

(2001) 02 GUJ CK 0007
In the Gujarat High Court

Case No : Criminal Revision Application No. 44 of 2001

Ramabhai Ichhabhai Chauhan

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 28-02-2001

Acts Referred:

Citation : (2001) 02 GUJ CK 0007

Hon'ble Judges : K.M. Mehta, J

Bench : Single Bench

Advocate : H.N. Jhala, for the Appellant; A.J. Desai, APP, for the Respondent

Final Decision : Allowed

Judgement

K.M. Mehta, J.—The petitioner-accused, Rambhai Ichhabhai Chauhan, has filed this Revision Application u/s 401 of the Criminal Procedure Code (hereinafter referred to as `the Code") challenging the order dated 21st December, 2000 passed by the learned Additional Sessions Judge, Vadodara. The learned Judge, by his Judgment and Order dated 21st December, 2000, was pleaded to reject application, exh. 57, in NDPS Case No. 8 of 1999 wherein the advocate for the accused has prayed for cross-examination of chemical analyser. The facts giving rise to this application are as under :

2. In this case, the petitioner was charged for offences punishable under Sections 20B(1) & 20B(2) of the Narcotic Drugs & Psychotropic Substances Act (hereinafter referred to as `the Act") for being in possession of 200 gms. of Ganja and 85 gms. of Charas. The complaint was lodged by Police Inspector, Shri Vijay Solanji, Narcotic Cell, Gujarat State, on 20th July, 1999. The offence was registered at Chhani Police Station being Criminal Case No. 116 of 1999. A copy of the complaint has been produced by the petitioner at Annexure A.

3. During the proceedings, the prosecution, with exhibit 6, has produced about 25 documents and at serial No. 20, the prosecution has produced report of Forensic Science Laboratory (hereinafter referred to as `F.S.L.") dated 13th

October, 1999, i.e. Exhibit 6/20.

4. During the oral evidence, the prosecution has examined Abbaskhan Ahmedkhan, Police Inspector, P.W. No. 8, at exhibit 33. He was examined on 4th July, 2000 and in view of Section 293 of the Code which provides that a report is to be executed, the said report was exhibited at exh. 37.

5. It appears from the record that thereafter, statement of accused u/s 313 of the Code was recorded on 18th December, 2000 and the matter was fixed for arguments on 21st November, 2000; 28th November, 2000; 30th November, 2000; 1st December, 2000; 7th December, 2000 & 18th December, 2000.

6. On 18th December, 2000, the learned advocate for the petitioner-accused has filed the present application in which, he has stated that during the cross examination of Police Inspector, some important legal questions have arisen regarding weight, seal test and regarding admissibility of F.S.L. report. It was further stated that for examining the said samples, chemical test and botanical test were carried out by two different Scientific Officers. In that application, it was stated that the accused desired to examine the officer of the F.S.L., who has produced report at exhibit 37, by whose signature, report has been produced. It may be stated that report has been signed by Mr. B.D. Davda, who has examined the said goods in question and the accused desires to cross examine Mr. Davda in this behalf. The learned Judge, by his Judgment and Order dated 21st December, 2000, was pleased to reject the said application. According to the learned Judge, the accused wanted to challenge the weight of the products in question. The accused is not challenging as to whether the product in question is Ganja or Charas, therefore, no useful purpose is served if the Chemical Analyser is to be cross examined. According to him in this case, the report of the examiner is of 30th October, 1999. Abbaskhan, in whose cross examination, this report is exhibited at 27, has been examined in July, 2000 and thereafter also, further statement of accused u/s 313 of the Code was recorded on 18th November, 2000. Thereafter seven dates for arguments were given which I have already mentioned and, therefore, this application is not being entertained on the ground of delay.

7. Mr. Jhala, the learned advocate for the petitioner, has submitted that the learned Additional Sessions Judge, Vadodara, has erred in exhibiting the F.S.L. report under the provisions of Section 293 of the Code without permitting the cross examination of F.S.L. expert under the provisions of Section 293 of the Code. He has stated that the defence has desired to cross examine the witness after further statement of the accused was recorded. According to the learned advocate, even if the expert is summoned as defence witness, he does not cease to be prosecution witness and though he may be prosecution witness called as defence witness, the right of the accused to cross examine him stands. He has relied upon Section 294(3) of the Code in this behalf.

8. He further submitted that sub section (2) of Section 293 read with Section 294

of the Code cast duty upon the learned trial Court to require the expert to be examined for clarification which was sought by the defence lawyer. He has further submitted that when the learned Judge has dismissed the application filed by the accused, the learned trial Court has not only closed the defence evidence but also caused serious prejudice to the accused and defence.

