

Allahabad High Court

Anand Pasi vs State Of U.P. & Another on 13 September, 2013

Bench: Anil Kumar Sharma

HIGH COURT OF JUDICATURE AT ALLAHABAD RESERVED/A.F.R.

CRIMINAL REVISION NO. 955 OF 2013 Revisionist : Anand Pasi Opposite parties : State of U. P. and another
Counsel for the Revisionist : Rajiv Lochan Shukla Counsel for the State : AGA CORAM:

HON'BLE ANIL KUMAR SHARMA, J Heard Sri Rajiv Lochan Shukla, learned counsel for the revisionist and learned AGA for the State as also the DGC (Criminal), Allahabad summoned by the Court vide order 23.5.2013.

2. This revision challenges the order dated 13.3.2013 passed by Addl. Sessions Judge, Court no. 9, Allahabad in S. T. No. 73 of 2009 State Versus Anand Pasi and others u/s 302 IPC P.S. Civil Lines, District Allahabad whereby after closure of arguments of the defence, allowing the application of the prosecution permission has been accorded to put the DNA report paper no. 32-A/2 to 32-A/10 to the revisionist in his additional statement u/s 313 Cr. P.C.

3. Assailing the impugned order, the learned counsel for the revisionist has vehemently argued that the DNA report could not be admitted in evidence without its formal proof as required under the law unless it is demonstrated that the same could be considered in view of Sections 293 and 294 Cr. P. C., therefore, the accused cannot be put to explain the same.

4. On perusal of the affidavits filed on behalf of the revisionist it appears that the revisionist is facing trial u/s 302 IPC before the trial Court and after closure of arguments on behalf of the defence, 13.3.2013 was fixed for reply by the prosecution in the case. Instead of making submissions on 13.3.2013, an application was filed by the complainant of the case duly submitted by the concerned ADGC (Criminal) stating that the report of DNA from Hyderabad had been received and is placed on the record, which is admissible in evidence without its formal proof, so it should be read in evidence. On the same day this application was disposed of by the learned trial Court with the following order:

"Case called out. Accused are present from jail.

Today it is fixed for reply by learned counsel for prosecution.

In place of reply learned counsel for prosecution moved application that DNA report be read in evidence.

Heard learned counsel for accused and prosecution.

Learned counsel for accused submitted that application has been moved just delay and accused are in jail for more than 5 years.

Learned counsel for the prosecution submitted that DNA report is already on file, but no question u/s 313 Cr.P.C. has been put to accused with regard to DNA.

Perusal shows that DNA report is papers no. 32-A/2 to 32-A/10 is already on file with addl. C.D. 32-A/1 with order dated 12.1.11 with order K.O.F.

Perusal of statement u/s 313 Cr.P.C. shows that by mistake or slip no question on DNA report has been put to accused.

Hence in the interest of justice it is necessary to put question on each and every evidence available on record to accused u/s 313 Cr.P.C. to enable accused to put the defence, if any.

Hence put up on 14.3.13 for additional statement u/s 313 Cr.P.C. Application of the prosecution is accordingly disposed off."

On 21.5.2013 when the revision came up before the Court as fresh following order was passed:

"Learned AGA is unable to show any Notification by the Central Government on the basis of which, DNA report submitted by CDFC can be admissible under section 293 Cr.P.C.

Let the District Government Counsel (DGC), Allahabad appear in person on the next date to apprise the Court with the appropriate Notification.

Put up this case on 4th July, 2013 as fresh.

In the meantime, the additional statement of the accused under section 313 Cr.P.C. shall not be recorded by the Addl. Sessions Judge, Court no. 9, Allahabad in S. T. No. 73 of 2009 on the basis of DNA report unless the DNA report is proved in accordance with law or it is shown to the satisfaction of the Court below on the basis of a Notification of the Central Government that DNA Report is admissible under section 203 Cr.P.C. without formal proof.

A copy of this order be given to learned AGA within 3 days."

