

Bharatkumar Dhaniram Kori .. Applicant
Versus
The State of Maharashtra .. Respondent

Ms. Rebecca Gonsalvez a/w Chandni Chawla for Applicant in IA NO. 2516 of 2024 and IA No. 2577 of 2024 and for respondent in CONF No.2 of 2022.

Mr.J.P. Yagnik, APP for the Appellant/State in CONF No.2 of 2022 and for respondent in IA No. 2516 of 2024 and IA No.2577 of 2024.

**CORAM: BHARATI DANGRE &
MANJUSHA DESHPANDE, JJ.
DATED : 29th JULY, 2024**

ORDER:- (PER BHARATI DANGRE J.)

1 On convicting accused Bharatkumar Kori in Special
POCSO Case No .17 of 2020 and having been sentenced to death, the
Confirmation Case No.2 of 2022, is placed before us for final
hearing, upon receipt of the Record and Proceedings with paper book.

The accused Bharatkumar has not filed any appeal, being aggrieved by the judgment of conviction.

2 In the Confirmation Case No.2 of 2022, Interim
Application No.2516 of 2024 is filed under Section 367 and 391 of
Code of Criminal Procedure, by the accused/convict seeking the

following reliefs:-

“a. Direct the Ld. Spl. Judge (POCSO) & Additional Sessions Judge, Thane, to summon and allow cross examination by counsel for the Applicant, of Mr. R.M. Shinde, Assistant Chemical Analyser to Govt. FSL Mumbai, who was involved in the preparation of DNA reports MLC Case No. DNA-3015/10 (Ex. 110 pg. 348), MLC Case No. DNA-441/2020 (Ex. 113 Pg. 534), MLC Case No.DNA-383/2020 (pg.377), and MLC Case No.DNA-384/2020 (Pg.372).

b. Direct the Ld. Spl. Judge (POCSO) & Additional Sessions Judge, Thane, to summon and allow cross examination by counsel for the Applicant of Mrs. S.V. Patil, Assistant Chemical Analyser to Govt. FSL Mumbai, who was involved in the preparation of serology reports including ML Case No. B-8588/19 (Ex.111, Pg. 350), ML Case No.8591/19 (Pg.366), ML Case No.8590/19 (Pg.370).

c. Call for complete laboratory documentation of Forensic Science Laboratory, Mumbai in respect of DNA reports MLC Case No.DNA- 3015/10 (Ex. 110 Pg. 348), MLC Case No. DNA-441/2020 (Ex.113 Pg. 354), MLC Case No.DNA-383/2020 (pg.377), and MLC Case No.DNA-384/2020 (Pg.372), including but not limited to copies of the following:

i. All laboratory documenation including case register, worksheets, bench notes and equipment log sheets related to tests conducted and methods used for DNA extraction, quantification, amplification, electrophoresis and interpretation for all the articles received;

ii. Electropherograms for DNA profiles and electronic raw data (.fsa) obtained from all exhibits received, allelic ladders and control samples used; and

iii.Working procedure manuals including DNA manual used in examination of all exhibits received; and

iv. Details of kits and softwares used for DNA extraction, quantification, amplification, electrophoresis and interpretation in the case along with manuals of such kits and softwares; and

v. Details of seals and sample seals of all exhibits received.

d. Call for complete laboratory documentation of

Forensic Science Laboratory, Mumbai in respect of serology reports ML Case No. B-8588/19 (Ex.111, Pg.350), ML Case No. 8591/19 (Pg. 366), ML Case No. 8590/19 (Pg. 370), including but not limited to copies of the following:

- i. All laboratory documentation including case register, worksheets, bench notes, equipment log, and any photographs of the observed resulted (visual and microscopic) relating to all articles received, for detection of blood and semen; and controls used for such examination;***
- ii. Details of tests conducted and techniques used for examination of the articles received as well as the results of these tests;***
- iii. Working procedure manuals/Standard Operating Procedure of the biology and/or sereology division which were used during the examination of all articles received;***
- iv. Complete documentation of chain of custody of all Articles sent for examination to FSL Mumbai with details of seals and sample seals used;***
- e. Issue appropriate directions for examination of the Applicant under S. 313, CrPC with respect to such additional evidence.***
- f. Pass any such further and other orders that this Hon'ble Court may deem fit and proper, in the interests of justice.***
- g. That the verification may be dispensed with as the Applicant is in custody ; and***
- h. For any other just and equitable relief that this Hon'ble Court may deem fit to grant."***

3 We have heard learned counsel Ms. Gonsalvez for the applicant in support of the application and it is argued by her that, the biological samples of the deceased were collected by Dr. Aditya Rayate (PW-20), after the postmortem examination being conducted at JJ Group of Hospital and the collected samples *interalia* included vaginal swab, high vaginal swabs, perivaginal swabs, perineal swabs, anal swabs, perianal swabs, oral swabs, nail clippings, scalp layer,

cotton swab from sole of foot and blood of the deceased.

