fWITEM No.1S Court No.1 SECTION IIA

SUPREME COURT OF INDIA
RECORD OF PROCEEDINGS

CRIMINAL APPEAL NO. 1058 OF 2009
(Arising out of S.L.P.(Crl.) No.1880/2007)

NARENDRA G. GOEL Appellant (s)

VERSUS

STATE OF MAHARASHTRA & ANR. Respondent (s)

WITH Crl.A.No...../2009 @ S.L.P.(Crl.) No.3206/2007

Date : 08/05/2009 The matter was called on for judgement today.

For Appellant (s) Mr. Gaurav Kejriwal, Adv.

Ms. Sangeeta Kumar, Adv.
Mr. Ashwani Garg,Adv.

For Respondent(s) Ms. Meenakshi Arora, Adv.

Mr. Ravindra Keshavrao Adsure, Adv.

Hon’ble Dr. Justice Arijit Pasayat pronounced the judgment of the Bench comprising His Lordship and Hon’ble Mr. Justice Asok Kumar Ganguly.

Leave granted.

The appeals are dismissed in terms of the signed judgment.

(SUMAN WADHWA)
COURT MASTER

(SHASHI BALA VIJ)
COURT MASTER

(Signed REPORTABLE judgment is placed on the file)

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1058 OF 2009
(Arising out of SLP (Crl.) No. 1880 of 2007)

Narendra G. Goel ....Appellant

Versus

State of Maharashtra & Anr. ....Respondents

CRIMINAL APPEAL NO. OF 2009
(Arising out of SLP (Crl.) No. 3206 of 2007)

JUDGMENT

Dr. ARIJIT PASAYAT, J.

1. Leave granted in both the Special Leave Petitions.

2. Challenge in these appeals is to the judgment of a Division Bench of the Bombay High Court. The appeal relating to Special Leave Petition (Crl.) No. 1880 of 2007 has been filed by Narender Goel who was not a party before the High Court while the Criminal Appeal relating to SLP(Crl.) No. 3206 of 2007 has been filed by Pawankumar Satyanarayan Goenka who was also not a party before the High Court. Dr. Sadankumar Goel, the petitioner in Criminal Writ Petition No. 1930 of 2006 is the husband of Dr. Asha Goel (hereinafter referred to as the 'deceased') who was found murdered. Said Dr. Sadankumar Goel filed the Criminal Writ Peition No. 1930 of 2006 with the prayer that respondents 1 to 7 in the Writ Petition should be directed to take appropriate steps under Section 166(A) of the Code of Criminal Procedure, 1973 (in short the 'Code') in CPNA No. 6 of 2004 registered at DCB CID, Unit II Malabar Hill Police Station CR. No.93 of 2003, in so far as the forensic investigation is concerned and to approach the Government of Canada for seeking assistance from appropriate agencies of the said Government to investigate the offences in so far as they relate to DNA testing of the articles recovered from the accused Pawankumar Satyanarayan Goenka the appellant in the appeal relatable to Special Leave (Crl.) No. 3206 of 2007 and Pradeep Parab during the investigation and of the materials recovered from the Santro car seized during investigation along with all other materials collected in the course of investigation relevant for the purpose of such forensic and medical examination to Canada as there is no such facility available in India.

3. Stand of Dr. Sadankumar was that for want of proper medical and forensic investigation, material evidence would be lost to the prosecutor and therefore at his request office of a Chief Coroner of the Province of Ontario has written a letter to Commissioner of Police, Crawford Market, Mumbai that they are ready to assist the investigating team in their desired area and the office of the Chief Coroner for

Ontario has performed a second autopsy of the deceased at the family's request and they have preserved genetic material of the deceased which can be used to make a genetic comparison to any samples that the Investigating Agencies in India wish to have tested.

4. The High Court after hearing noted that the reply reflects the concern on the part of the office of the Chief Coroner for Ontario; the deceased was a Canadian Citizen and a resident of Ontario. The High Court called upon the investigating agency to file their short reply. In the reply filed it was accepted that the facility for Mitochondrial DNA analysis is not available in the Forensic Science Laboratory either in Kalina or at Kolkatta and if it is the writ petitioner's belief that carrying out such an analysis on the material seized by the police during the course of investigation would bring to light with unerring certainty the culpability of the concerned accused, it will not only aid the investigation but also there cannot be any question of objection to the helping hand offered by the writ petitioner to the investigating agency. 5. The Court after considering the various submissions directed the investigating agency to get the material collected in the course of investigation examined in Canada. It noted that it will take sometime and therefore the trial court would wait for such a report which will be part of medical and forensic investigation which can be filed in the trial court under Section 173(8) of the Code.

