(2009) 01 GUJ CK 0044

Gujarat High Court

Case No: Criminal Appeal No. 36 of 2008

Premjibhai Bachubhai Khasiya		APPELLANT
	Vs	
State of Gujarat and Another		RESPONDENT

Date of Decision: Jan. 16, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 112, 45, 9
- Penal Code, 1860 (IPC) - Section 114, 363, 366, 376, 506(2)

Citation: (2009) CriLJ 2888 : (2009) 2 GLR 1268 : (1999) 4 RCR(Criminal) 186 : (2009) 4 RCR(Criminal) 186

Hon'ble Judges: J.C. Upadhyaya, J; A.L. Dave, J

Bench: Division Bench

Advocate: Harshit S. Tolia, Uttpal R. Dave and Parth S. Tolia, for the Appellant; U.R. Bhatt, Assistant Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

A.L. Dave, J.

The appellant came to be tried by Sessions Court, Bhavnagar for offences punishable under Sections 363, 366 read with Section 114, Section 376 read with Section 114 and Section 506(2) read with Section 114 of the Indian Penal Code (''I.P.C.'', for short) along with co-accused Arvindbhai Anandbhai Khasiya in Sessions Case No. 123 of 2007. At the end of the trial, co-accused Arvindbhai Anandbhai Khasiya came to be acquitted by the Sessions Court, and the present appellant came to be convicted for offences punishable under Sections 363, 366, 376 and 506(2), all read with Section 114 of the I.P.C. and sentenced as under:

Sections	Punishment

Under Section 363 read with Section 114 of the I.P.C.	R.I. for two years and fine of Rs. 1,000/- in default R.I. for one month.
Under Section 366 read with Section 114 of the I.P.C.	R.I. for three years and fine of Rs. 3,000/- in default R.I. for three months.
Under Section 376 read with Section 114 of the I.P.C.	R.I. for ten years and fine of Rs. 5,000/- in default R.I. for six months.
Under Section 506(2) read with Section 114 of the I.P.C.	R.I. for one year and fine of Rs. 1,000/- in default R.I. for one month.

The judgment was rendered on 15-11-2007 and all the sentences were ordered to run concurrently.

2. The facts of the case, in brief, are that the appellant - co-accused happen to be distant cousins inter se, and they also happen to be distant cousins of the father of the prosecutrix i.e. Shri Kanabhai Bachubhai Khasiya. The prosecutrix is the daughter of Kanabhai Bachubhai Khasiya and his wife Labhuben Kanabhai Khasiya. According to the prosecution case, the father of the prosecutrix, who is also the first informant and the appellants stay in their respective house, located in vicinity of each other. On 31-1-2007, mother of the prosecutrix noticed that the prosecutrix had bouts of vomiting. On being asked, the prosecutrix did not give any detail and was taken to a Gynaecologist at Bhavnagar, who upon examination diagnosed that the prosecutrix was pregnant of four months. After returning home, on intensive questioning by the mother, the prosecutrix is said to have told the mother that the appellant as well as the co-accused Arvindbhai lured her by promising gold and silver ornaments etc. and entered into coitus repeatedly for ten to fifteen times, as a result, she had become pregnant. On this disclosure by the prosecutrix, the father lodged an F.I.R. on 31-1-2007 with Vartej Police Station, implicating both the accused persons. An offence was registered and investigation started. The prosecutrix as well as both the accused persons were subjected to medical examination and samples for deoxyribonucleic acid (''D.N.A.'', for short) matching were also taken and sent to Forensic Science Laboratory (''F.S.L.'', for short). The F.S.L. found that the D.N.A. results did not match with co-accused Arvindbhai and submitted a report that the D.N.A. profiles of Arvindbhai Anandbhai excluded him as biological father of the foetus of the prosecutrix, whereas the test concluded that D.N.A. profiles of the present appellant was consistent as biological father of the foetus of the prosecutrix. The police having found sufficient material against the accused persons, filed charge-sheet in the Court of J.M.F.C., Bhavnagar, who in turn committed the case to the Court of Sessions and Sessions Case No. 123 of 2007 came to be registered.

2.1. The charge was framed against the accused persons at Exh. 5, and both the accused pleaded not guilty and claimed to be tried.

3. During the course of trial, the prosecution examined the first informant, his wife, the prosecutrix, the doctor who took samples, and who examined the accused persons, and the F.S.L. expert, besides the I.O. as major witnesses. The mother of the prosecutrix did not support the prosecution case and was declared hostile. The father of the prosecutrix and prosecutrix herself also did not support the prosecution case against the accused persons. They were, however, not treated as witnesses hostile to the prosecution.

