

JUDICIAL DISCRETION IN EXAMINING EXPERT WITNESS: ANALYZING THE LESSONS FROM ANOKHILAL VS STATE OF MP

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Abstract: The final verdict in the case of *Anokhilal v. State of MP* created an uproar among the public. A man, who had been sentenced to death twice, was finally acquitted by the Special Court of Khandwa after 11 years based, on the same evidence on record; except, the expert witness was examined in third and final trial. The Madhya Pradesh High Court in an appeal against the decision in the second trial, emphasized that when the courts rely on the expert evidence as the sole basis for conviction, they must take the oral testimony of the expert witness, which ultimately led to his acquittal in the subsequent trial. Various Supreme Court judgements had previously highlighted this principle, but to no avail, as the majority of the courts in India still dispense with the necessity of oral testimony before admitting expert evidence. This paper examines the relevant provisions with respect to the examination of expert witnesses in the Code of Criminal Procedure and the Bharatiya Nagarik Suraksha Sanhita, highlighting the lacunae in the Indian law as underscored by *Anokhilal vs State of M.P.* The paper subsequently draws comparison with the corresponding UK law and recommends similar legislative reforms to the Indian statutes to safeguard the right of the accused to a fair trial.

Keywords: Judicial Discretion; Expert Evidence; Expert Witness; DNA Report; Cross-examination

I. INTRODUCTION

The case of *Anokhilal vs State of MP* is a case of rape and murder of a nine-year old girl, where the accused was sentenced to death twice by the Trial Courts, primarily relying on the DNA reports. The same DNA reports led to his acquittal in the final trial owing to the examination of the expert witness. The paper highlights the risks of unguided judicial discretion in the examination of the expert witnesses, while analyzing the relevant statutory provisions.

II. FACTS OF THE CASE

The deceased victim was a nine-year old minor girl, and the accused – Anokhilal were the residents of Sargaon Joshi Village, Khandwa district.

On the night of 31.01.2013, the accused reached the home of the victim and asked her to buy a 'bidi' from the local store. Soon after the victim set out from her home, but did not return. Her father filed an FIR against the accused. On 01.02.2013, during a search for the victim, her body was discovered in an agricultural field. The police recovered forensic evidence from the crime scene and the body of the deceased.

Subsequently, Dr. Raksha Shrimali and Dr. Anil Tantwar performed the post-mortem of the

victim and opined the cause of the death to be 'asphyxia due to throttling' with signs of 'penetrative sexual assault'.

The accused, allegedly absconding, was apprehended by the police on 04.02.2013. Upon medical examination, scratch marks were found on both sides of his neck.

In the initial trials, the court primarily relied on circumstantial evidence-'last seen theory'. The victim was last seen alive with the accused by her neighbor Kirt Bai.

Pertaining to the forensic evidence, the prosecution had adduced and marked: Seized head hair from the fist of the victim, fingernails of the victim and the skin cells found under them, vaginal slide and anal slide of the victim, semen samples found on the pajamas of the victim, clothes of the victim, soil from the scene of the incident, pubic hair and head hair of the accused, semen sample and skin slide of the accused, clothes and undergarments of the accused (with the blood stains of the victim on them). These articles along with the medical examination reports were sent to the forensic labs for chemical analysis. The DNA report primarily established the guilt of the accused in the initial trials. The DNA of the hair collected from the victim's fist, skin under her fingernails and semen from her pajamas belonged to the accused and the blood stains on his underwear belonged to the deceased.

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Anokhilal was tried, convicted and sentenced to death twice.

III. PROCEDURAL HISTORY AND FINAL ACQUITTAL

In *Anokhilal vs. State of MP*, the accused was tried three times owing to the glaring procedural lapses pointed out by the Supreme Court and MP High Court in the first two trials respectively.

The first trial took place in 2013, whereby the Session Court Judge of Khandwa had convicted the accused under “Sections 302, 363, 366, 376(2) (f) and 377 of the Indian Penal Code” as well as under “Sections 3, 4, 5 and 6 of the Protection of Children from Sexual Offences Act, 2012” and sentenced the accused to death by an order dated 04.03.2013, for the rape and murder of a nine-year old girl.

On appeal and reference, the High Court by a judgement dated 27.6.2013 had upheld the conviction and death sentence. Both the Sessions Court and the High Court primarily relied on the DNA evidence report and the last seen theory to convict the accused. There were no direct eye-witnesses to the crime, and the case of prosecution was completely based on the circumstantial evidence.