6. The basic stand of the appellants is that the High Court has not kept in view the parameters of Section 166A of the Code. It is submitted that some evidence which is already in existence but in a country outside India can be collected. But for that purpose

(1) application is required to be made by the prosecution before the Competent Court of law i.e. the Court which is seized of the matter; and

(2) the application shall be for collecting the evidence and not for creating the evidence.

(3) On such application being allowed, an appropriate request by way of letter of authority from competent court of law to the concerned court of law or authority where such evidence is available has to be made.

7. It is the stand of the appellants that in the instant case neither the

application has been made by the prosecution nor any letter of request had been issued by competent court of law. Though the Court of Session at Sewree in Mumbai is seized of matter by avoiding the said court and by invoking writ jurisdiction of the Bombay High Court, consent order has been obtained between the family members of the deceased and the prosecution keeping the accused persons completely away from the proceeding though their rights are directed affected.

8. It is submitted that by the impugned order the Investigating Officer has been authorized to remove important piece of evidence from Bombay, take the same directly from the Office of the Chief Coroner of Ontario Laboratory for Mitochondrial DNA test. There is no letter of request from competent court to the concerned court or authority. The laboratory in question cannot be considered to be authority covered under Article 12 of the Constitution of India, 1950 (in short the 'Constitution') and in view thereof it cannot be said that the matter had been submitted to the authority contemplated under the provisions of law. It is submitted that the required test can be conducted at Kolkata.

9. The stand of the respondent No.2 is that the attempt of the accused person is to avoid detention of materials which would show the involvement of the accused persons. The State Government in its affidavit before the High Court has accepted that the facility of Mitochondrial DNA test is not available in the Forensic Laboratory either in Kalina or Kolkata. The investigating officer made similar statement. The FSL Kalina noted that the material for extraction of DNA was an old or washed clothes. The investigating officer therefore rightly stated that carrying out such an analysis on the material seized by the police during the course of investigation would bring to light with unerring certainty culpability of the concerned accused.

10. It is well settled that the accused has no right to be heard at the stage of investigation. The prosecution will however have to prove its case at the trial when the accused will have full opportunity to rebut/question the validity and authenticity of the prosecution case. In Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj v. State of A.P. [(1999) 5 SCC 740] this Court observed, "There is nothing in Section 173(8) to suggest that the court is obliged to hear the accused before any such direction is made. Casting of any such

obligation on the court would only result in encumbering the Court with the burden of searching for all the potential accused to be afforded with the opportunity of being heard." The accused can certainly avail himself of an opportunity to cross examine and/or otherwise controvert the authenticity, admissibility or legal significance of material evidence gathered in course of further investigations. Further in light of the views expressed by the investigating officer in his affidavit before the High Court, it is apparent that the investigating authorities would inevitably have conducted further investigation with the aid of CFS under Section 173(8) of the Code.

11. We are of the view that what is the evidentiary value can be tested during trial. At this juncture it would not be proper to interfere in the matter. It appears from the statement of learned counsel for the State that the lady who was murdered in Bombay was a Canadian citizen of the Indian origin. It is stated that there was a confession by accused persons on the basis of which recoveries were made. The blood stained clothes of the accused (A1) and the deceased were seized.

12. It is pointed out as noted above that the Canadian citizen was murdered and therefore the Candian police was involved. Dead body was taken to Canada and the genetic material were with the Canadian Coroner. Before the application by respondent No. 2 was filed there was a letter by the Coroner to the Police Commissioner. Whether there is actually illegal recovery, since documents are there they are to be proved. In that view of the matter we are not inclined to interfere and it is for the court to decide whether the evidence is admissible or otherwise. The appeals are accordingly dismissed.

.....J.
(Dr. ARIJIT PASAYAT)

.....J.
(ASOK KUMAR GANGULY)

New Delhi;
May 08, 2009