3.1. The trial Court upon considering the evidence led by the prosecution, particularly the F.S.L. report, containing D.N.A. profiles, came to a conclusion that the case against accused Arvindbhai was not proved and has recorded his acquittal, whereas, the trial Court found that the case against the present appellant Premjibhai was proved and recorded his conviction and sentenced him to imprisonment and fine, as stated in the earlier part of this judgment, and hence, this appeal.

4. Heard learned Advocate Mr. Tolia appearing for the appellant. He submitted that the F.I.R. is lodged at a very belated stage, only upon noticing pregnancy of the prosecutrix. The allegations and the charges were against both the accused persons of having repeatedly raped the prosecutrix. When it came to deposing before the Court, neither the prosecutrix nor her parents have supported the prosecution case. The first informant, father of the prosecutrix implicates both the accused persons in the F.I.R., but in his deposition, has implicated unknown persons and that too on basis of history given to him by the doctor. Similar is the situation with the mother of the prosecutrix. The prosecutrix takes a different stand in her deposition and states that she was raped by unknown persons. The tenor of her deposition is that she totally exonerates both the accused persons. Mr. Tolia submits that the prosecutrix in her history before the doctor has implicated only the acquitted-accused Arvindbhai. With this primary and substantive evidence, the trial Court could not have recorded conviction of the appellant, but the trial Court has lent support to the prosecution case from the D.N.A. report and has recorded conviction. Mr. Tolia submitted that D.N.A. report cannot be considered as a conclusive proof of guilt of the accused, though it can be considered as conclusive of innocence of the accused. He has relied on certain extracts of the 185th report of the Law Commission of India, so also the decision in case of Ranjitsing Brahmajeetsing Sharma Vs. State of Maharashtra and Another, and the case of R. v. Watters rendered by Court of Appeal (Criminal Division) on October 19, 2000 reported in 2000 All ER 1469. Mr. Tolia submitted that the trial Court therefore, erred in treating D.N.A. report as substantive and conclusive proof of guilt of the accused, whereas, such report can only lend support to the other evidence. He, therefore, submitted that the appeal may be accepted and the conviction recorded by the trial

Court may be set aside.

5. Learned Addl. Public Prosecutor Mr. Bhatt has opposed this appeal. According to him, Science has developed to such an extent that D.N.A. report is nearly accurate. The chances of any error in such report are 1:1 million, as per various reports. He, however, submitted that so far as India is concerned, there are no such statistics available for deciding such random occurrence ratio, but the same may be accepted. He submitted that the prosecutrix and her parents seem to have been influenced, because of their inter se relationship with the accused and may not have supported the prosecution case, but independent scientific analysis has pointed finger at the appellant, and the trial Court was justified in acting upon that report. The appeal, may therefore, be dismissed.

6. We have considered the record and proceedings and the evidence in light of rival side submissions.

7. We find that the appellant has taken a plea of total denial in his statement u/s 313 of the Code of Criminal Procedure.

8. The father of the prosecutrix and the first informant Kanabhai Bachubhai Khasiya is examined at Exh. 11. He states that his daughter, the prosecutrix having bouts of vomiting, was taken to the doctor and it was found that she was running fifth month of pregnancy, and on being questioned, she informed that an unknown person was responsible for her pregnancy. He states that he had not lodged the F.I.R. with police, nor had he sent the F.I.R. to the police. He is not able to state, whether the thumb mark on the F.I.R. at Mark 9/3 was his own. He says that he had lodged the F.I.R. at Kaliyak and was written down by one Mr. Jani, a Police Officer, as dictated by him, but he had not put his thumb impression on his F.I.R. During the cross-examination, he admits that the prosecutrix did not tell him that Arvindbhai had raped her. He also admits that both the accused persons were of their village and prosecutrix knew both of them from birth.

8.1. It is thus clear that this witness gives a total go-by to his F.I.R., wherein he clearly implicated both the accused persons, on basis of what was allegedly told to him by the prosecutrix.

8.2. The mother of the prosecutrix Labhuben Kanabhai is examined at Exh. 12. She also sails in the same boat. However, she has been treated as a witness hostile to the prosecution and has been cross-examined by the learned A.P.P. He denied to have stated before the police that the prosecutrix on being questioned indicated names of both the accused persons as persons responsible for her pregnancy. During cross-examination to the defence Counsel, she states that the prosecutrix did not implicate either of the accused for the offence of rape.