On appeal to the Supreme Court, it was held that the Trial Court did not follow the procedure established by law. The Court observed that the counsel of the accused was not given ‘sufficient opportunity’ in the trial. Since, the accused was sentenced to death; the court observed that even the slightest error in the trial can arbitrarily deprive a person of his life. The Apex Court noted that it is the duty of the court to ensure that ‘sufficient opportunity’ had been afforded to the counsel, and making substantial progress on the same day as the date of appointment of counsel is in breach of that rule.

On the order of the Apex Court for ‘trial de novo’, the Sessions Court of Khandwa had initiated a fresh trial of the accused. However, the summons issued to the expert witness Dr. Pankaj Srivastava was cancelled and relying on Section 293 of CrPC the burden to show why the expert needs to be summoned was shifted unjustly on the defense. All the evidences were freshly examined and by judgment of conviction dated 29.08.2022 and the order of sentence dated 30.08.2022, the accused was sentenced to death again by the Sessions Judge.

In the appeal and reference to the Madhya Pradesh High Court, the court allowed the interim application of the accused under “Section 367 read with Section 391 of the CrPC”, seeking: laboratory documents of SFSL, Sagar and RFSL, Indore; examination of the expert witnesses-Pankaj Shrivastava and Dr. S K Verma by the appellant’s counsel; and re-examination of the accused u/s 313 of CrPC.

The High Court set aside the orders of conviction and death sentence, reiterating the principle that examination of expert witness is indispensable when the conviction is majorly based on the DNA report and ordered the Sessions Court to allow the examination of expert witnesses by the appellant’s counsel, and to re-conduct the examination of the accused u/s 313 of CrPC. The matter was remanded to the trial court, with the direction that the previous evidence on record should remain undisturbed. In the third trial, the Sessions Court observed several discrepancies in the seizure, sealing and storing of the evidence collected. The testimony of the expert witness, as ordered by the High Court, turned out to be critical evidence that played a major role in the acquittal of the accused.

The examination of Pankaj Shrivastava (*Scientific Officer Assistant Chemical Examiner*), revealed that the semen sample collected from the private parts of the victims belonged to another male, other than the accused. This testimony casted a major shadow of doubt on the prosecution’s case that the accused had solely brutally raped and murdered the victim.

A. Legal grounds for Acquittal

It is imperative to note that the entire prosecution’s case was based on circumstantial evidence: DNA reports and last seen theory. It is a settled principle of law that when a conviction is based on circumstantial evidence, the chain of evidence must be so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.¹ The Apex Court stated that “*When the conviction is based on circumstantial evidence solely, then there should not be any snap in the chain of circumstances. If there is a snap in the chain, the accused is entitled to benefit of doubt.*”² The testimony of the expert witness disclosed that the semen sample collected from the victim’s body did not belong to the accused,

¹*Sharad Birdhichand Sarda vs State of Maharashtra*, 1984 AIR 1622

²*Bhim Singh & Anr vs State of Uttarakhand*, 2015 (4) SCC 281

resulting in a snap in the chain of circumstances and the accused was given the benefit of doubt.

Additionally, the case against the accused turned weaker on account of the discrepancies observed by the Sessions court in the handling of the DNA evidence. The major evidence that formed the basis of his initial conviction: head hair found in the hands of the deceased, DNA sample collected from the nails of the deceased, the clothes of the deceased with the semen of the accused and such evidence as mentioned previously, were doubted to be mishandled by the court. Such doubts were not without basis: there were multiple inconsistencies in the seizure reports, no evidence or documentation ascertaining that the samples collected were sealed and unexplained gaps in the chain of custody of the samples.

The fact that the accused was acquitted during his third trial, after the above testimonies and observations raises numerous questions. What could have been done right the first time?

The accused had suffered 11 years of imprisonment on death row, solely because the court had been incautious and inattentive in its scrutiny of the forensic evidence. However, it is important to emphasize that this paper will only address the importance of examination of expert witnesses and not the additional dimensions of mishandling or procedural irregularities in the collection, storage, and analysis of DNA evidence.

