Prem Sagar Manocha vs State (Nct Of Delhi) on 6 January, 2016

Equivalent citations: AIR 2016 SUPREME COURT 290, AIR 2016 SC (CRIMINAL) 419 2016 (2) ADR 30, 2016 (2) ADR 30

Bench: T.S. Thakur, Kurian Joseph

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 9-10 OF 2016
(Arising from S.L.P. (Criminal) Nos. 7153-7154/2013)

PREM SAGAR MANOCHA … APPELLANT (S)

VERSUS

STATE (NCT OF DELHI) … RESPONDENT (S)

J U D G M E N T

KURIAN, J.:

Leave granted.

Appellant is aggrieved by the proceedings initiated by the High Court of Delhi against him under Section 340 of The Code of Criminal Procedure, 1973 (hereinafter referred to as 'CrPC') which culminated in the impugned order dated 22.05.2013 whereby the High Court directed its Registrar General to file a complaint against the respondent.

SHORT FACTS:

In connection with the investigation of F.I.R. No. 287 of 1999 registered at Police Station, Mehrauli (Jessica Lal Murder Case), the Police sought an expert opinion from the State Forensic Science Laboratory, Rajasthan by letter dated 19.01.2000. The expert opinion was in respect of the following three questions:

"1. Please examine and opine the bore of the two empty cartridges present in the sealed parcel.

2. Please opine whether these two empty cartridges have been fired from a pistol or a revolver.

3. Whether both the empty cartridges have been fired from the same firearm or otherwise." (Emphasis supplied) The appellant at the relevant time was working as the Deputy Director of the Laboratory. He forwarded a report dated 04.02.2000 with the following result of examination:

> "(i) The caliber of two cartridge cases (C/1 and C/2) is .22.
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> (ii) These two cartridge cases (C/1 and C/2) appear to have been fired from pistol.
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> (iii) No definite opinion could be given on two .22 cartridge cases (C/1 and C/2) in order to link firearm unless the suspected firearm is available for examination." (Emphasis supplied) During the trial before the Sessions Court, New Delhi, 101 witnesses were examined for the prosecution. Appellant was PW-95. The trial court acquitted all the ten accused of all the charges. In Criminal Appeal 193 of 2006, by judgment dated 20th December 2006, the High Court convicted all of them. The conviction was upheld by this Court in judgment dated 19.04.2010 [The decision is reported in (2010) 6 SCC 1].

Disturbed by the conduct of many of the witnesses turning hostile, the High Court, in the appeal against acquittal, initiated suo motu proceedings, by notice dated 20.12.2006 against 32 witnesses including the appellant. After considering their replies, the proceedings against a few of them were dropped. However, the appellant and a few others were directed to be proceeded against. The Court was of the opinion that the oral evidence tendered by the appellant reflected a shift in stand from that of the written opinion which was apparently to help the accused, and hence, Section 193 of the Indian Penal Code (45 of 1860) (hereinafter referred to as 'IPC') was attracted.

In order to appreciate the factual position a little more in detail, which is necessary for the purpose of this appeal, we shall extract the relevant portion of the deposition:

> "And after examination the report was prepared with reference to the queries. My report is Ex. PW-95/2 which was typed at my dictation and bears my sign at point A. On examination I came to the conclusion as under:
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> In answer to query no.1, in Ex-PW-95/1B regarding the bore of two empty cartridges I came to the conclusion that the caliber of two cartridge cases (marked C/1 and C/2) examined by me is .22 bore.
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> Regarding query no. 2 the two cartridge cases in question 1 came to the conclusion that these two cartridges appear to have been fired from pistol. The query at no.2 was "please opine whether these two empty cartridges have been fired from pistol or revolver".

Query No. 3 was 'whether both the empty cartridges have been fired from the same fire arm which had not been sent for examination in order to link the cartridge cases with that. So my conclusion was that no definite opinion could be given on two .22 bore cartridge cases (C/1 and C/2) in order to link with the firearm unless the suspected fire arm is available for examination.

Court question Q. For reply to query no. 3 the presence of the fire arm was not necessary. The question was whether the two empty cartridges have been fired from one instrument or from different instruments?