The frock allegedly worn by the deceased on the night of the incident was seized at Bhoiwada police station on 22/12/2019, and her nicker/tights was seized by the police from near Monish Hotel on 24/12/2019.

Similarly the biological samples of the applicant were also seized at Indira Gandhi Medical Hospital on 26/12/2019, including blood samples, pubic hair, and nail clippings.

Since, it is the case of the prosecution that the clothes worn by the applicant on the night of the incident were found hanging on a rope near Kamal Textile, and they were seized, which included his shirt and jeans along with underwear and these samples were forwarded to Forensic Science Laboratory, Mumbai (FSL) for a range of forensic tests and chemical analysis.

4 Results of DNA analysis under the signature of Assistant Chemical Analyser Mr. R.M. Shinde was received, which reported as under:-

“a. DNA-3015/2019 dated 14.02.2020 (Ex.110), which inter alia found that the DNA profile obtained from the biological samples of the deceased did not match the DNA profile from the blood sample of the Applicant.

b. DNA-441-2020 dated 14.07.2020, (Ex.113), which inter alia found that the DNA profile obtained from the semen stains on the tights of the deceased matched the DNA profile obtained from the Applicant's blood sample. Additionally, the report records that the DNA profile obtained from the bloodstains on the shirt of the Applicant matched the DNA profile obtained from the deceased's scalp hair.

c. DNA-383/2020 dated 30.07.2020 (Pg. 374), which inter alia reported that only a female DNA profile was obtained from biological samples of the deceased.

d. DNA-384/2020 dated 30.07.2020 (Pg. 372), which inter alia reported that only a female DNA profile was obtained from smear slides of the deceased's biological samples.

5 Results of the serology analysis were signed by Asst. Chemical Analyser Mrs. S.V. Patil and reported as follows:

e. Serology report B-8588/19 (Ex.111) inter alia found human semen stains on the deceased's tights, and found human blood of 'A' group on the clothes of the deceased and the Applicant. The blood group of the semen stains could not be determined.

f. Serology report B-8590/19 did not report any presence of semen in the deceased's biological samples. A bare reading of the report suggests that the samples were forwarded for DNA analysis without any preliminary chemical analysis to ascertain the presence of semen or blood.

g. Serology report B-8591/19 did not report any presence of semen in the smear slides prepared from the deceased's biological samples. A bare reading of the report suggests that the samples were forwarded for DNA analysis without any preliminary chemical analysis to ascertain the presence of semen or blood."

We have taken note of the aforesaid reports.

6 The learned Special Judge, who tried the accused has heavily relied upon this forensic report, when he recorded a finding that, the DNA of the accused and the victim has matched and in order to derive a conclusion that there was a forcible sexual intercourse with the victim girl and the death was homicidal in nature, on considering the evidence of all the witnesses, i.e. witnesses on last seen theory, the Judgment record as below:-

"...However, considering the evidence of all witnesses i.e. witnesses on the last seen theory, co-workers of the accused and DNA report which are matched with the accused and victim are corroborated to the prosecution story. From all this

evidence on record, it appears that the prosecution has established the fact that accused has committed rape and murder of the victim.”

7 The application is preferred for issuance of summons to the forensic expert Mr. R.M. Shinde and Mrs. S.V. Patil, who have issued the reports and it is urged before us that, the accused was not afforded opportunity to challenge the reports during trial and without examining the Analyst and the reports were incomplete without the underlying documents.

8 We have noted that forensic reports were exhibited through PW-20, a Junior Resident Doctor at J.J. Hospital, who conducted postmortem report, but he had no personal knowledge of the forensic test conducted or the analysis undertaken, in addition no laboratory documentation explaining the process that was followed while conducting the test was brought to the notice of learned trial Judge, as Mr. R.M. Shinde and Mrs. S.V. Patil, who are signatories of the said report were not examined.

It is urged before us that the trial court did not call for any underlying material in order to understand the reports as per Section 45 of the Indian Evidence Act, being the evidence coming from the ‘Expert’.

On the ground that the reports are scientific in nature and require careful study and analysis, since no opportunity was afforded to challenge the said report, it is projected before us that the right of accused/applicant under Article 21 of the Constitution is violated.