9. Mr. Desai, learned APP, has tried to support the order of the learned Judge in this behalf.

9.1 He has submitted that looking to the facts and circumstances of the case, the learned Judge has rightly exercised his discretion so this Court may not interfere with the order in the revisional jurisdiction. Before, I consider the submissions of the learned counsel for the parties, it is necessary to refer to Section 293 which provides for reports of certain Government Scientific Experts. This Section reads as under :

293 (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 proceedings under this Code.

293 (2) The court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

293 (4) This Section applies to the following Government scientific experts, namely;

(a) any Chemical Examiner or Assistant Chemical Examiner to Government;

(b) --

(c) --

(d) --

(e) --

Section 294 reads as under :

294 (1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

294 (3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed :

Provided that the Court may, in its discretion, require such signature to be

proved.

10. The learned counsel for the petitioner has submitted that this is a case under the NDPS Act and the accused has right to call the scientific officer, Office of the Assistant Chemical Examiner, Government of India, Regional Forensic Science Laboratory and also to cross examine him. Mr. Jhala, the learned counsel for the petitioner, has fairly conceded that it is true that the application has been filed at a belated stage. However, his submission is that the accused has very vital right to cross examine the officer in question and what is evidential value of the report, is a very important aspect in this case, and therefore, in the interest of justice, the Court must allow the application filed by the accused for cross examination.

10.1 Mr. Jhala, learned counsel for the petitioner has relied upon the Judgment of the Hon'ble Apex Court in the case of State of Punjab Vs. Baldev Singh, . In that case, the Court was considering the provisions of NDPS ACT, 1985 and particularly, requirements of Sections 42 and 50 of the Act. The question was whether any search is made without informing the person of his search right would the search be illegal even if he does not of his own exercise his right u/s 50(1) and other questions. In that context, in paragraph 28, on page 199, the Hon'ble Supreme Court has observed as under :

"This Court cannot overlook the context in which the NDPS Act operates and particularly the factor of widespread illiteracy among persons subject to investigation for drug offences. It must be borne in mind that severe punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed. "

In the same judgment, in paragraph 45, on page 206, the Hon'ble Supreme Court has also observed as under:

"..... Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused and cannot be abandoned. While considering the aspect of fair trial, the nature of the evidence obtained and the nature of the safeguard violated are both relevant factors."

11. He has also stated that in view of Section 293 of the Code, it is no doubt true that Court can exhibit the report of the F.S.L. If the accused challenges the same, there is discretion of the Court not to exhibit the same. In this behalf, he has stated that when the accused casts a doubt against the report, the same can be removed only after calling of the person making the report. In this behalf, he has shown certain deficiencies in the report and according to him, the report notes the personal elucidation and, therefore, the scientific officer is required to be examined. In this behalf, he stated that in sub section (2) of Section 293, word `May' is used which means that Court can use its discretion judicially and in this case, it is necessary in the interest of justice that scientific officer be

called and examined as a witness and accused may have right to cross examine him. According to him, the report of the scientific officer in this case is a determining factor and, therefore, he is to be examined. He has also relied upon the provisions of Section 294(3) of the Code in this behalf.

12. The learned counsel for the accused has relied on a Judgment of the Supreme Court in case of Himachal Pradesh Administration Vs. Om Prakash, , in which the Court has observed as under :

"..... As long as the report shows that the opinion was based on observations which lead to a conclusion that opinion can be accepted, but should there be any doubt it can always be decided by the calling of the person making the report."

13. I have considered the submissions of the learned counsel for the accused as well as the State; Judgments of the Supreme Court and relevant provisions of law. In my view, trial is going on under the NDPS Act. In my view Section 293 of the Code contains special rules of evidence. The report of the Chemical Examiner and the other persons specified in subsection (4) is treated differently from that of a medical report which is not evidence. The former, i.e., the original report signed by the Chemical Examiner who examined the matter submitted is evidence. The accused has valuable right to cross examine the scientific officer as report of the scientific officer is determining factor in this case and also as per Section 293 read with Section 294 of the Code, the accused has right to cross examine the Chemical Examiner in this behalf. Looking to the facts and circumstances of the case, the application, exhibit 57, dated 18th December, 2000, filed by the accused is required to be granted and the order, dated 21st December, 2000 passed by the learned Additional Sessions Judge, Baroda rejecting the application is quashed and set aside. The Revision Application is allowed. However, as the application is filed at a very belated stage, the learned Additional Sessions Judge is requested to give an opportunity to the accused to examine Mr. Davda, Chemical Examiner of the F.S.L. and to see that cross examination of the said officer by the accused is being completed at an early date. Thereafter, the matter can be fixed for hearing in this behalf and same can be decided as expeditiously as possible. Mr. Jhala, learned advocate for the petitioner has assured me that the accused will co-operate in the fair trial of the case. Rule is made absolute.