

**IN THE COURT OF SESSION FOR GR. BOMBAY AT BOMBAY
ORDER BELOW EXH.114
IN
SESSIONS CASE NO.240 OF 2013**

The State of Maharashtra
(Bandra Police Stn.)

... Complainant

V/s.

Salman Salim Khan

... Accused

Coram : H.H.J. the Additional Sessions
Judge Shri D. W. Deshpande,
(C.R. No. 52).

Date : 18th February, 2015.

Mr. Gharat, Spl. P. P. for State.
Mr. Shivade, Advocate for accused.

ORDER

1. By moving this application, the prosecution has raised objection to ask questions in cross-examination to the officer of Forensic Department to produce the record on which his report is based and to disclose the nature of particulars of the test applied by him in the course of examination of the blood for alcohol test.

2. Reply of accused is also called to the application filed by the prosecution.

3. Heard Mr. Gharat, ld. SPP, and Mr. Shivade, ld. Defence Counsel.

4. It appears that PW-18 Mr. D.K. Bhalshankar, who is an Assistant Chemical Analyser, analyzed the blood of Cine Actor Salman

Khan (accused) in order to ascertain the alcohol percentage. The prosecution has examined Mr. D.K. Bhalshankar, Assistant Chemical Analyser, as a witness. In his evidence, report dated 01.10.2002 for analyzing the blood sample of accused Salman Khan is proved (Exh.81). Mr. Shivade, Id. Counsel for the accused, also extensively cross-examined the Chemical Analyzer Mr. D.K. Bhalshankar. The prosecution then moved the present application raising objection that in view of provisions of Sec.292(3)(a) and (3)(b) of the Cr. P.C., the defence is prevented to call for the records on which report is based and also prevented to ask the questions regarding the nature of particulars of the test applied by C.A. in the course of examination of matter or thing. According to Id. SPP Mr. Gharat, the prosecution has never objected to the cross-examination on the attending facts and circumstances. However, according to prosecution, the prosecution has objection to put the question to disclose the nature of particulars of the test applied by him in the course of the examination of the matter or thing.

5. Exh.117 is the reply filed by accused. It is contended that the Assistant Chemical Analyzer is examined by the prosecution. The said witness has deposed about the percentage of the alcohol allegedly found by him. Hence, according to the accused, the defence is entitled to cross-examine the witness on every aspect of his evidence and the right to cross-examine is a statutory right of the accused and needs to be protected. It is also contended that there is no provision in law which permits the prosecution to lead evidence of a witness which is prejudicial to the accused and prevents the accused from cross-examining the said witness on the most material aspects of his evidence.

6. Further it is contended that the Section 292 of the Cr. P.C. is restricted to two categories of experts under the heading 'Evidence of Officers of the Mint'. It is further contended that Section 292 of the Cr. P.C. is not applicable in the present case. It is further contended that the first category specifies the officer of any Mint or Note Printing Press or of any Security Printing Press (including the officer of the controller of stamps and stationary). The second category is in respect of the officer of any forensic department or division of F.S.L. or any Government examiner of questioned documents or any state examiner of questioned documents as the case may be. As the Central Government may by notification specify in this behalf, upon any matter or theme duly submitted to him for examination and report in the course of any proceedings under this Code, may be used as evidence in any enquiry, trial or other proceedings under this Code although such officer is not called as a witness. The accused submits that the prosecution has not produced any such notification of Central Government and as such the said provision is not applicable in the present case. It is submitted that on this ground itself, the application deserves to be dismissed.

7. Further it is mentioned in the say that as regards Sub-Section (2) of Section 292 of the Cr. P.C., the accused states that in the present case, the prosecution has waived the restriction contemplated by Section 292 (assuming the said restrictions are applicable) and elected to examine the said witness. Sub-Section (3) speaks about giving of any evidence derived from any unpublished official record on which the report is based or disclose the nature or particulars of any test applied by him in the course of examination of the matter or thing. That is not the case here. The words 'such officer' referred to in the

clause is the officer of the Mint, etc. or forensic expert in respect of whom the Central Government has issued notification and as such Section 292 is wholly inapplicable in this case and the reliance on the same by the prosecution is devoid of any merit.