Ans. The question is now clear to me. I can answer the query here and now. These two cartridge cases were examined physically and under sterio and comparison microscope to study and observe and compare the evidence and the characteristic marks present on them which have been printed during firing. After comparison I am of the opinion that these two cartridge cases C/1 and C/2 appeared to have been fired from two different fire arms." (Emphasis supplied) The witness was declared hostile, and in cross examination, the following question and its answer were tendered.

"Q. Is it correct that according to your own notings at pt. C to C on worksheet you were of the view that definite opinion as to whether the fired cases C1 and C2 have been fired from the same firearm i.e. one firearm or from two different weapons can be given only if the firearm involved in question is produced otherwise not.

Ans. I have already stated that these two cartridge cases appeared to have been fired from two different firearms. Definite opinion would have been given once the weapon is given to me for examination." (Emphasis supplied) Shri K. V. Viswanathan, learned Senior Counsel appearing for the appellant, contended that being an expert and a professional, the appellant only tendered his opinion in response to the specific question by court and that does not amount to even a borderline case of perjury.

Perjury falls under Chapter XI of the IPC "Of False Evidence and Offences Against Public Justice". As per Section 193 of IPC, "whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine, and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine....." .

Section 340 of CrPC falls under Chapter XXVI of the Code- "Provisions as to Offences Affecting the Administration of Justice". Either on an application or otherwise, if any court forms an opinion that it is expedient in the interests of justice that an inquiry should be made in respect of an offence referred to under Section 195 of CrPC which appears to have been committed in relation to a proceeding in that court, the court

after such preliminary inquiry, enter a finding and make a complaint before the Magistrate of competent jurisdiction. It is this jurisdiction which has been invoked suo motu by the High Court in the Criminal Appeal, leading to the impugned order.

Section 340 of CrPC, prior to amendment in 1973, was Section 479-A in the 1898 Code and it was mandatory under the pre-amended provision to record a finding after the preliminary inquiry regarding the commission of offence; whereas in the 1973 Code, the expression 'shall' has been substituted by 'may' meaning thereby that under 1973 Code, it is not mandatory that the court should record a finding. What is now required is only recording the finding of the preliminary inquiry which is meant only to form an opinion of the court, and that too, opinion on an offence 'which appears to have been committed', as to whether the same should be duly inquired into. We are unable to appreciate the submission made by the learned Senior Counsel that the impugned order is liable to be quashed on the only ground that there is no finding recorded by the court on the commission of the offence. Reliance placed on Har Gobind v. State of Haryana[1] is of no assistance to the appellant since it was a case falling on the interpretation of the pre-amended provision of the CrPC. A three-Judge Bench of this Court in Pritish v. State of Maharashtra[2] has even gone to the extent of holding that the proceedings under Section 340 of CrPC can be successfully invoked even without a preliminary inquiry since the whole purpose of the inquiry is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed. To quote:

"9. Reading of the sub-section makes it clear that the hub of this provision is formation of an opinion by the court (before which proceedings were to be held) that it is expedient in the interest of justice that an inquiry should be made into an offence which appears to have been committed. In order to form such opinion the court is empowered to hold a preliminary inquiry. It is not peremptory that such preliminary inquiry should be held. Even without such preliminary inquiry the court can form such an opinion when it appears to the court that an offence has been committed in relation to a proceeding in that court. It is important to notice that even when the court forms such an opinion it is not mandatory that the court should make a complaint. This sub-section has conferred a power on the court to do so. It does not mean that the court should, as a matter of course, make a complaint. But once the court decides to do so, then the court should make a finding to the effect that on the fact situation it is expedient in the interest of justice that the offence should further be probed into. If the court finds it necessary to conduct a preliminary inquiry to reach such a finding it is always open to the court to do so, though absence of any such preliminary inquiry would not vitiate a finding reached by the court regarding its opinion. It should again be remembered that the preliminary inquiry contemplated in the sub-section is not for finding whether any particular person is guilty or not. Far from that, the purpose of preliminary inquiry, even if the court opts to conduct it, is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed." In the impugned

order, the High Court did form an opinion after the inquiry. To quote:

