
(2004) 02 GUJ CK 0033

In the Gujarat High Court

Case No : Criminal Revision Application No. 68 of 2004

Chandan Panalal Jaiswal

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 25-02-2004

Acts Referred:

Bombay Prohibition Act, 1949 — Section 66(1), 85
Criminal Procedure Code, 1973 (CrPC) — Section 173(2), 293
Penal Code, 1860 (IPC) — Section 114, 234, 323, 338, 342

Citation : (2004) CriLJ 2992 : (2005) 25 GLH 225 : (2004) 3 GLR 2726

Hon'ble Judges : C.K. Buch, J

Bench : Single Bench

Advocate : Saurin A. Shah, for Petitioner No. 1-2, for the Appellant; A.D. Oza, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

C.K. Buch, J.—Rule. Mr. A.D.Oza learned PP waives formal service of Rule on behalf of the respondents.

2. With the consent of the parties the matter is taken up for final hearing.

3. Heard the learned counsel for the parties.

4. Present Revision Application is moved against the order dated 9.2.2004 passed by the learned Metropolitan Magistrate, Court no.4, Ahmedabad allowing the applications preferred by the Investigating Officer dated 27.1.2004 and 30.1.2004 with reference to an offence registered with Shahibag Police Station, Ahmedabad being CR-I 2 of 2004.

5. Both the petitioners, according to the case of the prosecution, are the original accused of the said offence punishable u/s 376,342,338,234,323 read with section 114 of the Indian Penal Code and sections 66(1)(b) and Section 85 of the Bombay Prohibition Act.

6. It is prayed by both the petitioners that the order under challenge, granting both the applications preferred by the investigating Officer, Assistant Commissioner of Police, F Division, Ahmedabad City, Ahmedabad may be quashed. Alternatively, it is prayed that the petitioners may be permitted to engage DNA Forensic Examiners of their own choice and the investigating agency may be directed to see that the team DFS as well as the team of DNA Forensic examiners engaged by the petitioners jointly conduct the DNA finger printing test. The petitioners have also prayed one more alternative relief that at the time of taking of the sample of the blood for the purpose of conducting DNA finger printing test, the DNA examiners engaged by the petitioners may be permitted to collect the sample of the blood at the same time for the purpose of taking DNA finger printing test and to give their independent opinion about their finding.

7. The basic purpose of asking this relief in para 7 of the memo of the revision is that the petitioners have consistently raised a plea of alibi with the investigating agency and the agency is not paying any heed and the investigating officer has not even cared to ascertain the various facts told to the investigating office in support of their plea of alibi. The other bone of submission is that the test is very sensitive and the test being a scientific test, it should be conducted with utmost care and caution because some small/minor error may disturb the entire test and finding and that may result into serious prejudice to the accused.

8. The anxiety of expressed by Mr. Saurin Shah learned counsel for the petitioner before the court is that, if proper care is not taken while drawing the sample and testing the sample drawn from the body of the accused with crime exhibit (the alleged muddamal or articles) then the original exhibit (article) may vanish because of its smallness and use in testing process and the accused may not get a chance to rebut the finding recorded by praying re-testing even if they so desire at the time of placing their defences. Other aspects are also elaborately mentioned in the arguments, written submissions and other documents shown to the court today. So all relevant care and caution are required to be taken including the secrecy of the data. Thus according to Mr. Shah there should not be any objection on the part of the respondent State in permitting the accused to engage their own experts in the entire process, which the prosecution presently intends to undergo for DNA finger printing test. It is submitted that the names suggested by the petitioners can be scrutinised by the Respondent-State.