8. Further it is contended in the say that the superior officer of the witness was present in the Court during the recording of evidence and therefore, it cannot be said that his evidence is without permission of the Forensic Department. It is also contended that the Assistant Chemical Analyser falls under Section 293(4) of the Cr. P.C. and the prosecution has examined PW-18 Mr. D.K. Bhalshankar and as such, application is liable to be rejected.

9. It is necessary to reproduce Sections 292 and 293 of the Cr. P.C. which read as under:-

“292. Evidence of officers of the Mint – (1) Any document purporting to be a report under the hand of any such [officer of any Mint or of any Note Printing Press or of any Security Printing Press (including the officer of the Controller of Stamps and Stationery) or of any Forensic Department or Division of Forensic Science Laboratory or any Government Examiner of Questioned Documents or any State Examiner of Questioned Documents, as the case may be,] as the Central Government may, by notification, specify in this behalf, upon any matter or thing duly submitted to him for examination 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, although such officer is not called as a witness.

(2) The Court may, if it thinks fit, summon and examine any

such officer as to the subject-matter of his report:

Provided that no such officer shall be summoned to produce any records on which the report is based.

(3) Without prejudice to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), no such officer shall, [except with the permission of the General Manager or any officer in charge of any Mint or of any Note Printing Press or of any Security Printing Press or of any Forensic Department or any officer in charge of the Forensic Science Laboratory or of the Government Examiner of Questioned Documents Organisation or of the State Examiner of Questioned Documents Organisation, as the case may be,] be permitted-

(a) to give any evidence derived from any unpublished official records on which the report is based; or

(b) to disclose the nature or particulars of any test applied by him in the course of the examination of the matter or thing.

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.

(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with

the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely:-

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

[(b) the Chief Controller of Explosives;]

(c) the Director of the Finger Print Bureau;

(d) the Director, Haffkeine Institute, Bombay;

(e) the Director [Deputy Director or Assistant Director] of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government.

[(g) any other Government Scientific Expert specified, by notification, by the Central Government for this purpose.]”

10. Ld. SPP relied on the case of **State of H.P. Versus Mast Ram [(2004) 8 Supreme Court Cases 660]**, wherein it is held as under:-

“Secondly, the ground on which the High Court has thrown out the prosecution story is the report of the ballistic expert. The report of the ballistic expert (Ext. P-X) was signed by one Junior Scientific Officer. According to the High Court, a Junior Scientific Officer (Ballistic) is not the officer enumerated under sub-section (4) of Section 293 of the Code of Criminal Procedure and, therefore, in the absence of his examination such report cannot be read in evidence. This reason of the High Court, in our view, is also fallacious. Firstly, the forensic

science laboratory report (Ext. P-X) has been submitted under the signatures of a Junior Scientific Officer (Ballistic) of the Central Forensic Science Laboratory, Chandigarh. There is no dispute that the report was submitted under the hand of a government scientific expert. Section 293(1) of the Code of Criminal Procedure enjoins that any document purporting to be a report under the hand of a government scientific expert under the section, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under the Code, may be used as evidence in any inquiry, trial or other proceeding under the Code. The High Court has completely overlooked the provision of sub-section (1) of Section 293 and arrived at a fallacious conclusion that a Junior Scientific Officer is not an officer enumerated under sub-section (4) of Section 293. What sub-section (4) of Section 293 envisages is that the court is to accept the documents issued by any of the six officers enumerated therein as valid evidence without examining the author of the documents.”

11. In our case in hand, PW-18 Mr. D.K. Bhalshankar is an Assistant Chemical Analyzer. He is working in the Forensic Science Laboratory at Pune. During the period 1986 to 2001 and in the year 2001, he was working in Forensic Science Laboratory, Mumbai, on the post of Assistant Chemical Analyzer.

