

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.992 OF 2018

Ms.Aruna D. Narayankar

... Appellant

Vs.

The State of Maharashtra & Ors.

... Respondents

Mr.R.Sathyanarayana I/b T.R. Vispute for the Appellant

Mr.S.R. Pasbola I/b Bhavesh Thakur for Resp. No.3

Mr.A.R. Patil, APP, with Mr.A.A. Palkar, APP, for the Respondent –
State

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: OCTOBER 12, 2018

P.C.:

1. In this application, the order passed by the learned Additional Sessions Judge, City Civil and Sessions Court, Greater Mumbai dated 4.8.2018, below exhibit 146 in Sessions Case No.122 of 2013, is challenged. It is the case of the prosecutrix that the respondent No.3 had committed rape on her, due to which she conceived. The accused further committed an offence of causing miscarriage of the fetus without her consent, which is an offence punishable under section 313 of the Indian Penal Code. Before the Sessions Court, the prosecution examined 11 witnesses and

thereafter, the accused examined 7 witnesses in his defence. The arguments of the learned Prosecutor are over and during the course of the arguments of the learned defence Counsel, especially on the point of DNA report, it was revealed that there is one Histopathology Report (HPR) showing positive test affirming the products of conception in the sample. At that stage, as the prosecution did not move any application, the prosecutrix who is an original complainant, submitted the application under section 311 of the CRPC, for summoning the material witnesses to bring the said report on record.

2. After hearing the arguments of both the sides on the said application (exhibit 146), the learned Additional Sessions Judge rejected the said application mainly on the ground of discharge summary (exh. 51) and relying on the DNA report, held that DNA report is the scientific and most accurate test and when that report is on record, no other report is required in respect of conception. Hence, this application.

3. A copy of the report which is taken on record, is produced by the prosecution before this Court as it is found necessary to decide its importance and bearing on the issue. The said document i.e.,

HPR dated 17.11.2012 is signed by three Doctors from the Department of Pathology from Sir J.J. Group of hospitals. It shows Pathology Slide number and the impression is "Production of Conception". The accused is charged under section 313 of the Indian Penal Code and, therefore, the prosecution has to first prove the fact of conception. In view of this, any report either confirming or denying the fact of conception is undoubtedly a material document for the Court.

4. The question raised is whether at the final stage of the arguments, this document can be allowed to be produced on record? While answering this question, one has to get assured whether this document was in existence or it is manipulated. If it is a doctored document, there is no question of allowing this document on record. However, the document shows the date as 17.11.2012. Two incidents of rape as per the case of the prosecution, have taken place – first on 12.5.2012 and the second on 15.8.2012. Thereafter, various tests like Ultra Sonography, PCOD test, etc. were carried out on various dates from 22.9.2012 onwards. Thus, this report is a document prepared at the relevant time subject to very special evidence and circumstance being

brought on record by the defence to rebut this assumption. Another question raised is why the document was not a part of chargesheet, which was filed in the Court on 16.1.2013?

5. Learned Prosecutor explained after taking instructions from the concerned Investigating Officers, who are present in the Court, that the sample of the fluid was not sent by the police for histopathological test during the course of investigation. He relied on the discharge summary which shows that the victim was admitted in the J.J. hospital and on 31.10.2012 and she was discharged on 3.11.2012. He pointed out that there is specific mention that the products of conception like material evacuated, sealed and sent to Kalina for DNA analysis. It was sent as per the request made by the Investigating Officer. However, in the discharge summary, under the caption of 'COURSE IN THE HOSPITAL AND DISCUSSION', it is specifically mentioned that -

“PT ADMITTED WITH ? INCOMPLETE ABORTION FOR SUCTION EVACUATION. RMO INFORMING DONE AND VALID CONSENT OBTAINED
2/11/12 SUCTION EVACUATION DONE BY MVA SYRINGE.
PT WITHSTOOD THE PROCEDURE WELL. **POCS SENT FOR HPR AND FOR DNA ANALYSIS**

3/11/12 – REVIEW USG DONE – MINIMAL ENDOMETRIAL COLELCTION.

PT WANTS DISCHARGE AGAINST MEDICAL ADVISE SEIORS INFORMED. DISCHARGE GIVEN AGAINST MEDICAL ADVISE.”
(emphasis added)

6. Thus, the learned Prosecutor has on the basis of this discharge summary, explained that this is a course of treatment or analysis which is internally conducted by the hospital itself. So, the hospital sent POCS i.e., the Product Of Conception Sample, for HPR through Department of Pathology and after examination, this report was prepared, which is the disputed document. Thus, it appears that this report was in existence. This is not a manipulated document and the police were unaware of the existence of this document till the arguments were advanced and the point was raised by the defence. Hence, the explanation given by the Prosecutor is accepted.

7. Mr.Pasbola while opposing this application and supporting the order passed by the learned Sessions Judge gave chronology of the gynaecological / pathological investigations carried out by the various Doctors in the J.J. Hospital on examination of the prosecutrix during 28.9.2012 till 2.11.2012. Mr.Pasbola, the learned Counsel appearing for Respondent No.3, submitted that this document is allowed to be taken on record and the

prosecution be directed to lead evidence accordingly as it is a crucial document. The main submission of Mr.Pasbola is based negative DNA report wherein it is mentioned that the sample is found not suitable for DNA. He submitted that the DNA test is an authentic test to arrive at a finding in respect of pregnancy. Once the DNA report is on record, no other document can be given more importance. Secondly, the learned Counsel submitted that allowing this document will mean reopening of the trial and as this document was not in the chargesheet, it will cause prejudice to the defence taken by the accused.

8. The submissions of Mr.Pasbola that this document was not a part and parcel of the chargesheet and if it is taken on record, then, it will cause prejudice to the defence is correct; however, this prejudice can be done away by allowing to examine / cross-examine the witnesses. Additionally, the defence can make application specifically stating as to whom it wants to recall and conduct further cross-examination of the earlier witnesses. If such application is placed, then, further cross-examination of the earlier witnesses is to be allowed and it is the duty of the prosecution to produce those witnesses on the scheduled dates. The document

will not go on record as it is but it is necessary for the prosecution to examine proper witness and tender a correct evidence of the authorship of the said document. The defence will be given a fair opportunity to cross-examine the witnesses, who are going to be examined by the prosecution in order to prove the impugned document. Whether the DNA report is more authentic than HPR on the point of conception is a matter of arguments and that is left to the trial Court after assessing the entire medical evidence, the Court will give its verdict on this point.

9. Lastly, it is necessary to mention that for understanding the pathological report, one needs sound medical knowledge and therefore, if such evidence is brought on record, especially on the background of the special circumstances in this case, then, I am of the opinion that it is to be allowed in this case, even at this late stage.

10. I am informed that the trial has commenced in 2014 and is still going on and therefore, it is necessary for the trial Court to conclude the trial on or before 30.11.2018. The trial Court shall accordingly commence its trial on 22.10.2018. The parties to appear before the trial Court on 22.10.2018 at 11am and

thereafter, the trial Court to go with the trial on a day to day basis at least in one sitting a day with some exceptions, however should conclude the trial on or before 30.11.2018.

11. With the above direction, the application is disposed of.

(MRIDULA BHATKAR, J.)