9. Mr. Shah learned counsel appearing for the petitioners while dealing with the contentions raised in the memo of revision, has taken me through some part of the report of a Committee on DNA Forensic Science and the work done by a Commission on DNA Forensic Science published by National Academy Press, Washington D.C. 1996 and has pointed out that in our country without an Act like "DNA IDENTIFICATION ACT 1994" or any other law establishing a formal framework for setting national standard of quality assurances and proficiency testing, the accused should be permitted to participate in the process. He has also quoted some part of a research paper presented during the proceedings of 11th

All India Forensic Science Conference by a expert Kashyap V.K., Central Forensic Science Laboratory, BPR&D, Calcutta, wherein the expert focused on some important aspects of Forensic DNA Technology and has pointed out that in USA and UK and other developed countries, Governments have enacted a special law to introduce DNA testing and provided funds for such federal frame work to introduce DNA testing and make the testing compulsory in analysis of crime exhibits and generating data base on general sample only to see that investigation and prosecution move in the correct direction. An evaluation of Forensic DNA evidence , has always looked to various scopes of error including the laboratory errors and has pointed out number of cases tried and concluded by foreign courts wherein rape convictions have been overturned since 1992 to 1996. According to me, the years of these overturned cases, are relevant. in light of the facts pointed by Mr. Oza and the say of Dr. Mehta who has assisted the court as and when the query was raised by the court during the hearing of this revision application.

10. The apprehension expressed before the court is qua the DNA evidence collection or the attempts by highly prejudicial investigating agency . A sample, if not properly collected and/or analysed with , (i.e. of general sample and the crime exhibits), then the same could not to be called into question and the accused shall have to face trial and therefore, when the petitioners have consistently taken the plea of alibi, they should be atleast permitted to observe the process of drawing of sample from the body of the person of the accused and the process of examination which was take place in Forensic Science Laboratory (FSL for short), atleast from outside of a window glass.

11. It is true that the high profile test is considered irrefutable proof of identification and therefore, it is necessary to establish standard of analysis and accuracy in the level of statistical calculations. The Laboratory performing such tests should be submitted to Double Blind Test in which neither the Lab. nor the Technicians know what the samples are to ensure that they are working with acceptable quality control. In the present case, it is now the say of the petitioners is that they may not be subjected to wrong test or a wrong method(i.e. out out dated method) or that the test is being performed against their will and wish.

12. On the contrary Mr. Shah submitted that the accused persons are ready to give general samples from their respective body so that they can strengthen their case and the findings may give strength to their plea of alibi. But the question raised before the court is whether the investigating agency can be conferred with the authority to resort to DNA test in absence of any special law enacted by the legislature for the said test. The answer would be that under the Cr.P.C. vide powers of investigation are conferred on the investigating agency and when the present accused are not under police remand/custody, necessary permission can be sought for from the court. The court can permit, on merit of each case, the investigating agency to take the accused for necessary test such

as NARCO analysis, lie detection test or finger printing etc. of the accused and to draw general sample from the body of an accused person. But obviously, when an accused is asked to undergo DNA analysis while granting such permission to the said authority/agency (when it comes to DNA finger printing analysis/test,) appropriate directions can be issued to safeguard the interest of the accused and other relevant aspects as the test has been believed to be conclusive even though the same is sensitive from all biotechnological and sociological point of view. There should not be a permission for an invasion on individual privacy and therefore, the 3 (three) factors determining seriousness of invasion on privacy pointed out by Mr. Shah should be taken care of. These three factors are; (a) whether the person has a reasonable expectation that the information is private and will be accessible by others only with the person's consent (b) how sensitive the information is i.e. what impact on them might be from non-consensual disclosure and (c) how invasive the method of obtaining the information is ? and under such circumstances special safeguards are required to be enacted to protect the information pertaining to individual DNA analysis/test.

13(i). At this juncture I would like to quote some part from the book published by Pearson Education having heading "Understanding Biotechnology" from Chapter 10 titled as "Forensic DNA" wherein the author has stated that,

" Considering the DNA analysis a powerful identification technic it should be used carefully. The sensitivity level of many DNA test is so high that cells from a Technician's hands or from its sneeze could contaminate the sample. Therefore, care in the collection, custody and manipulation by the biological sample is of great importance for the validity of this analysis. Finally, human being can make mistakes. Technicians can mislabel a flask, change codes, change names and so on. Due to many possible errors, many laboratories use double reading in each step of the analysis. They also save part of the sample for possible re-analysis."

13(ii) It would be also proper to quote a very relevant portion from a book titled as "Foundation for DNA Finger Printing Evidence" by Jeffrey Lee Ashton dealing with "The Evidentiary Matter" and the same is about "chain of custody":

"Proof of the chain of the custody of sample used in DNA identity testing present no unusual problems. Procedures already used for collection, storage and transportations of samples used in the standard serology will suffice well for samples used in DNA testing. Care should be taken to seal and label samples properly to ensure the future integrity and the identification of the samples.."