5. On 11.7.2013 in compliance with the order of the Court dated 23.5.2013 Sri R. P. Singh, District Government Counsel, Allahabad appeared and placed before the Court photo-copy of letter no. TS-17-2002(1)/298 dated February 11, 2010 issued by the Head Quarter of U. P. Police Technical Services under the signature of its Additional Director General Police addressed to all Inspector Generals of Police, Railways, PAC, CBCID, all Deputy Inspector Generals of Police, Senior Superintendent of Police of the State and Incharge Director and Joint Director of Forensic Science Laboratory, Lucknow, Agra and Varanasi, the context of the letter is reproduced below:

"fo"K; & iSr`d fookn ds vfrfjDr vU; Mh0 ,u0 ,0 ijh{k.k lh0 Mh0 ,Q0 Mh0] Mh,u, fQaxj fizUV ,oa funku dsUnz] gSnjkckn ls djK;s tkus ds laca/k esaA fof/k foKku iz;ksx'kkyk] mRrj izns'k] y[kuÅ esa iSr`d fookn laca/kh Mh0,u0,9 ijh{k.k ds laca/k esa iqfyl egkfun'skd] m0iz0 y[kuÅ ds ifji= la;k&7@2009 fnukad 30-1-2009 ¼layXud&1½ dk lUnHkZ xzg.k djsaA bl laca/k esa mYys[kuh; gS fd fof/k foKku iz;ksx'kkyk] mRrj izns'k] y[kuÅ esa fQygy iSr`d fookn laca/kh Mh0,u0,0 ijh{k.k gks jgk gS] blds vfrfjDr vU; ijh{k.k ds fy, lSEiy lhMh,QMh] gSnjkckn Hksts tk ldrs gSaA fof/k foKku iz;ksx'kkyk] mRrj izns'k y[kuÅ vkSj lhMh,QMh ds chp

gq;s ,e0vks0;w0 ds rgr ;g ijh{k.k muds }kjk vk/ks nj ij fd;s tk;saxsA jDr@jDr ds /kCcs ds izfr lSEiy 5000@& :i;k dh nj dh rgyuk esa 2500@& :i;k rFkk vU; lSEiy ds fy, 10000@& :i;k dh nj dh rgyuk esa 5000@& :i;k fy;s tk;saxsA bl ds fy, izn'kZ lhMh,QMh] Mh,u, fQaxj fizaV ,oa funku dsUnz] gSnjkckn }kjk tkjh fn'kk&funsZ'k ,oa layXu izi= 1&2&3 ds lkFk Hksts tkus pkfg,A lkFk gh izn'kZ funs'kd] fif/k foKku iz;ksx'kkyk ds vxzs"k.k i= ds lkFk gh Hkstk tkuk pkfg,] vU;Fkk 50 izfr'kr dh NwV ugha izklr gks ldsxhA bl lECU/k esa fdh izdkj dh tkudkj@leUo; gsrq fof/k foKku iz;ksx'kkyk] mRrj izns'k] y[kuÅ ds QSDl la[;k 0522&2336232 rFkk lh;wth uEcj 9454491992 ls lEidZ fd;k tk ldrk gSA layXud& ;Fkksifj g0 vij iqfyl egkfuns'kd rduhdh lsok;sa] mRrj izns'kA "

6. The learned AGA countering the arguments of revisionist's counsel has contended that the DNA report of CDFD, Hyderabad is admissible u/s 293(1) Cr.P.C. Reliance for this proposition has been made on the case of Cr. Appeal no. 620 of 2007 Vinay Kumar Vs. State and Cr. A no. 826 of 2007 Munish Kumar Vs. State decided by a division bench of Delhi High Court on 3.7.2012, wherein it has been observed as under.

"Under Section 293 of the Criminal Procedure Code a report of a scientific expert duly submitted by him for examination or analysis can be used as evidence without examining the expert under certain circumstances. The Apex Court in State of H.P v. Mastram, (2004) 8 SCC 660 had held that the report of DNA fingerprinting cannot be rejected on the ground that the Government scientific expert who has issued the same, is not enumerated under sub Section (4) 293 of Criminal Procedure Code. The Supreme Court had rather held that the report of DNA Fingerprinting has to be admitted in evidence under sub Section (1) of Section 293 as a report which is issued under the hand of a Government Scientific Expert. Therefore, the report exhibit PW.29/A of CDFD which has also been proved in the statement of Sh. S. P. R. Prasad, PW-29 can be considered and is admissible under Section 45 of the Indian Evidence Act and cannot be ignored."

Reliance has also been placed on the case of Appeal no. 8850 of 2002 Geetha Vs. State of Kerala decided by High Court of Kerala on 17.3.2005 to contend that the report of DNA fingerprinting issued by the CDFD can be admitted in evidence without examination of the expert u/s 293 of the Cr.P.C.