IV. NECESSITY OF ORAL TESTIMONY IN EXPERT EVIDENCE

The DNA is a piece of expert evidence, the weightage of which depends on the factual matrix of each case. However, when DNA evidence forms the basis of conviction, the court has the duty to ascertain the reliability of the DNA report. The Supreme Court in *Pattu Rajan* had stated - "This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible..."³

³*Pattu Rajan vs. State of T.N. and others* (2019) 4 SCC 771

⁴*Ramesh Chandra Agrawal vs. Regency Hospital Limited and others*, (2009) 9 SCC 709

⁵*Ghulam Hassan Beigh vs. Mohammad Maqbool Magrey and others*, (2022) 12 SCC 657;

Thus, the testimony of expert evidence is important to determine the reliability of the DNA report which depends upon the data, material, and the basis on which conclusions were drawn in DNA report.

The DNA report, in the instant case, had been the primary evidence on which the accused was convicted. In such a situation, it is indispensable for the court to summon the expert who prepared the report, not only to corroborate the report, thereby establishing the case against the accused beyond any reasonable doubt, but also to allow the opportunity to the defense to cross-examine.

However, during the second trial, the Trial Court had cancelled the summons issued to the expert Dr. Pankaj Shrivastava for his oral testimony and wrongly shifted the burden upon the defense to prove the necessity of summoning the expert. Despite having the opportunity to examine the expert, the court exercised its discretion to not examine him with no substantial reason. Consequently, the High Court, through the application of the accused, had to order the Sessions Court to take the testimony of the expert.

This is a well settled principle in law that was re-iterated by numerous Supreme Court judgments. In a landmark judgment the Supreme Court emphasized that the foremost test of admissibility of the expert evidence is the necessity of 'hearing' the expert evidence.⁴ The Apex Court re-iterated on many occasions the significance of the expert testimony in adducing the facts and materials and elucidating the court regarding the technical aspects of the case, so that the court may form its independent judgment.⁵

In *Parappa and others vs. Bhimappa and another*, the Karnataka High Court reaffirmed that

*"If the prosecution relies on a report of the expert, not only the report is to be produced, the author of the report is also to be examined in the Court on oath and an opportunity should be given to the accused to cross-examine the said expert on the correctness of the report. It is only then the said evidence becomes admissible and not otherwise....."*⁶

In *Rahul vs. the State*, "... the lower courts failed to assess the foundational basis for the DNA

State of Himachal Pradesh v Jai Lal, (1999) 7 SCC 280

⁶*Parappa and others vs. Bhimappa and another*, (2008) ILR KAR 1840

report and if the expert had accurately and reliably conducted the examination...". As such, the Supreme Court in this case refused to admit the DNA report.⁷

In another case, the Supreme Court ascertained that the accused must be given an 'actual opportunity' to cross examine the expert. It held that – "The scientific experts were called to prove the reports, remanded the matter to the trial Court for de-novo trial holding that no proper opportunity was granted to the accused therein to defend himself..."⁸ Furthermore, it was stated in another case that the failure of the trial court in taking the deposition of the expert testimony has led to failure of justice.⁹

V. JUDICIAL PRECEDENTS VS. SECTION 293 CRPC: THE UNRESOLVED STATUTORY GAP AND A MISSED OPPORTUNITY IN BNSS

The principle laid down by the Supreme Court in various cases emphasized the importance of examining expert witnesses when relying on DNA reports and forensic evidence. The reason is that the reliability of DNA evidence varies with each case and it is not always infallible¹⁰; it depends on factors such as the quality and quantity of the samples, the techniques employed for the analysis and the data used. That is the reason it is necessary for the courts to take the testimony of expert witnesses to determine reliability of the DNA reports, especially in cases where they are used to determine the guilt of the accused. Expert testimony ensures fairness of the trial, as it also provides the accused with an opportunity to cross-examine the expert witness.

However, the principles laid down by the Apex Court in this regard bear no reflection in the Criminal Procedure Code or the BNSS (as discussed in subsequent sections). Section 293 of Criminal Procedure Code provides wide discretion to the courts to determine the necessity of summoning the expert witnesses for oral testimony.

Section 293 provides that reports from the government scientific experts may be admissible in the courts as evidence. However, it does not impose any mandatory requirement on the court

to summon the expert witnesses to the court. The section also provides that, the experts summoned for testimony may even, after permission from the court, depute another officer to testify in their place. This further dilutes their accountability.¹¹

If this discretion is not exercised cautiously or without proper application of mind, it could lead to miscarriage of justice as not only will the court be relying on an expert report, the reliability of which is not ascertained but it will also be depriving the accused of his/her opportunity to cross-examine the witness. The section allows the court to do away with the need for the expert's testimony even when the expert reports form the basis for conviction without examining the underlying basis for the report. Sometimes, it could result in the court accepting incomplete forensic reports or even reports derived from contaminated samples. Furthermore, it is often observed that the courts unfairly shift the burden on the defense to prove the necessity for summoning an expert witness, as seen in the *Anokhilal's* case or leave it upon them to try and secure the attendance of the experts for testimony in the court.