9 We have heard Mr. Yagnik, APP, representing the respondent State and he would place reliance upon the affidavit filed

on behalf of the respondent/investigating officer, wherein it is asserted that the evidence, which is relied upon by the learned Judge, has come on record through witness no. PW-13, PW-20, PW-23, PW-24 and PW-25.

PW-20, according to investigating officer has deposed about the external examination of the body of the deceased and he has also deposed about the swabs, which were collected and sent for chemical analysis. The Investigating officer has relied upon the Exhibits 100 to 106, which include the articles which were sent for analysis and the reports at Exhibit 108, 109 and 110, which referred to six sealed packets.

In addition, the deponent has deposed that PW-21 attached to Bhoiwada Police Station had gone to FSL, Kalina to bring the DNA kit and this witness has confirmed the other muddemal articles like clothes of accused, clothes of victim, spot panchnama, as well as the stone having seal of Bhoiwada Police Station and she had confirmed that the DNA sample of the accused from IGM hospital was marked with a seal.

PW-13 according to the affidavit has proved the seizure of clothes of the accused, which also include his undergarments.

Mr. Yagnik has submitted that when the CA report was produced through PW-20 and the same was exhibited under Section 293 of Cr.P.C, the accused as well as the advocate were absent and since no objection was raised for exhibiting these documents, at this stage of Section 366 of Cr.P.C, when the death sentence imposed is before this Court for confirmation, no such objection can be raised.

10 It is also submitted by him that, in the present case DNA report which were part of the record and the same have to be read along with other documents having been admitted in U/s 294 of Cr.P.C and therefore there was no question of examining any witnesses by the prosecution in fact the applicant/accused had enough opportunity to make an application for examining the expert witness, if at all they were aggrieved by the said report produced by the prosecution and though accused did not raise any objection after having cross examined the prosecution witnesses, now they cannot file the present application and the same needs to be rejected.

 It is urged that the accused has not demonstrated in what respect the report was deficient, so as to summon the expert before exhibiting the DNA report in evidence during the Trial.

 Hence now the objection raised during the hearing of reference, by the State, the application for examining the expert requires to be rejected.

11 We have considered the rival contentions. We must take note of Section 366 of the Code, which prescribe that when a Court of Sessions passes sentence of death, the proceedings must be submitted to the High Court for its confirmation.

 Section 367 provide to the power of the High Court, to which the proceedings are submitted and it contemplate that if the High Court thinks that a further enquiry should be made into or additional evidence be taken upon, on any point bearing upon the guilt or innocence of the convicted person, it may make such enquiry or take such evidence itself, or direct it to be made or taken by the

Court of Sessions.

On consideration of the case submitted to it, the High Court may confirm the sentence or pass any other sentence warranted by law or may annul the conviction and convict the accused of any offence of which the Court of Session might have convicted him or order a new trial on the same or amend charge or it may acquit the person.

12 The proceedings contemplated under Chapter XXVIII under a caption 'submission of death sentences for confirmation' has been held to be proceedings in continuation of the trial, as it entitle the High Court to direct further enquiry or even to take additional evidence and even the High Court is competent to acquit the accused, who has been sentenced to death by the Sessions Court.

Section 386 of the Code is a power to be exercised by an Appellate Court, which includes the power to reverse the finding and sentence imposed and acquit or discharge the accused or directing him to be re-tried and this power shall be exercised when the Court is hearing an Appeal either under Section 377 or Section 378 of the Code and when it is found that, there is no sufficient ground for interfering, the Appeal may be dismissed.

Section 391 allow the Appellate Court, if it thinks additional evidence to be necessary, record its reasons and either may take the evidence itself, or direct it to be taken by the Court of Session or a Magistrate, with a right being conferred on the accused or his pleader to be present when the additional evidence is taken on record.

Sub-section (4) of Section 395 clarify that the taking of evidence under the said Section shall be subject to provisions of Chapter XIII as if it was an enquiry.