7. Neither the DGC (Criminal), Allahabad nor the learned AGA could produce before the Court any Notification issued by the Central Government u/s 293(4) (g) of the Code of Criminal Procedure making provision for acceptance of the DNA report of scientific expert of the CDFD, Hyderabad. Section 293 of the Code provides that the reports of certain Government scientific experts may be used as evidence in any inquiry, trial or other proceedings under the Code. The section reads as under:

293. Reports of certain Government scientific experts.

- (1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.
- (2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely:-

- (a) any Chemical Examiner or Assistant Chemical Examiner
- (b) the Chief Inspector of Explosives;
- (c) the Director of the Finger Print Bureau;
- (d) the Director, Haffkine Institute, Bombay; (e) the Director, Deputy Director or Assistant Director of a C Serologist to the Government.
- (f) the
- (g) any other Government scientific expert specified, by notification

8. In both the cases cited at the Bar on behalf of the State, reliance has been placed on the case of State of H. P. Vs. Mast Ram (2004) 8 SCC 660. In this case the Hon'ble Apex Court was dealing with the report of Ballistic Expert of Central Forensic Science Laboratory, Chandigarh signed by one Junior Scientific Officer. Dealing with the issue, following observations have been made in para-6 of the report, which reads as under:

"Secondly, the ground on which the High Court has thrown out the prosecution story is the report of ballistic expert. The report of ballistic expert (Ex. P-X) was signed by one junior scientific officer. According to the High Court, a junior scientific officer (Ballistic) is not the officer enumerated under sub-section (4) of Section 293 of the Code of Criminal Procedure and, therefore, in the absence of his examination such report cannot be read in evidence. This reason of the High Court, in our view, is also fallacious. Firstly, the Forensic Science Laboratory Report (Ex. P-X) has been submitted under the signatures of a junior scientific officer (Ballistic) of the Central Forensic Science Laboratory, Chandigarh. There is no dispute that the report was submitted under the hand of a Government scientific expert. Section 293(1) of the Code of Criminal Procedure enjoins that any document purporting to be a report under the hand of a Government scientific expert under the section, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under the Code, may be used as evidence in any inquiry, trial or other proceeding under the Code. The High Court has completely over-looked the provision of sub-section (1) of Section 293 and arrived at a fallacious conclusion that a junior scientific officer is not an officer enumerated under sub-section 4 of Section 293. What sub-section 4 of Section 293 envisages is that the court to accept the documents issued by any of six officers enumerated therein as valid evidence without examining the author of the documents."

9. The judgments in the cases of Geetha (supra) and Mast Ram (supra) were delivered prior to addition of sub-clause (g) in sub-section (4) of section 293 Cr.P.C. The aforesaid judgments were pronounced on 17.3.2005 and 10.9.2004 respectively, while sub-clause (g) in sub-section (4) of section 293 Cr.P.C. came in the Code with effect from 23.6.2006 vide section 26(b) of Act No. 25 of 2005. Thus, there was no occasion for the Courts to deal with the object, scope and effect of inclusion of sub-clause (g) in sub-section (4) of section 293 Cr.P.C. This fact was also not noticed by the Delhi High Court in the case of Vijay Kumar (supra). Although entire section 293 of the Code had been reproduced in the para-59 of the judgment, but sub-clause (g) is missing. The legislature in its wisdom has enlarged the scope of section 293 by including any other Government scientific expert, but with a rider of specific notification being issued by the Central Government in this behalf. It is also pertinent to note that in the case of Vijay Kumar (supra), the DNA report was proved by the expert - Senior Technical Examiner PW-29 who had analyzed the DNA samples and matched the DNA samples of appellant with that of the blood found on the clothes of the victim. Thus, the cases of Vijay Kumar (supra) and Geetha (supra) do not help the prosecution in the instant case. In these circumstances, there cannot be no other conclusion, but to hold that the DNA report of the CDFC, Hyderabad cannot be read in evidence under section 293 Cr.P.C. unless it is proved according to the provisions of Evidence Act.

10. In the instant case the learned trial Court without addressing himself to the core question about the admissibility of the DNA report without its having been proved according to law has illegally stepped forward to put the same in additional statement of the revisionist u/s 313 Cr.P.C. Thus, the learned trial Court has exceeded its jurisdiction in passing the impugned order. The DNA report in question could be put to the revisionist in his additional statement u/s 313 Cr. P. C., if its genuineness is admitted by the defence or it is duly proved as per the provisions of law by examining the concerned expert. The trial Court can exercise its jurisdiction u/s 311 Cr. P. C. to summon the expert, if any such application is moved by the prosecution.

11. The net result of the foregoing is that the impugned order is unsustainable. The revision is allowed and the order dated 13.3.2013 is set aside.

(Anil Kumar Sharma, J) Dated : September 13, 2013 Imroz/-