
marks, they could have also opted for the objective scientific test. The absence of this test has created a doubt in the mind of the Court with regard to the conviction of accused Suresh Pal for committing the offence of rape.

(15) In view of the discussions made above, we are of the opinion that the entire picture of the occurrence, as presented by the prosecution and its witnesses, is very much suspicious and doubtful. The appeal is, accordingly, allowed. Appellants are acquitted of the charges levelled against them. The appellants, if in custody, be set at liberty forthwith, if not required in any other case.

(16) The result is unfortunate, but it cannot be helped. It is pity that brutal murder is going unpunished.

R.N.R.

Before T.P.S. Mann, J.

AMRIT LAL AND OTHERS,—*Petitioners*

versus

STATE OF HARYANA AND OTHERS,—*Respondents*

Cr. Misc. No. 52240/M of 2005

18th January, 2007

Code of Criminal Procedure, 1973—Ss. 293(2) and 311—Accused failing to lead their defence despite a number of opportunities granted—Report of expert, FSL admitted in evidence—No objection by accused—Prayer for summoning expert, FSL declined—Challenge thereto—S. 293(2) permits summoning of the expert for his examination as to the subject matter of his report—Discretion—Exercise of—Judiciously—Justice should not be done but it should appear to have been done—Request of accused ought to have been accepted to give sufficient opportunity to defend him in the trial—Petition allowed.

Held, that though the report prepared by Dr. R.K. Kaushal of FSL was admitted in evidence without there being any objection from the accused and the said report thereafter put to the accused while they were examined under Section 313 Cr. P.C. yet an objection was raised by them during the stage of defence and arguments that

Dr. R.K. Kaushal, who was the author of the said report and an expert, be called for cross-examination. Section 293(2) Cr. P.C. permits the summoning of the expert for his examination as to the subject matter of his report. Though, it is not a must, but the Court has to exercise its discretion while calling such an expert to the Court for his examination. This discretion vested with the Court is to be exercised judiciously especially when a request had come from the accused for the said purpose.

(Para 7)

Further held, that learned trial Court did not rule out that a witness might be recalled or summoned at any stage but while declining the request of the accused for summoning Dr. R.K. Kaushal, it held that the cross examination of the said witness was not essential. The trial was still in progress. The accused had come up with an application under Section 311 Cr. P.C. for summoning Dr. R.K. Kaushal for cross-examining him in respect of the report in question. The justice should not be done but it should appear to have been done. In the event of the accused making a genuine request before the trial Court, such a request ought to have been accepted so that at any later point of time he may not allege that he was not given sufficient opportunity to defend him in the trial.

(Para 10)

D.P. Singh, Advocate for Mr. Mohit Mathur, *Advocate for the petitioners.*

Y.P. Malik, Assistant Advocate General, Haryana for *respondent No. 1.*

Vikram Singh, Advocate for the complainant.

T.P.S. Mann, J,

(1) The petitioners are aggrieved by the order passed by Additional Sessions Judge (Fast Track Court), Gurgaon on 1st September, 2005, whereby their application under Section 311 Cr.P.C. for summoning Dr. R.K. Kaushal from Forensic Science Laboratory, Madhuban (for short 'FSL') for cross examination was dismissed.

(2) Trial of FIR No. 80, dated 14th March, 2001 was going on against the petitioners and respondent Nos. 2 to 7 in the Court of Additional Sessions Judge, Gurgaon. During the same, the prosecution

tendered into evidence report Ex. PQ of Director FSL on 21st July, 2004. No objection whatsoever was raised by the accused at that time regarding its admissibility. Even otherwise the said report was admissible in evidence by virtue of the provisions of Section 293 Cr. P.C. The aforementioned report Ex. PQ was also put to the accused in their respective statements. After the prosecution evidence was over and the statements of the accused were recorded under Section 313 Cr. P.C. on 13th October, 2004, the case then proceeded to the stage of recording of defence evidence. Several adjournments were granted to the accused for leading their defence. However, on 18th August, 2005, they filed an application for summoning Dr. R.K. Kaushal from FSL for cross-examining him in respect of the report Ex PQ. This prayer was declined by the trial Court,—vide impugned order. It was held therein that the accused had been given a number of adjournments for leading their defence and arguments including last adjournment but they did not do so. They thereafter moved the aforementioned application on 18th August, 2005 for prolonging the disposal of the case.