In the epoch of forensic evidence, the significance placed on it has increased tremendously. However, this does not render it irrefutable. With its growing importance in determining the guilt of the accused, the need to ensure its reliability and accuracy also increases. This being said, the responsibility falls upon the courts to rigorously test the reliability of the expert evidence before making them the basis for conviction. However, the Indian courts often fall short in this regard, given the broad discretion granted to the courts in dispensing with the examination of the experts.

Taking insight from the UK law, the Indian legislations should adopt the element of accountability. It can adopt the provision wherein the summoning of an expert for his/her testimony can be waived, only with the permission of the court. This would ensure that the court while deciding upon such exemption, has the responsibility to scrutinize whether it would have any adverse impact on the case, thereby ensuring accountability on their part. This further guarantees that except in few cases, the expert report is always followed by the examination of its author, to test its reliability.

⁷Rahul etc. etc. vs. State of Delhi, Ministry of Home Affairs and Another, (2023) 1 SCC 83

⁸Naveen @ Ajay v. State of Madhya Pradesh, (2023) INSC 936

⁹Irfan @ Bhayu Mevati vs The State Of Madhya Pradesh, (2025) SC 150

¹⁰Pattu Rajan vs. State of T.N. and others (2019) 4 SCC 771

¹¹The Code of Criminal Procedure 1973, s. 293

The recently enacted Bharatiya Nagarik Suraksha Sanhita (BNSS) which replaces the old Criminal Procedure Code (CrPC), presented a good opportunity for the legislation to rectify all the existing lapses in the current code. Nevertheless, under section 329 of BNSS (the corresponding provision of 293) the scope of discretion given to the judges has ironically been expanded than restricted.¹² While the entire provision remains unchanged, sub-section 4 clause (g), has been altered to include 'any other scientific expert' as opposed to 'any other government scientific expert' mentioned in section 293. Another key distinction between the Section 293 and 329 is that in the former, only the 'central government' has the power to notify the scientific experts who can be brought under the ambit of the section. However, in the later, this power has been extended to the 'state governments' as well. This implies that the application of this provision has been extended to the private scientific experts as well, who, as and when notified by the central government or the state government may fall under the domain of this section.

While the provision retains judicial discretion in summoning an expert, it fails to provide for any accountability on the part of the judges in exercising their discretion. This reflects the missed opportunity by the legislators in addressing the lacuna in the existing criminal code, to provide relief to the accused through the right to cross-examine, particularly in cases where the expert evidence becomes the primary basis of conviction.

VI. STRENGTHENING FORENSIC JUSTICE: INCORPORATING UK AND US PRACTICES ON EXPERT TESTIMONIES AND CROSS-EXAMINATION

The UK and US criminal justice systems emphasize the importance of examination and cross examination of expert witnesses, when forensic evidence is presented against the defendant. The underlying principle is that scientific evidence should be scrutinized by the court and not accepted at face value. It is important for India to incorporate these practices to strengthen forensic justice and prevent wrongful convictions arising from such unchallenged forensic reports as in the case of Anokhilal.

A. United Kingdom

¹² Bharatiya Nagarik Suraksha Sanhita 2023, s. 329

¹³ Criminal Justice Act 1988, s. 30

Unlike Indian law, the UK statute incorporated a few safeguards to ensure fairness in the matter of examination of expert witnesses or the lack of it to be specific. It provides a balanced approach by giving way for guided judicial discretion.

The UK law under Section 30 of the Criminal Justice Act, 1988 speaks of the expert reports and expert evidence.¹³ It clearly lays down that the reports of experts can be admissible irrespective of the expert being summoned to the court for his oral testimony. However, it states that in certain cases the summoning of the expert can be dispensed with, but only with the permission of the court. The court while doing so considers certain parameters like the content of the report, the weight it adds towards proving the guilt of the accused, the probability of unfairness to the accused if the report is accepted without being cross-examined and the reasons provided for not examining the witness. After examining these factors, the court decides whether or not to grant the leave to admit the report without summoning the expert. This ensures that while discretion is given to the courts in summoning the experts for their testimony, it does not go unchecked and there is an element of accountability.

In contrast, the Indian law gives ample discretion to the judiciary in the matter of examining expert witnesses that could result in miscarriage of justice. It completely eliminates the element of accountability, as neither the prosecution nor the defense is required to take the leave of the court before foregoing the examination of the expert witness when they submit expert reports as evidence.

