

Uday Kumar Singh @ Uday Singh and Others Vs. Kameshwar Singh and Others

Uday Kumar Singh @ Uday Singh and Others Vs. Kameshwar Singh and Others

SooperKanoon Citation : sooperkanoon.com/1151664

Court : Patna

Decided On : May-16-2014

Judge : I.a. Ansari & Samarendra Pratap Singh

Appeal No. : Criminal Appeal (DB) Nos.102, 196 & 135 of 2014

Appellant : Uday Kumar Singh @ Uday Singh and Others

Respondent : Kameshwar Singh and Others

Judgement :

I.A. Ansari, J.

1. Under challenge, in the present appeals, are the judgment, dated 13.01.2014, of conviction, in Sessions Trial No.242 of 1987, by learned Ad hoc Additional Sessions Judge II, Vaishali at Hajipur, and the order, dated 18.01.2014, whereby sentences have been passed against all the accused-appellants.

2. By the impugned judgment, the learned trial Court has convicted all the accused-appellants, except accused-appellant, Kameshwar Singh, namely, (i) Uday Kumar Singh @ Uday Singh, (ii) Ranjeet Choudhary, (iii) Ram Babu Singh, (iv) Sachitanand Singh @ Sachchidanand Singh, (v) Sanjay singh, (vi) Kapildeo Singh, (vii) Sunil Kumar Singh, and (viii) Surendra Singh, under Sections 302 read with Section 149 of the Indian Penal Code. Following their conviction under

Section 302 read with Section 149 of the Indian Penal Code, the accused-appellants, namely, (i) Uday Kumar Singh @ Uday Singh, (ii) Ranjeet Choudhary, (iii) Ram Babu Singh, (iv) Sachitanand Singh @ Sachchidanand Singh, (v) Sanjay Singh, (vi) Kapildeo Singh, (vii) Sunil Kumar Singh, and (viii) Surendra Singh, have been sentenced to undergo imprisonment for life and, pay fine of Rs. 10,000/- each. Following his conviction under Section 302 of the Indian Penal Code, the accused-appellant, Kameshwar Singh, has been sentenced to undergo imprisonment for life and, pay fine of Rs. 25,000/-.

3. The case of the prosecution, as unfolded at the trial, may, in brief, be set out as under:

(i) On 09.10.1986, at about 7:00 PM, the informant, Shatrughan Choudhary (PW 8), accompanied by his younger brother, Parmanand Choudhary (PW 7), elder brother, Nawal Kishore Choudhary, Shiv Nath Singh, Brij Nandan Choudhary, Balram Choudhary (PW 2), Nanda Choudhary (PW 4) and Nagendra Choudhary (PW 6), returning to their respective houses after seeing fair at Bhagwanpur Belhatta and were one furlong short of south Gali No.33 of Bhagwanpur Station, they saw their co-villagers, Kameshwar @ Bhola Singh, Sunil Singh, Ram Babu Singh, Ram Surat Choudhary, Ranjeet Choudhary, Sachchidanand Singh, Uday Singh, Sanjay Singh, all armed with country-made pistols, Basawan Singh with Chura (dagger), Umashankar Singh with small danda, Kapildeo Singh and Surendra Singh, armed with lathis, near the house of one Arun Mukherjee and, on seeing Shatrughan Choudhary and his companions, accused Umashankar Singh incited his associates to avenge blood with blood, which will put an end to all sort of litigation. Following the instigation so given, by accused Umashankar Singh, accused Kameshwar Singh @ Bhola Singh fired on Nawal Kishore Singh and the bullet hit on the right ear of Nawal Kishore Singh, and accused Sunil Singh also fired and the bullet hit Nawal Kishore Singh, just above his left ear. On sustaining bullet injuries, Nawal Kishore Singh yelled in pain. Thereafter, accused Ram Babu Singh shot from his pistol on the left waist of Nawal Kishore Singh and accused Ram Surat Choudhary fired, while exhorting others to kill Nawal Kishore Choudhary, from his pistol, the bullet hit Nawal Kishore Choudhary, on his left buttock. The bullet fired by accused Ranjeet Choudhary, hit on the right thigh of

Nawal Kishore Choudhary. Accused Uday Singh, Sachchidanand Sintangh and Sanjay Singh, too, fired on Nawal Kishore Choudhary; whereas accused Basawan Singh assaulted Nawal Kishore Singh, with his dagger, below the waist of Nawal Kishore Choudhary and, then, the accused persons fled away.

(ii) The reason behind the occurrence, according to PW 8, is the old land enmity with accused-appellant Kameshwar Singh and others.

(iii) On receiving the information about the occurrence, police from Bhagwanpur Police Station arrived at the private clinic of Dr. Jaiswal, on 09.10.1986, at 10:30 PM, and recorded, in the form of fardbayan, the information given by Shatrughan Choudhary (PW 8) about the occurrence. The information, so given by PW 8 was forwarded to the Rail Police Station, Muzaffarpur for institution of the case.

