against the doctor and the police officer to the Director General (Health) and DGP. The Apex Court even initiated contempt proceedings against the Director General Health Services of U.P./ Uttarakhand and Director General of Police. U.P./ Uttarakhand under the provisions of the Contempt of Court Act for not complying with the directions of the trial Court and in failing to take action against the errant Medical officer and Investigating Officer

<sup>3</sup> (2010) 12. SCC324

<sup>4</sup> 1988 AIR 1998

<sup>5</sup> 2004 (5) SCC 353

<sup>6</sup> 2004 (9) SCC 177

<sup>7</sup> CAPITAL CASES NO. – 574 of 2013

<sup>8</sup> (2012) 13 SCC 598

for dereliction of their duties and also directed that disciplinary proceedings be initiated against them.

It was further clarified that in case the I.O. and the Medical officer had retired, action could be taken against them even by withdrawal of their pensions. It was further observed in Dayal Singh (2012) that if primacy is given to such designed or negligent investigations, omission and lapse by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the enforcement agency. but also in the administration of justice.”

Court shown his anguish in following words that we are also disturbed by the manner, in which the trial Judge has recorded the 313 Cr.P.C. statement, which only consisted of six questions compositely putting the case, the witnesses and documents to the accused and simply questioning him as to why he was prosecuted and whether he had anything else to say or defence to lead, instead of seeking the explanation of the accused on each of the incriminating circumstances which appeared against him in the evidence on record, which is the requirement of law.

Court was therefore constrained to re-framed detailed questions against the accused with the assistance of the learned G.A. on all the existing incriminating circumstances on the record, addition to the further specific questions which were framed regarding the DNA analysis and other co-related material when the accused was re-examined under section 313 Cr.PC by this Court on 27.1.14.

The recent case before the Division Bench of the Allahabad High Court directions were issued to concerned authorities for improving investigations and trials in rape and murder cases. Division Bench of Allahabad High Court after finding it imperative issued the following directions:

#### **IV. COLLECTION OF CIRCUMSTANTIAL EVIDENCE**

That in cases of rape and murder of minor girls, which are based on circumstantial evidence, as far as possible, material which is collected from the deceased or the accused for example hair or blood of the victim or the accused, which is found on the persons or clothes of the victim or the accused or at the spot, seminal stains of the accused on the clothes or body of the victim, Seminal swabs which may be collected from the vaginal or other orifices of the victim and the blood and other materials extracted from the accused which constitutes the control sample should be sent for D.N.A. Analysis, for ensuring that forensic evidence for establishing the participation of the accused in the crime, is available.

#### **Mandatory Examination of Accused, Collection of Evidence, Training to Examining Forensic Medical Practitioners**

Court also directed the Director General Medical Health U.P., Principal Secretary. Health, U.P., and D.G.P., U.P. to mandate sending the accused for medical examination in each case for ascertaining whether he has any injuries caused by the resisting victim, or when he attempts to cause

harm to her as is provided under section 53 A of the Code of Criminal Procedure Code, which was introduced by Act 25 of 2005, (w.e.f. 23.6.2006).

Court further noted that in particular if the rape suspect is apprehended at an early date after the crime, it should be made compulsory to take both dry and wet swabs from the penis, urinary tract, skin of scrotum or other hidden or visible regions, after thorough examination for ascertaining the presence of vaginal epithelia or other female discharges which are also a good source for isolating the victim's DNA and necessary specialized trainings be imparted to the examining forensic medical practitioners for this purpose.

#### **Prohibition of Finger Test on Rape Survivors**

Division Bench of Allahabad High Court further directed the Principal Secretary (Health), U.P.. Director General (Health and Medical Services) U.P. to prohibit conducting the finger insertion test on rape survivors. and to employ modern gadget based or other techniques for ascertaining whether the victim has been subjected to forcible or normal intercourse. These finger insertion tests in female orifices without the victim's consent have been held to be degrading, violative of her mental and physical integrity and dignity and right to privacy and are re-traumatizing for the rape victim.

Relying on the International Covenant on Economic, Social, and Cultural Rights, 1966 and the 'the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985 it was further held in Lillu vs. State of Haryana, (2013)<sup>9</sup> that no presumption of consent could be drawn ipso facto on the strength of an affirmative report based on the unwarranted two fingers test.

#### **V. ESTABLISHMENT OF MODERN FORENSIC SCIENCES LABORATORY**

We find that there is absence of an adequately equipped D.N.A. Laboratory in U.P. which has advanced mitochondrial DNA analysis facilities, comparable to the CDFD, Hyderabad, (from where we were able to obtain positive results in this case, after unsuccessful DNA matching in an earlier case, Bhairo vs. State of. U.P. [6] where this Court had sent the sample of vaginal smear slides and swabs and appellant's underwear to the. U.P. DNA laboratory, viz. Forensic Science laboratory, Agra), and we direct that such a DNA centre comparable to the CDFD be established in the State of U.P. at the earliest so that Courts and investigating agencies are not compelled to send DNA samples at high costs to the specialized facility of the CDFD at Hyderabad.

#### **Through Investigation by Efficient Investigation Officers**

The Director General of Prosecution. U.P.. and the Director General of Police U.P. and Director General Medical Health should ensure that blind cases of rape and murder of minor girls or other complicated cases are thoroughly investigated by efficient Investigating Officers. Effective steps should be taken for forensic investigations by collecting and promptly sending for DNA analysis all

<sup>9</sup> 2013 (14) SCC 643

possible incriminating material collected from the deceased, victim, accused, and at the scene of the crime etc. which may give information about the identity of the accused and his involvement in the crime, after taking precautions for preventing the contamination of the material.

#### **Protection of Witnesses**

Court observed that this is necessary to prevent Courts being rendered helpless because the prosecution and investigating agency are lax in producing witnesses or because witnesses have been on over or are reluctant to depose in Court. Steps should also be taken for preventing witnesses from turning hostile, by prosecuting such witnesses, and even by cancelling bails of accused where they have secured bails where it is apparent that efforts are being made to win over witnesses and by providing witnesses with protection where ever necessary so that they can give evidence in Court without fear or pressure.

#### **Strict Action against Investigating Officers, Medical Officers and Other**

Court observed that in case there is reason to think that the Investigating Officers or medical officers or others have colluded with the accused, strict action is initiated against

the colluding officials as was recommended in the case of Dayal Singh vs. State of Uttaranchal (2012).

### **VI. DEVELOPMENT OF POLICIES AND PROTOCOLS**

Court further observed that It is necessary that policies and protocols be developed by the DGP, Principal Secretary Health, Director Medical Health Director of Prosecutions, U.P., for the aforesaid purposes.

#### **Proper Training is given to Judicial Officers**

Judicial Training and Research Institute (JTRI), Lucknow must ensure that proper training is given to judicial Officers on framing proper questions for 313 Cr.P.C. examinations, so that the entire circumstances of the case are put to the accused and they cannot claim the benefit of being inadequately questioned about the incriminating circumstances of the case.

There is need for proactive approach to investigate rape cases by using modern tools and techniques in the letter and spirit of these court directions by all the stake holders to bring these conclusion and thus, help in serving the ends of justice in larger public interest.