The provision does not lay down the factors that the court needs to consider before it decides to forego the examination of expert witness when admitting expert evidence. It is not even mandated to enquire into the reasons for the non-examination of the witness. To put it simply, the court is given unguided discretion. The most essential factor that is overlooked is that the court often does not consider whether the non-examination of expert witnesses will result in any unfairness towards the accused.

The UK law prescribes greater accountability and responsibility on the judiciary by mandating court's permission and judicial scrutiny for the non-examination of expert witnesses.

B. United States

Further in the US, the sixth amendment¹⁴ to the constitution deals with the 'protection to the rights of the people accused of crimes' Under

¹⁴ United States Constitution amend VI

the same, a specific clause – the confrontation clause has received widespread acceptance across the federal rules of the courts. The confrontational clause, as the name suggests, states that the criminal defendants have the right to ‘face the witnesses against them’ i.e., they have the right to cross-examine the witnesses who have given testimonies against them in the court of law.

In the case of *Arizona v. Smith*¹⁵, the right to cross examine the witness whose expert report was relied as a sole basis for the conviction of the criminal defendant was read into the confrontation clause. As held in the case, since the defendant did not get the right to cross-examine the expert witness, the report is said to be violative of the Sixth Amendment. This highlights the emphasis placed on the oral testimony of the expert witness, as it gives the criminal defendants a chance to cross-examine the witness.

United States constitutionally protects the right of the accused to cross-examine the expert witnesses under its Confrontation Clause. In India the defendant lacks such safeguards, which undermines the Constitutional Principle of Fair trial under Article 21. It is important to recognize the right of the accused to confront the evidence presented against him, especially when his life and liberty is at stake.

The UK and the US laws have underscored the importance attached to the cross-examination of the relevant expert witness by the defendant. This stipulation ensures a fair trial to the accused, as he/she is not deprived of the opportunity to challenge the DNA evidence and it safeguards their right to defend themselves. While, the Indian approach affords greater flexibility, it is often at the risk of admitting unreliable expert reports without oral testimonies, which could have grave repercussions as crucial evidence might be admitted in determining the guilt of the accused without the necessary scrutiny.

The examination of the relevant law in the above two jurisdictions, emphasize the need to reform Indian law in two dimensions: Guided judicial discretion and Rights of the Defendant.

VII. CONCLUSION

Anokhilal vs State of M.P underscores the importance of exercising rigorous judicial scrutiny while admitting expert evidence without oral testimonies, especially in cases where DNA/forensic evidence forms the basis

of conviction. The accused anguished in prison for a decade as a death row inmate, which could have been avoided if he was given the chance to cross-examine the expert witness. A major reason for the acquittal of the accused in the third and final trial was the oral testimony and cross examination of Dr Pankaj Srivastava who disclosed that the semen sample collected from the clothes of the deceased did not belong to the accused. *Anokhilal vs State of M.P* was a wakeup call to the criminal justice system highlighting the dangers of admitting DNA reports without examining the expert witnesses over the reliability of such evidence.

A major take away from this case is the risks associated with the lack of statutory guidelines in the Indian law with respect to the admission of expert evidence without oral testimonies. The Criminal Justice Act, 1988 of UK mandates court’s permission before forgoing the examination of an expert. It provides for guided discretion of the court and imposes on it to take a well-reasoned decision. In contrast, the Indian law- Section 293 of the Indian CrPC, and its equivalent Section 329 of the BNSS- gives wide and unguided discretion to the court, completely eliminating the element of accountability. The lack of statutory guidelines for the court to ascertain the necessity of examination of the expert witnesses poses great risk of wrongful convictions, as crucial evidence goes unquestioned and unchallenged.

To prevent such miscarriage of justice, it is imperative for the Indian legislature to incorporate structured judicial oversight as laid down in the UK law. Reforms should introduce guided discretion to the courts while deciding upon the necessity of examination of experts. The courts should weigh the value of the expert evidence in proving the guilt of the accused, the need for cross –examination and the potential disadvantage to the accused before taking the decision. Subjecting forensic evidence to rigorous scrutiny, and ascertaining their reliability through oral testimonies safeguards the right of the accused to a fair trial. *Anokhilal’s* case serves as a reminder of the injustice an innocent man could suffer when not given a fair trial.

¹⁵ *Arizona v. Smith*, 602 U.S. 779