8.3. The prosecutrix is examined at Exh. 13. She says that she was attacked from behind by unknown persons and was raped. She was intimidated by them and she

became pregnant out of that rape. She states that those unknown persons were not her relatives nor did she know them. She says that the case is lodged against unknown persons, whose names are not known to her. She identifies the accused persons as her uncles. She states during her cross-examination that neither of the accused persons had raped her. She also states that neither of the accused persons had lured her. She states that she had not given history to the doctor at Vartej, implicating Arvindbhai, but the same was given by the lady constable accompanying her. The Court had put certain questions to the prosecutrix, and what emerges therefrom is that she was not interrogated by the police and she has not disclosed anything to police about rape by either Arvindbhai or Premjibhai the appellant.

9. If the above pieces of evidence are assessed and appreciated as a whole, the picture that emerges is that the first informant gives a go-by to his original version. The first information is founded on basis of what is told to the first informant by the prosecutrix. In the first information, both the accused persons are implicated, whereas the first informant in his deposition does not implicate any of the accused persons, but implicates unknown persons. The mother of the prosecutrix also sails in the same boat, and the prosecutrix, who is the only witness examined, having primary knowledge about the incident, states that neither of the accused ever raped her nor ever lured her or intimidated her. They are not responsible for her pregnancy, and she states that she was raped by unknown persons, who were not her relatives, whereas, the accused persons were her relatives. The evidence on oath, thus, does not implicate any of the accused persons. Differently put, there is no ocular evidence, which would inculpate any of the accused persons, except the evidence of the doctor, who says that the history was given by the prosecutrix, implicating accused Arvindbhai, which part is not supported by the evidence of the prosecutrix, when she says that history was not given by her and was given by the police constable, on basis of some writing with her. Thus, there is total absence of ocular evidence, which would prove the guilt of any of the accused persons.

10. Now, therefore, what is left out is the documentary evidence, which is heavily relied upon by the trial Court in form of the D.N.A. report. The D.N.A. report says that the D.N.A. profile of the appellant is consistent as biological father of the foetus of the prosecutrix, whereas the D.N.A. profile of Arvindbhai excludes him from being biological father of the foetus of the prosecutrix, and this evidence is relied upon by the trial Court to record conviction of the appellant.

11. The question, therefore, that arises for our determination is whether the D.N.A. report can be the sole basis and conclusive evidence of the paternity of the child (foetus) or guilt of the accused for rape, in absence of any other evidence and whether the D.N.A. can be considered as a substantive and conclusive piece of evidence to record conviction of an accused of rape on its sole basis.

12. In this regard, we would firstly like to refer to the report made by the Scientific Officer, D.N.A. Division of F.S.L., which has given following conclusion:

From the above observations, it is concluded that D.N.A. profiles of Mr. Premjibhai Bachubhai (source of Ex T : blood sample) is consistent as biological father of the foetus (source of Ex D), foetus of Naniben Kanabhai (source of Ex E : blood sample). While from the above observations, it is concluded that D.N.A. profiles of Mr. Arvindbhai Anandbhai (source of Ex. M : blood sample) is excluded as biological father of the foetus (source of Ex D), foetus of Naniben Kanabhai (source of Ex. E : blood sample).

12.1 A plain reading of the above conclusion would go to show that the opinion is conclusive so far as Arvindbhai Anandbhai is concerned, which says that the observations concluded that the D.N.A. profiles of Arvindbhai Anandbhai excluded him from being biological father of the foetus. Thus, the report is conclusive, so far as non-involvement of accused Arvindbhai is concerned. Now, if the report in respect of the present appellant is seen, it only says that the observations concluded that D.N.A. profiles of Premjibhai Bachubhai is consistent with biological father of foetus. Thus, it only says that it is consistent with the biological father of the foetus, but does not say with certainty of conclusiveness that he is the biological father of the foetus.

13. We are supported in our interpretation of the above report in above manner (and we are of the view that the language used by the Scientific Officer is also consistent with the science of D.N.A.) by what has been observed in the 185th Report of the Law Commission of India, where, while accepting changes in Sections 9, 45 and 112 of the Evidence Act, following observations are made:

While discussing report of the Australian Law Reform Commission, it is observed that:

...But the report then discusses about situations where the D.N.A. samples match, the extent of probability of the identity and whether evidence of experts should be admitted on the question of probability, based on the D.N.A. data available in the particular country.

This latter aspect is still quite complicated and we feel that where the D.N.A. samples match, it is not necessary to make any provision at all at this stage of scientific development.

But, so far as cases where the D.N.A. samples do not match, it is now fairly accepted that the identity is not proved.