(iv) Treating the said fardbayan as First Information Report, Muzaffarpur Rail Police Station Case No. 78 of 1986 was registered, under Sections 302, 307/34 of the Indian Penal Code, against 12 accused persons, namely, (i) Kameshwar Singh, (ii) Sunil Kumar Singh, (iii) Ram Babu Singh, (iv) Ram Surat Choudhary, (v) Ranjeet Choudhary, (vi) Umashankar Singh, (vii) Sachchidanand Singh, (viii) Kapildeo Singh, (ix) Sanjay Singh, (x) Uday Singh, (xi) Basawan Singh and (xii) Surendra Singh.

(v) During investigation, inquest was held over the said dead body, which was also subjected to post mortem examination, and, on completion of investigation, charge sheet was laid against accused persons, namely, (i) Basawan Singh, (ii) Kameshwar Singh, (iii) Sunil Kumar Singh, (iv) Ram Babu Singh, (v) Ram Surat Choudhary, (vi) Ranjeet Choudhary, (vii) Sachchidanand Singh, (viii) Sanjay Singh and (ix) Uday Singh, under Sections 147/148/149/302 of the Indian Penal Code and Section 27 of the Arms Act, 1959.

4. At the trial, when a charge, under Section 302 read with Section 149 of the Indian Penal Code, was framed, the accused-appellants, namely, (i) Kameshwar Singh, (ii) Sunil Kumar Singh, (iii) Ram Babu Singh, (iv) Ram Surat Choudhary, (v) Ranjeet Choudhary, (vi) Sachchidanand Singh, (vii) Sanjay Singh, (viii) Uday Singh, (ix) Basawan Singh and (x) Surendra Singh, the accused-appellant pleaded

not guilty thereto. When charges, under Section 302 read with Section 149 and 302 read with Section 109 of the Indian Penal Code, were framed against accused-appellant, namely, (i) Uma Shankar Singh, (ii) Kapildeo Singh and (iii) Surendra Singh, they, too, pleaded not guilty to the charges so framed.

5. During trial, accused Ram Surat Choudhary and Basawan Choudhary died.

6. In support of their case, prosecution examined altogether 13 (thirteen) witnesses. The accused persons were, then, examined under Section 313(1)(b) of the Code of Criminal Procedure and, in their examinations aforementioned, the accused persons denied that they had committed the offences, which were alleged to have been committed by them, the case of the defence being that of denial. The defence has adduced ten witness.

7. Having, however, reached the finding that the accused persons were guilty of the offences as indicated above, learned trial Court has convicted them accordingly and, consequent thereupon, sentences have been passed against all the appellants as have been mentioned above. However, the learned trial Court has acquitted accused Uma Shankar Singh of the charges framed against him. Aggrieved by their conviction and the sentences, which have been passed against them, the accused, as convicted persons, have preferred these appeals.

8. These three appeals, having arisen out of the impugned judgment of conviction, dated 13.01.2014, and the impugned order of sentence, dated 18.01.2014, have been heard together and are being disposed of by this common judgment and order.

9. We have heard Mr. Ajay Kumar Thakur, learned Counsel appearing on behalf of the appellants and Mr. Ram Suresh Roy, learned Senior Counsel, appearing on behalf of the informant. We have also heard Mr. D. K. Singh, Ms. Shashi Bala Verma, and Mr. A. Sharma, learned Additional Public Prosecutors, appearing on behalf of the State.

10. The moot point, for consideration, is: whether the prosecution has been able to prove, beyond all reasonable doubt, the offences, which the accused-appellants

stand convicted of. Out of the 13 (thirteen) witnesses examined by the prosecution, PW 2, PW 3, PW 4, PW 5, PW 6, PW 7 and PW 8 have been examined as eye-witnesses to the occurrence. However, out of them, PW 5 and PW 6 have been declared hostile and PW 3 died during the pendency of the trial and, as such, could not be cross-examined. Thus, his evidence could not be relied upon by this Court.

11. While considering the present appeals, what attracts the attention, most prominently, is that in the case at hand, the doctor, who had conducted post mortem examination on the dead body of the said deceased and determined the cause of his death, was not examined nor was examined the Investigating Officer.

12. As per the post mortem examination report, the death has been caused by fire-arm injury, which is described below.

œLacerated circular injury, 2" diameter, with inverted margin, penetrating into the skull bone making a hole of 2" diameter, associated with the fracture of the skull bone into small fragment crossing the whole of the brain walls and again damaging the left side of the occipital bone having a circular hole of 2" associated with lacerated wound on the skin just about the back of the neck and behind the left ear with everted margin, skin in torn in star shaped fashion having four flaps. This is an injury of fire arm having the wound of entry on the right parietal bone and the wound of exit on the occipital bone behind the left ear. The bullet has passed through skull damaging the skull bones and the brain matter.?