"90. It was argued on behalf of the state by the learned standing counsel that the ballistic expert's deposition, Ex. PW-95 was calculated to let the accused Manu Sharma off the hooks. It was submitted that the witness had stated that no definite opinion could be given whether the two empty cartridges were fired from the same weapon. However, on the basis of the same material, he took a somersault and gave a completely contrary opinion in the Court saying that they appear to have been fired from different weapons. It was submitted that by the time this witness stepped on to the box, the defence had formed its definite plan about a "two weapon theory". The deposition of this witness was sought to support the "two weapon theory". That this court and Supreme Court rejected the theory did not in any way undermine the fact that PW-95 gave false evidence." Therefore, what is to be seen is whether the High Court is justified in forming the opinion on commission of the offence under Section 193 of IPC. The stand of the appellant in his report (Ex PW-95/2) dated 04.02.2000, and while deposing before the court at the trial, it is to be noted, was consistent. Query No.3 was whether both the empty cartridges were fired from the same firearm or otherwise. Since there was no recovery of the firearm, the same was not sent along with the cartridges for the examination by the expert. Therefore, the opinion tendered was that he was unable to give any definite opinion in answer to Query No.3, "unless the suspected firearm is available for examination." It was at that juncture, there was a court question. According to the court, "for reply to query no. 3, the presence of the firearm was not necessary. The question was whether the two empty cartridges have been fired from one instrument or from different instruments". To that question, the appellant responded that "after comparison, I am of the opinion that these two cartridge cases C/1 and C/2 appeared to have been fired from two different firearms". It is not a clear, conclusive, specific and definite opinion. In further examination, the appellant has clearly stated that "I have already stated these two cartridge cases appear to have been fired from two different fire arms. Definite opinion would have been given once the weapon is given to me for examination".

We fail to understand how the stand taken by the appellant, as above, attracts the offence of perjury. As we have already observed above, the appellant has all through been consistent that as an expert, a definite opinion in the case could be given only if the suspected firearm is available for examination. It is nobody's case that scientifically an expert can give a definite opinion by only examining the cartridges as to whether they have been fired from the same firearm. It was the trial court which insisted for an opinion without the presence of the firearm, and in that context only, the appellant gave the non-specific and indefinite opinion. An expert, in such a situation, could not probably have given a different opinion.

In fact, this Court, in the decision rendered on the appeal filed by the accused and reported in Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)[3], has

specifically dealt with the issue explaining, and in a way, justifying the stand of the appellant. To quote:

"180. Similar is the case with the expert opinion of PW 95 which is again inconclusive. There is no evidence on record to suggest that PW 95 gave an opinion to oblige the prosecution. On the contrary, his response to the court question reveals that he was extremely confused as to the issue which had to be addressed by him in the capacity of an expert. In the concluding part of his testimony he reaffirms the opinion given by him which is that without test firing the empties from the weapon of offence no conclusive opinion can be given." (Emphasis supplied) This Court in State (Delhi) v. Pali Ram[4] held that:

"51. ....the real function of the expert is to put before the court all the materials, together with reasons which induce him to come to the conclusion, so that the court, although not an expert, may form its own judgment by its own observation of those materials. Ordinarily, it is not proper for the court to ask the expert to give his finding upon any of the issues, whether of law or fact, because, strictly speaking, such issues are for the court or jury to determine".

In Ramesh Chandra Aggrawala v. Regency Hospitals[5], this Court has dealt with the difference between an 'expert' and 'a witness of fact'.

"20. An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions." Mr. Vishwanathan, learned Senior Counsel has invited our attention and has placed heavy reliance on a judgment of the Supreme Court of Pakistan in Sqn. Ldr. (R) Umeed Ali Khan v. Dr. (Mrs.) Sultana Ibrahim and Others[6]. While dealing with the issue of perjury by expert witnesses, observed as follows:

"6. We have also dilated upon the import and significance of the Handwriting Expert report by whom it was opined that the "receipt" was signed by Dr. Sultana Ibrahim. It is well-settled by now that Expert's evidence is only confirmatory or explanatory of direct or circumstantial evidence and the confirmatory evidence cannot be given preference where confidence-inspiring and worthy of credence evidence is available. In this regard we are fortified by the dictum as laid down in Yaqoob Shah v. The State PLD 1976 SC 53. There is no doubt that the opinion of Handwriting Expert is relevant but it does not amount to conclusive proof as pressed time and again by the learned