13.1. After referring to the decision in the case of Smt. Kanti Devi and Another Vs. Poshi Ram, the Commission has further observed:

It is, therefore, fairly established that if the D.N.A. result does not match, then the identity of the person is not established. But the contrary is not true. Where the test result is that the D.N.A. does not match, it cannot lead to a conclusion of identity of the person.

13.2. In the latter part of the report, it has been observed thus:

If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a data base of D.N.A. samples, an approximate number reflecting how often a data base of D.N.A. samples, an approximate number reflecting how often a similar D.N.A. ''profile'' or ''fingerprint'' is found. It may be, for example, that the relevant profile is found in 1 person in every 100,000: This is described as the ''random occurrence ratio'' (Phipson 1999, 15th Edn. Para 14.32).

Thus, D.N.A. may be more useful for purposes of investigation but not for raising any presumption of identity in a Court of law.

13.3. In the decision of R. v. Watters 2000 All ER 1469, it is found that no reliance is placed on the D.N.A. report, because, it does not conclusively fix the identity. It was observed therein thus:

We have taken care to confine our remarks to the circumstances of this case for the reason that we have already made clear: every case has to be viewed on the totality of the evidence in that case. D.N.A. evidence may have a greater significance where there is supporting evidence, dependent, of course, on the strength of the evidence. We are not for one moment saying that merely because there was not other evidence of a cogent kind that this appeal has to be allowed. We simply conclude that on the facts of this case and the evidence that was available in this case this evidence was not strong enough to go to the jury and should not have done so. Even if we had been wrong about that, the directions given by the Judge were insufficient to make clear to the jury what their consideration of the matter should be. For those reasons, we conclude that this is a matter where the points made by the appellant are valid.

The said part was also referred to by the Apex Court in the case of Ranjitsing Brahmajeetsing Sharma Vs. State of Maharashtra and Another, In paragraph 78, Their Lordships have quoted thus:

D.N.A. evidence may have a great significance where there is supporting evidence, dependent, of course, on the strength of that evidence.

...in every case one has to put the D.N.A. evidence in the context of the rest of the evidence and decide whether taken as a whole it does amount to a prima facie case.

14. It is thus clear that positive D.N.A. report can be of great significance, where there is supporting evidence, depending of course on the strength and quality of that evidence. If the D.N.A. report is the sole piece of evidence, even if it is positive, it cannot conclusively fix the identity of the miscreant, but, if the report is negative, it would conclusively exonerate the accused from the involvement or charge.

15. The science of D.N.A. is at a developing stage and when the random occurrence ratio is not available for Indian society, it would be risky to act solely on a positive D.N.A. report, because only if the D.N.A. profile of the accused matches with the foetus, it cannot be considered as a conclusive proof of paternity. Contrarily, if it is solitary piece of evidence with negative result, it would conclusively exclude the possibility of involvement of the accused in the offence.

16. The D.N.A. science and report is founded on probability theory. When the profiles of accused and foetus/child are consistent, it only shows a probability as per random occurrence ratio. Obviously, it cannot be treated as conclusive proof and cannot be made use of as sole basis of conviction in a criminal case, more so when the random occurrence ratio is not available of Indian society.

16.1. But, when it is found that the D.N.A. profiles are not consistent or do not match, they conclusively rule out the possibility of involvement of the accused and can be used for recording an acquittal in a criminal case.

16.2. We appreciate the action on the part of the Investigating Police Officer to opt for collection of scientific evidence in form of D.N.A. report. D.N.A. report plays an important role and its need and usefulness cannot be underestimated. It is useful to any Investigating Police Officer to assess as to whether his investigation of a crime is on right track or not. It would save people from facing unwarranted prosecutions. But, when the question of appreciation of evidence of such report arises before a Criminal Court, especially when such report is positive, it shall look for other evidence, particularly when such other evidence does not fall in line with the result in the positive D.N.A. report or when such other evidence is in direct conflict with the opinion expressed in such positive report. Such report can be used as corroborative evidence i.e. an evidence to substantiate other evidence. A positive D.N.A. report cannot be the sole and conclusive evidence to record conviction in a criminal case.

17. In the case on hand, considering the peculiar facts and circumstances and evidence on record, the positive D.N.A. report should not have been accepted by the trial Court in isolation, i.e. as sole piece of evidence to record the conviction.

18. The appeal is allowed. Conviction recorded by the Additional Sessions Judge, Fast Track Court No. 6, Bhavnagar in Sessions Case No. 123 of 2007 dated 15-11-2007 for the offences punishable under Sections 363, 366, 376 and 506(2) read with Section 114 of the Indian Penal Code is set aside. Appellant-accused person is set at liberty forth with, if not required in any other case. Fine, if paid, be refunded.