(3) Learned counsel for the petitioners submitted that if the opportunity to the accused for cross-examining Dr. R.K. Kaushal of FSL in respect of report Ex. PQ was not granted, a great prejudice will be caused to them. Further that the report submitted by an expert does not become evidence automatically and the person, who had prepared the said report was required to be examined as a witness in the Court and had to face cross-examination. Even if the FSL report was per se admissible in evidence under Section 293 of the Code, a discretion vested with the Court to summon the expert and the said discretion was to be exercised judiciously.

(4) Learned State counsel and the counsel representing the complainant while supporting the impugned order submitted that the report Ex. P.O. prepared by Dr. R.K. Kaushal of FSL was admissible as such in evidence without calling for the expert, who had prepared the same.

(5) I have heard learned counsel for the parties and gone through the impugned order minutely.

(6) The opinion of Dr. R.K. Kaushal of FSL, as contained in report Ex. P.Q. was a relevant fact given by a person specially skilled in forensic science. Such an opinion given by an expert is made admissible as such in view of the provisions of Section 293(1) Cr. P.C. in any enquiry, trial of the other proceedings under this Code. However,

Section 293(2) permits the Court to summon and examine any such expert as to the subject matter of his report if it thought fit. The relevant provisions are reproduced hereinbelow :—

“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.”

(7) In the present case, though the report Ex. PQ was admitted in evidence without there being any objection from the accused and the said report thereafter put to the accused while they were examined under Section 313 Cr.P.C. yet an objection was raised by them during the stage of defence and arguments that Dr. R.K. Kaushal, who was the author of the said report and an expert, be called for cross-examination. Section 293(2) Cr.P.C. permits the summoning of the expert for his examination as to the subject matter of his report. Though, it is not a must, but the Court has to exercise its discretion while calling such an expert to the Court for his examination. This discretion vested with the Court is to be exercised judiciously especially when a request had come from the accused for the said purpose.

(8) In *State of Himachal Pradesh versus Jai Lal*, (1), the Hon'ble supreme Court, while relying upon an earlier judgment held that the report of an expert did not go in evidence automatically and he had to be examined as a witness in the Court and face cross-examination. It was observed as under :—

“The report submitted by an expert does not go in evidence automatically. He is to be examined as a witness in Court and has to face cross-examination. This Court in the case of Hazi Mohammed Ikramul Haque versus State of West Bengal, AIR 1959 SC 488 concurred with the finding of the High Court in not placing any reliance upon the evidence of an expert witness on the ground that his evidence was merely an opinion unsupported by any reasons.”

(9) In *State of Punjab versus Balraj Singh Takhar (2)*, a Division Bench of this Court held that though the report of an expert was *ex facie* admissible in evidence in view of the provisions of Section 293 of the Code, the Court ought to have granted an opportunity to the complainant to produce the expert. It was held as under :—

“Furthermore, the learned trial Court has also not appreciated the provisions of Section 293 of the Code in their right perspective. If the Court was of the opinion that the report required to be proved and it intended some clarification, it was obligatory upon the Court to summon the expert before rejecting the report wholly or partially. The findings recorded by the learned trial Court are clearly suggestive of the fact that it has declined to fully and substantially rely upon the report, which was *ex facie* admissible in evidence. The Court ought to have granted an opportunity to the complainant to produce the expert.”

(10) Learned trial Court also did not rule out that a witness might be recalled or summoned at any stage but while declining the request of the accused for summoning Dr. R. K. Kaushal, it held that the cross-examination of the said witness was not essential. The trial was still in progress. The accused had come up with an application under Section 311 Cr. P.C. for summoning Dr. R. K. Kaushal for cross-examining him in respect of the report in question. The justice should not be done but it should appear to have been done. In the event of the accused making a genuine request before the trial Court, such a request ought to have been accepted so that at any later point of time he may not allege that he was not given sufficient opportunity to defend him in the trial.

(11) Accordingly, the present petition is accepted, impugned order passed by the trial Court is set aside and the application filed by the accused under Section 311 Cr. P.C. is accepted. The trial Court is directed to summon Dr. R. K. Kaushal of Forensic Science Laboratory, Madhuban for one particular date on which the accused would cross-examine him in respect of report Ex. PQ. It is made clear that once the said respondent appears in the Court for cross-examination, the accused would cross-examine him on that very date and no adjournment, whatsoever, will be granted and the cross-examination concluded on the same day itself.

R.N.R.