14. Irrespective of the request made by the accused the courts are supposed to ensure the laboratory accuracy and should also focus while granting such permission and asking the present accused to undergo DNA finger printing test/analysis on the aspect of "laboratory error"

16. Expressing apprehension of vanishing the entire crime exhibits, it is argued that where there is no scope of duplicate tests of a particular crime exhibit, the prayer of the petitioner being innocuous, should be accepted and the petitioners

may be permitted to keep their DNA Forensic examiner(expert) present right from the stage of collection of blood samples till the test analysis are performed.

17. Mr. Oza learned PP has strongly resisted the submission and has pointed out that there is no scope of errors as pointed out by Mr. Shah and the apprehension expressed by him is in reference to the methods earlier adopted by the FSL in performing DNA finger Printing Test because in early years the Restriction Fragment Length Polymorphism(RFLP) based technology was used. Of course the new technology known as PCR base technology was also adopted during some of these years i.e. between 1987 and 1998. In the year 1997 PCR and Sequence based technology was used (which is useful) in determining the maternal LINEAGE and/or parental relatedness. At present the latest technology-analysis technique use is STR technology which has some relation with PCR and the sequence based technology. This STR i.e. Short Tandem Repeat is the latest one. So the apprehension expressed by Mr. Shah is only relevant, if any earlier or out dated technology is sought to be adopted for analysis/test, in the present case.

18. A statement has been made by the learned PP on instructions from Dr. Mehta Jt. Director , who was present in the court at the instance of the court, that in the present case considering the routine procedure of collection of reference blood sample in DNA identification, a format is being prepared and the same is required to be signed and submitted by the person who gives reference blood from his body and he is required to ensure the authenticity of the blood sample collected for DNA analysis. There is DNA division in the State Laboratory and the format prescribed is to be signed by the responsible medical officer of the hospital and is also supposed to put his seal giving the details providing details in the format prescribed. Over and above such a format carries a recent passport size photograph and the source with a declaration by him as a donor. If the donor is a minor or lunatic or otherwise disabled, such declaration has to be signed by his guardian.

19. In response to a query raised by the court Mr. Shah submitted that the petitioners have no objection if the blood sample is drawn from the source by a responsible medical officer and the petitioners shall co-operative in preparing and signing the format.

20. It is relevant to note that DNA Laboratory of FSL, Gujarat State, Ahmedabad has entered into a MOU with Central Forensic Science Laboratory, Kolkatta and Centre for DNA Finger Printing & Diagnostic, Hydrabad. The laboratory facilities, instruments and the techniques followed by all the three laboratories are the same. All the methods/Kits(instruments etc.) used are well validated for Forensic Identification purpose and in the present case the analysis which is the latest one i.e. STR is to the applied. The STR technique is the latest one and is human specific,fast and easy to standardize. The technique is automated which ensure better accuracy and reproducibility. (emphasis) It is submitted by Mr. Oza that the interpretation of the results is also quite simple and all activities are being

done and observed mainly by computers. Therefore, the possible chances of errors are eliminated.

21. The demand for appointment of an observer is not found acceptable as it may demoralize the Forensic Scientist of FSL who is an independent authority and not working either under police or under the guidance or supervision of police authorities. The Role of FSLs can very well be appreciated in the light of the scheme of section 293 Cr.P.C. and other relevant provisions under which these Laboratories are functioning. It is also relevant to note that appointment of an observer may also lead to contamination including leakage of confidential report and even some information and aspects which would be otherwise required to be kept secret. The potential defence witnesses whether ever could be permitted to enter the laboratory is also a question and this proposed invasion whether can create any hurdle or embargo in performing the analysis also would be a crucial aspect, if such private experts starts non co-operation. If the accused persons have any question or doubt as to the method adopted by the FSL experts, then while examining such expert during the trial the accused positively can bring their own expert who can assist the counsel.