13 ***In Munna Pandey vs. State of Bihar AIR (2023) SC 5709***, the contours of the power to be exercised by the High Court, when it confirm a sentence of death imposed by the trial court has been specifically highlighted in the following words:-

“...The position is, however, different where the appeal is by an accused who is sentenced to death, so that the High Court dealing with the appeal has before it, simultaneously with the appeal, a reference for confirmation of the capital sentence under Section 366 of the CrPC. On a reference for confirmation of sentence of death, the High Court is required to proceed in accordance with Sections 367 and 368 respectively of the CrPC and the provisions of these Sections make it clear that the duty of the High Court, in dealing with the reference, is not only to see whether the order passed by the Sessions Judge is correct, but to examine the case for itself and even direct a further enquiry or the taking of additional evidence if the Court considers it desirable in order to ascertain the guilt or the innocence of the convicted person. It is true that, under the proviso to Section 368, no order of confirmation is to be made until the period allowed for preferring the appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of, so that, if an appeal is filed by a condemned prisoner, that appeal has to be disposed of before any order is made in the reference confirming the sentence of death. In disposing of such an appeal, however, it is necessary that the High Court should keep in view its duty under Section 367 CrPC and, consequently, the Court must examine the appeal record for itself, arrive at a view whether a further enquiry or taking of additional evidence is desirable or not, and then come to its own conclusion on the entire material on record whether conviction of the condemned prisoner is justified and the sentence of death should be confirmed.”

14 While exercising this power we are called upon to

consider the request of the accused to cross-examine the Chemical Analyser, who had submitted the DNA report and this request is examined by us in light of Section 293 of the Code of Criminal Procedure, which allow a document purporting to be a report under the hand of a Government Scientific Expert to be used as evidence in any enquiry, trial or proceeding under the Code, upon any matter or thing duly submitted to him for examination or analysis.

Sub-section (2) of Section 293 empower the court, if it things fit, to summon and examine any such expert as to the subject matter of his report.

Admittedly, the Section applies to the Chemical Analyser or Assistant Chemical Analyser to government, who is categorized as Government Scientific Experts by virtue of sub-section (4).

15 Section 45 of the Evidence Act, is with reference to the opinion of experts and who are the persons who would fall in this category is culled out in section 45 which reads thus:-

“45. Opinions of experts.—When the Court has to form an opinion upon a point of foreign law or of science, or art, or as to identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] [or finger impressions] are relevant facts. Such persons are called experts.”

In order to bring the evidence of the witness within the category of expert it is to be established that he is the person, who has made special study of the subject or acquired a special experience therein or in other words, that he is a skilled person or has adequate knowledge of the subject.

16 ***In Ramesh Chandra Aggarwal vs. Regency Hospital Ltd, (2009) 9 SCC 709***, their lordships of the Apex Court has culled out the role of an expert witness in the following words:-

“20. An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions.”

22. In the article “Relevance of Expert’s Opinion” it has been opined that the value of expert opinion rests on the facts on which it is based and his competency for forming a reliable opinion. The evidentiary value of the opinion of an expert depends on the facts upon which it is based and also the validity of the process by which the conclusion is reached. Thus the idea that is proposed in its crux means that the importance of an opinion is decided on the basis of the credibility of the expert and the relevant facts supporting the opinion so that its accuracy can be cross checked. Therefore, the emphasis has been on the data on the basis of which opinion is formed. The same is clear from the following inference:

“Mere assertion without mentioning the data or basis is not evidence, even if it comes from an expert. Where the experts give no real data in support of their opinion, the evidence even though admissible, may be excluded from consideration as affording no assistance in arriving at the correct value.”

The take away of the aforesaid pronouncement is, that when the expert gives no real data in support of his evidence, such evidence even though admissible may be excluded from

consideration, as it afford no assistance in arriving at the correct value.

17 It is not in dispute that the Apex Court has highlighted the importance of quality control measures and quality assurance procedure during testing and analysis of forensic samples and to ensure that adequate precautions are taken during its analysis to minimize the possibility of contamination.

18 The forensic experts, who signed the DNA and serology reports, i.e., Mr. R.M. Shinde and Mrs. S.V. Patil, respectively; were not examined in the present case. The forensic reports relied on by the prosecution only record the Analysts final opinion, without providing any reasons, data, or the underlying basis for the same.

Sereology reports Ex.111 (B-8588/19), B-8590/19, and 8591/19 do not disclose which forensic examinations were conducted on the samples, the process followed during these examinations, and also do not provide the laboratory documents in support of the results of the analysis.

Without this information, the Ld. Trial Court could not have assessed the credibility of the forensic results and the applicant was not in a position effectively challeng the incriminating findings in the reports.

Similarly, DNA reports, DNA-384/2020, and DNA-383/2020 do not record details of the tests conducted on the samples, the kits and softwares used in analysis, or the allelic tables and electropherograms generated during the analysis.

Although DNA reports Ex. 110 (DNA-3015/19) and Ex.

113 (DNA-441/2020) contain allelic tables mentioning the DNA profiles obtained from each sample, these findings are also not supported by the electropherograms or the underlying electronic raw data on the basis of which the allelic table was prepared by the DNA analyst.