12. It is pertinent to note that Section 293 is applicable to the Government Scientific experts which are mentioned in Section 293(4) of the Cr. P.C. It includes any Chemical Analyzer or Assistant Chemical Analyzer to the Government. As per Section 293 of the Cr. P.C., a report of Chemical Analyzer may be used as evidence in any inquiry, trial or other proceeding under the Code of Criminal Procedure. As per Section 293(2) of the Cr. P.C., the Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report. In view of Section 293(3) of the Cr. P.C., if any such expert is unable to attend personally after summoning, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf. So it is clear that in view of Sec. 293(1) and (4) of the Cr. P.C., the report of the Government Scientific Expert as mentioned in Sec. 293(4) (a) can be admitted in evidence without examining the author of the document.

13. The important question is to be decided at this juncture is whether the defence is entitled to put the questions to the witnesses about what test applied by him and ask the questions on the particulars of any test applied by him during the examination.

14. In our case in hand, PW-18 Mr. D.K. Bhalshankar has deposed about the modified diffusion oxidation method for the purpose of analyzing and also he verified whether preservative was added in blood phial or not. He also deposed about Marpholine test.

15. Ld. defence Counsel Mr. Shivade vehemently submitted that the prosecution chose to examine C.A. as a witness and therefore, right is accrued to the accused to cross-examine the witness. According to ld. Counsel Mr. Shivade, Dr. Pawar had extracted 6 ml. blood, however, blood was found 4 ml. at the time of analysis. According to Mr. Shivade, it is right of the accused to cross-examine C.A. After going through the provisions of Sec. 292 as well as 293 of the Cr. P.C., I am of the opinion that Section 292 deals regarding the evidence of officers of Mint. Though there is mention of the officer of any forensic department or division of F.S.L., Section 292 nowhere speaks that it is also covered Chemical Analyzer or Assistant Chemical Analyzer to the Government. It is pertinent to note that so far as Chemical Analyzer or Assistant Chemical Analyzer is concerned, Section 293 of the Cr. P.C. is applicable. In view of Section 292 (3) of the Cr. P.C., without prejudice to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), no such officer shall, [except with the permission of the General Manager or any officer in charge of any Mint or of any Note Printing Press or of any Security Printing Press or of any Security Printing Press or of any Forensic Department or any officer in charge of the Forensic Science Laboratory or of the Government Examiner of Questioned Documents Organisation or of the State Examiner of Questioned Documents Organisation, as the case may be,] be permitted to give any evidence derived from any unpublished official records on which the report is based; or to disclose the nature or particulars of any test applied by him in the course of the examination of the matter or thing.

16. However, Section 292(3) of the Cr. P.C. does not cover Chemical Analyzer or Assistant Chemical Analyzer to the Government. Ld. SPP Mr. Gharat vehemently submitted that PW-18 Mr. D.K. Bhalshankar is working in Forensic Science Laboratory, therefore he is covered under Section 292(3) of the Cr. P.C. I am afraid to accept the contention of Mr. Gharat on the ground that PW-18 Mr. D.K. Bhalshankar stated in cross-examination that there are various departments in the Forensic Laboratory such as Ballistic, Biological, Prohibition, Physics etc. So PW-18 Mr. D.K. Bhalshankar being an Assistant Chemical Analyzer though working in Forensic Science Laboratory is not covered u/s.292(3) of the Cr. P.C. There is specific provision under Section 293(4)(a) of the Cr. P.C. to cover any Chemical Analyzer or Assistant Chemical Analyzer to the Government. Section 293(2) reveals that any such expert covered under Section 293 may be summoned and examined as to the subject-matter of his report. If he is examined, then the accused is entitled to cross-examine the Assistant Chemical Analyzer. Section 293, which is applicable to the Government Scientific experts including any Chemical Analyzer or Assistant Chemical Analyzer, nowhere speaks that Chemical Analyzer or Assistant Chemical Analyzer is prevented to give any evidence devoid of any unpublished official record on which the report is based or disclose the nature or particulars of any test applied by him in the course of examination of the matter or thing.