22. The court can reject the request made of such a nature but, I am afraid, if the relief as prayed for is granted, it would amount to interference by court in the investigation. The courts have no role to play during the investigation nor to regulate the same, which is an accepted proposition of law. The learned Magistrate while passing the order under challenge seems to have followed this proposition of law. The ratio of the decision in the case of Union of India vs. Prakash Hinduja and ors. reported in JT 2003 (5) SC 300 could be attracted wherein the Apex Court by referring a case reported in State of Bihar and Another Vs. J.A.C. Saldanha and Others, has observed that power of the police to investigate into the cognizable offence is ordinarily not to be interfered with by the judiciary. The legal position is absolutely clear and also settled that the court would not interfere with the investigation. Such an attempt would mean from the time of lodging of FIR till the submission of the report by the officer incharge of investigation, in the court u/s 173(2) Cr.P.C. this field being exclusively reserved for the investigating agency.

23. In view of the submissions made by Mr. Oza before the court and the statement made by him that present analysis technique followed by the FSL, Gujarat State shall be STR which is the latest one, this court would not interfere in the process of adopted by the said authorities by granting the relief as prayed. But considering the various aspects brought to the notice of the court and the other aspects emerging from the record and the materials supplied to the court while dealing with this revision application, it would be appropriate to give the following directions:

i) that the the authorities should see that blood samples are collected by a responsible medical officer preferably in the jail ward itself and by obtaining a declaration with the photograph in the format shown to the court during the

course of hearing of this petition.

ii) if required, the petitioner accused should be taken to the civil hospital and the blood samples should be drawn by a responsible doctor under a police Japta but the same shall not be treated as handing over the accused to investigating officer and the accused shall remain in the custody of the jail authorities.

iii) The FSL, Gujarat State, Ahmedabad should see/ensure that splitting/division of crime exhibit remains possible. Of course, this would depend upon the size or sufficiency of crime exhibit so that in the event of challenge, duplicate test if required, can be performed as independently as possible and the risk or error can be reduced enormously. If splitting/division of crime exhibit is not possible, then, in such eventuality, the FSL shall inform the court about vanishing of crime exhibit, (totally used) during process.

It is clarified that merely because no specific Act having been enacted by the legislature in our country, the investigating agency can resort to call upon the suspect/accused to undergo DNA analysis/test. It may be virtually under the powers conferred on the investigation by Cr.P.C. Thus even if there is vacuum of legislation, the court is supposed to see that no authority suffers from any type of prejudice. Maximum care, if required, should be taken and it would be wrong to presume any inaction or negligence on the part of the said authorities and especially the doctor who is to draw the sample or FSL experts who have to draw the analysis. Committing some laboratory error, would result into wrong finding, especially when the State has assured that latest technique i.e. STR is to be performed in the present case.

24. I have gone through the relevant part of the book let given by Mr. Oza throwing light on STR Typing by Automated DNA Sequencer. This deals with STR Makers in Human Identification. The book let is prepared for the workshop organized by Central Forensic Science Laboratory, Calcutta and sponsored by Applied Biosystems, USA between 27.9.2003 and 1.10.2003. This court has no reason to ignore the facts and other details emerging from the work done by the Scholars and gathered in research in recent past.

25. For short the apprehension expressed by Mr. Shah is not accepted as well founded. Of course Mr. Shah and Mr. Oza have assisted this court immensely by putting their good efforts. Though this is a case where the petitioners-accused have accepted that they would undergo DNA Finger Printing Test to see that their plea of alibi can be strengthened from the finding which may be recorded. But in all other cases also the ratio would remain the same wherein the FSL is asked to play some role in the investigation of a crime because the accused cannot be permitted and should not be permitted to put his own expert either to participate in such investigation or to watch the investigation. Ultimately, it may otherwise, prejudice either the defence or prosecution because it would amount to interference in the process of investigation.

26. In view of the above observations and directions made in para 20 of the

judgment, the revision application deserves to be dismissed. Accordingly the revision application is dismissed. Rule discharged.

27. The registry is directed to send a copy of this judgment to the Jail Authorities where the accused persons are kept in judicial custody and to the Director of FSL, Gujarat State, Ahmedabad and also to the investigating officer through the Public Prosecutor, High Court of Gujarat, Ahmedabad .