> Advocate Supreme Court on behalf of petitioner and can be rebutted by overwhelming independent evidence. In this regard reference can be made to Abdul Majeed v. State PLD 1976 Kar.
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> 762. It is always risky to base the findings of genuineness of writing on Expert's opinion. In this behalf we are fortified by the dictum as laid down in case of Ali Nawaz Gardezi v. Muhammad Yousuf PLD 1963 SC 51. It hardly needs any elaboration that expert opinion must always be received with great caution, especially the opinion of Handwriting Experts. An expert witness, however, impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him. The mere fact of opposition on the part of the other side is apt to create a spirit of partisanship and rivalry, so that an Expert witness is unconsciously impelled to support the view taken by his own side. Besides it must be remembered that an Expert is often called by one side simply and solely because it has been ascertained that he holds views favourable to its interest. Although such evidence has to be received with "great caution", yet such evidence, and reasons on which it is based, are entitled to careful examination before rejection and non-acceptance by Court of Expert's evidence does not mean that the Expert has committed perjury. Of all kinds of evidence admitted in a Court, this is the most unsatisfactory.

It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence"

> We are afraid that the decision is of no assistance to the appellant, since according to that court, the expert is often called by a party after ascertaining that the expert holds a view in favour of that party. That is not the situation or scheme under The Indian Evidence Act, 1872. And, in any case, a Government scientific expert certainly stands on a different footing.
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> Expert evidence needs to be given a closer scrutiny and requires a different approach while initiating proceedings under Section 340 of CrPC. After all, it is an opinion given by an expert and a professional and that too especially when the expert himself has lodged a caveat regarding his inability to form a definite opinion without the required material. The duty of an expert is to furnish the court his opinion and the reasons for his opinion along with all the materials. It is for the court thereafter to see whether the basis of the opinion is correct and proper and then form its own conclusion. But, that is not the case in respect of a witness of facts. Facts are facts and they remain and have to remain as such forever. The witness of facts does not give his opinion on facts; but presents the facts as such. However, the expert gives an opinion on what he has tested or on what has been subjected to any process of scrutiny. The inference drawn thereafter is still an opinion based on his knowledge. In case, subsequently, he comes across some authentic material which may suggest a different opinion, he must address the same, lest he should be branded as intellectually dishonest. Objective approach and openness to truth actually form the basis of any expert opinion.

In National Justice Compania Naviera SA v. Prudential Assurance Co Ltd (The "Ikarian Reefer")[7], the Queen's Bench (Commercial Division) even went to the extent of holding that the expert has the freedom in such a situation to change his views. It was stated that "if an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report".

Hence, merely because an expert has tendered an opinion while also furnishing the basis of the opinion and that too without being conclusive and definite, it cannot be said that he has committed perjury so as to help somebody. And, mere rejection of the expert evidence by itself may not also warrant initiation of proceedings under Section 340 of CrPC.

It is significant to note that the appellant's opinion that the cartridges appeared to have been fired from different firearms was based on the court's insistence to give the opinion without examining the firearm. In other words, it was not even his voluntary, let alone deliberate deposition, before the court. Therefore, it is unjust, if not unfair, to attribute any motive to the appellant that there was a somersault from his original stand in the written opinion. As a matter of fact, even in the written opinion, appellant has clearly stated that a definite opinion in such a situation could be formed only with the examination of the suspected firearm, which we have already extracted in the beginning. Thus and therefore, there is no somersault or shift in the stand taken by the appellant in the oral examination before court.

The impugned proceedings initiated against the appellant under Section 340 of CrPC are hence quashed. The appeals are allowed.

.....CJI.

(T. S. THAKUR)

....……J. (KURIAN JOSEPH)

New Delhi;
January 6, 2016.

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[1] (1979) 4 SCC 482

[2] (2002) 1 SCC 253

[3] (2010) 6 SCC 1

[4] (1979) 2 SCC 158

[5] (2009) 9 SCC 709

[6] LEX/SCPK/0483/2006

[7] [1995] 1 Lloyd's Rep 455

REPORTABLE