17. It is pertinent to note that in view of Section 293(1) and (4) of the Cr. P.C., the report of Government Scientific Expert can be admitted without examining him. However, it is pertinent to note that though report of PW-18 D.K. Bhalshankar can be admitted in evidence,

however, the prosecution chose to examine him as a witness. In such situation, the accused is having right to cross-examine the witness. So far as ground mentioned by the Id. SPP Mr. Gharat that defence cannot put the questions to the witness on the analysis done by him, I find that Section 293 of the Cr. P.C. no where bars to put questions to the Chemical Analyzer. No doubt Section 292 (3) of the Cr. P.C. reveals that the officer in the category mentioned under Section 292(1), no such officer [except with the permission of the General Manager or any officer in charge of any Mint or of any Note Printing Press or of any Security Printing Press or of any Security Printing Press or of any Forensic Department or any officer in charge of the Forensic Science Laboratory or of the Government Examiner of Questioned Documents Organisation or of the State Examiner of Questioned Documents Organisation, as the case may be,] be permitted to give any evidence derived from any unpublished official records on which the report is based; or to disclose the nature or particulars of any test applied by him in the course of the examination of the matter or thing.

18. However, in view of Section 293 of the Cr. P.C., which is applicable to the Chemical Analyzer or Assistant Chemical Analyzer, does not state so.

19. In the reported case of **Nirmal d/o Manohar Lal v. State of Punjab, 2002 CRI. L.J. 447**, the prosecution was allowed to produce the report of handwriting expert by way of additional evidence. The said report was allowed to be tendered in evidence without examining the expert and allowing opportunity to the accused to cross-examine him. In the said case, it is held by the Hon'ble Punjab and Haryana

High Court as under:-

“8. From a perusal of the above it would be clear that Section 293, Cr. P.C. applies only to certain experts like Chemical Examiner or Assistant Chemical Examiner to the Government, Chief Inspector of Explosives, Director of the Finger Print Bureau, Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory and the Serologist to the Government, besides Director of Haffkine Institute, Bombay. The report of the handwriting expert, even if it has been given by the expert working in the Forensic Science Laboratory, would not be per se admissible under Section 293, Cr. P.C. unless the maker of the said report is summoned and examined as a witness and the other side is given opportunity to cross examine the witness. In my opinion, there was absolutely no occasion for the learned Sessions Judge to have observed that the report of the handwriting expert was admissible under Section 293, Cr. P.C. and could be allowed to be tendered into evidence without summoning the author of the report.

10. In view of the above, in my opinion, even if the prosecution was allowed to produce the report of the handwriting expert by way of additional evidence, the learned Sessions Judge, had gone wrong in allowing the prosecution to tender the said report of the handwriting expert in evidence, without examining the expert and

allowing opportunity to the accused to cross-examine him. As referred to above, this was contrary to law, in as much as such a report would not be covered under Section 293, Cr. P.C.”

20. It is pertinent to note that the handwriting expert is not covered under Section 293(4)(a) of the Cr. P.C. In our case, Chemical Analyzer though is working in Forensic Laboratory is also not covered u/s.292(1) and (3) of the Cr. P.C. However, PW-18 Mr. D.K. Bhalshankar is covered under Section 293(4) of the Cr. P.C. So in my opinion, Section 292(1) and (3) is not attracted in our case. In my opinion, as Assistant Chemical Analyzer is covered under Section 293 (4)(a) of the Cr. P.C. and he is examined by the prosecution, the accused is entitled to cross-examine him. Therefore, the objection raised by Mr. Gharat, Id. SPP, to restrict the cross-examination of the accused in view of Section 292 (3)(a) and (b) cannot be accepted. The defence is entitled to cross-examine the witness. The objection raised by the Id. SPP cannot be accepted. As such, defence is permitted to continue with cross-examination. PW-18 Mr. D.K. Bhalshankar to remain present for cross-examination.

Order is dictated and pronounced in open Court.

(D. W. DESHPANDE)
Addl. Sessions Judge,
Gr. Bombay

Date : 18/02/2015

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