Crucial information regarding the process followed for DNA examination, including, the kits and software used at different steps during DNA profiling, the notes and worksheets regarding the findings at each step and the supporting laboratory documentation for the different steps and processes involved in DNA analysis have not been provided either to the court or the accused.

Without these underlying documents, the court could not have assessed the credibility of the findings of the DNA report, which is relied upon in recording a finding of conviction and imposing death sentence.

19 The underlying documents are essential for the court to determine if the reports meet the required standard under Section 45 of Indian Evidence Act, 1872.

Notably, as supported by above mentioned orders of the Hon'ble Supreme Court and various High Courts, absence of request on the Applicant's part to access these documents at an earlier stage should not to foreclose his right to trial.

Recently, the Hon'ble Supreme Court has acknowledged that the right of fair disclosure of an accused, extends to any document which is relevant for his defence in ***P. Ponnusamy v State of Tamil Nadu 2022 (16) Scale 230.***

20 We find substance in the submission of Ms. Gonsalvez, who have urged that the biological samples of the deceased were collected by PW-20 on 22/12/2019, and handed over to one API Joshi on the same day, to be forwarded for analysis to FSL Mumbai through the police. These samples were received at FSL Mumbai for forensic analysis on 26/12/2019. Details of the storage of these samples for four days between collection on 22/12/2019 and forwarding on 26/12/2019, have not been brought on record. As biological samples are susceptible to degradation and contamination if stored under improper conditions, details of the conditions of storage are necessary to ensure that the samples were suitable for forensic analysis.

 Similarly, there is no information on record regarding the conditions of storage of the samples or their internal movement after being received at FSL Mumbai. Although, the biological samples of the deceased for chemical and DNA analysis were received on 26/12/2019, results of the forensic analysis were not available until 14/07/2020. In order to rule out the possibility of degradation or inadvertent contamination of the biological samples, it is necessary to examine the conditions in which the samples were kept for nearly 8 months at FSL, Mumbai, before the forensic analysis was completed.

21 We have noticed that the DNA report does not mention any statistical analysis data, without which the frequency of occurrence of DNA samples have become doubtful and as DNA evidence is inherently probabilistic in nature and need to be supported by its statutory evaluation.

 It is only an expert, who can throw light upon the profile

obtained during analysis and since there are specific guidelines to be followed for conducting DNA analysis in form of the manual of forensic DNA testing issued by the Directorate of Forensic Sciences Services, Ministry of Home affairs, we deem this to be a fit case, where in absence of the DNA expert being examined, the finding of guilt in the impugned judgment cannot be said to be conclusively proved.

It is for this aforesaid reason, and since the accused deserve a fair opportunity for dealing with the evidence, which is relied upon for reaching of his conviction, we deem it appropriate to grant the application.

ORDER

- a) Interim Application No.2516 of 2024 is allowed in terms of prayer clause (a), and (b).
- b) The Special Judge (POCSO) & Additional Sessions Judge, Thane, shall summon Mr.R.M. Shinde, and Mrs. S.V. Patil, Assistant Chemical Analysers to Govt. FSL Mumbai, in connection with Exhibit No.111 and 113 and upon their examination, afford an opportunity to the applicant/accused to cross-examine the two expert witnesses.
- c) Upon the examination of the expert witnesses, if any incriminating evidence is brought before the learned trial Judge, that shall be put to the accused under Section 313 of Cr.P.C, by way of additional evidence, either by securing his presence in person or by adopting virtual mode.
- d) The presence of the applicant/accused is dispensed with while

the witnesses are examined/cross-examined, but it should be ensured that the evidence is taken in the presence of the counsel representing the applicant.

e) We direct the Sessions Judge, to complete the entire exercise of recording evidence of the expert witnesses, within a period of two months from the day of uploading of this order and if necessary, by putting the same to the accused under Section 313 of Cr.P.C, within a period of one month thereafter and submit the same before this Court on or before 14/11/2024, by complying the provisions of Section 367(3) of Cr.P.C.

f) Record and Proceedings of the Special POCSO Case No. 17 of 2020, received in this Court, shall be remitted to the trial court forthwith for compliance of the aforesaid direction and along with the evidence, which is directed to be forwarded, as directed above, the R & P shall also be remitted back to this Court.

g) We direct the Registrar (Judicial) to communicate this order to the trial court in addition to the communication by the learned APP.

h) Parties to act on the authenticated copy of this order.

(MANJUSHA DESHPANDE,J)

(BHARATI DANGRE, J.)