13. Since the defence has not disputed the factum of murder, we, now, proceed to examine whether the time of the occurrence, the place of the occurrence and the manner of the occurrence, as alleged by the prosecution, have been proved beyond all reasonable doubt.

14. While considering the above aspects of the present appeals, we may point out that the informant (PW 8) has deposed that Parmanand Choudhary (PW 7) was together with him, when he, accompanied by the said deceased, was returning after seeing Fair at Bhagwanpur Belhatta in the evening of 09.10.1986. According to this witness, all the accused persons apprehended the prosecution party when

they were returning from the fair at about 7 PM and on the instigation of accused Umashankar Singh, accused Kameshwar Singh @ Bhola Singh fired at the right side of head of the deceased Nawal Kishore Choudhary, whereafter accused Sunil Singh fired around left ear of deceased Nawal Kishore Choudhary. Accused Ram Babu Singh fired from the pistol above the left waist of the said deceased. In the meantime, accused Ram Surat Choudhary also fired from his pistol from back which caused injury on the hip of Nawal Kishore Choudhary. Accused Basawan Singh struck with dagger causing injury below the waist of the said deceased. The accused persons after ensuring that the said deceased is dead, they fled away from the place of occurrence.

15. Close to the heels of PW 8 are the evidence of PW 2, PW 5 and PW 7.

16. From the cross-examinations of PW 2, PW 5, PW 7 and PW 8, nothing could be elicited by the defence to show that what these witnesses had deposed was untrue or false. The evidence of PW 2, PW 5, PW 7 and PW 8 cannot, therefore, be taken to have been shaken by cross-examination. Their evidence, thus, remained wholly intact.

17. In the backdrop of the above unshaken evidence adduced by the prosecution, it may be noted that the defence, too, as indicated above, has adduced evidence. The evidence, given by the defence, is to the effect that one of the accused, namely, Sachchidanand Singh has filed Bhagwanpur Police Station Case No. 01 of 1984 against the prosecution side. Accused Kameshwar Singh has lodged a case, namely, Bhagalpur Police Station Case No. 27 of 1986, under Section 307 of the Indian Penal Code, against the prosecution side. Sanjay Singh, another accused of the instant case has filed Bhagwanpur Police Station Case No. 78 of 1986 against the prosecution side. The criminal cases filed by both the sides indicate inimical terms between the parties, prior to the present case.

18. Mr. Ajay Kumar Thakur, learned Counsel, appearing on behalf of the appellants, submits that most of the witnesses have stated that the fardbayan had been recorded on 8.30 PM, but in the initial fardbayan (said to be the original fardbayan) the said time has been given as 07.30 PM. The Police Station Case Number mentioned in the inquest report is Bhagwanpur Police Station Case No.

101 of 1986, dated 09.10.1986 and there is no mentioning of Muzaffarpur Rail Police Station Case Number. Even the post mortem examination report of the deceased which has been exhibited as exhibit 4 would also show that initially Bhagwanpur Police Station Case No. 101 of 1986 dated 09.10.1986 was inscribed. Similarly, Clause-1 of the seizure list also mentions Bhagwanpur Police Station Case No. 101 of 1986 dated 09.10.1986. Mr. Thakur, learned Counsel further submits that the First Information Report bearing Bhagwanpur Police Station Case No. 106 of 1986 has not been brought on record during the trial. He next submits that the injuries found on the deceased and those mentioned in the inquest report bears no similarity. Further, there is difference between the copies of inquest report prepared from the same carbon process. Both, the Investigating officer as well as the doctor who conducted the post mortem examination have not been examined. The police officer who had recorded the fardbayan has also not been produced as a witness. The prosecution case does not find corroboration from the medical evidence.

19. As regards the enmity, which, admittedly, existed between the prosecution side and the defence side, suffice it to point out, in this regard, that if there was enmity between the two, this enmity was a double-edged weapon. While enmity may be the cause for falsely implicating an accused either alone or in association with others, enmity may also become the cause of causing hurt and, in the case of present nature, this animosity, which existed between the parties, cannot be ignored inasmuch as the accused-appellants had the reason to injure and kill Nawal Kishore Singh.

20. However, in order to determine the truth or falsity of the prosecutions case, it was incumbent, on the part of the learned trial Court, to examine the doctors and the Investigating Officer, because the doctors could have given the finding as to what injury or injuries had been found on the said deceased and the weapons used for causing such injury or injuries.

21. In terms of the impugned judgment and the relevant record of the case, the doctors have not been examined and the learned trial Court has observed in the impugned judgment that it (learned trial Court) has taken all efforts to secure the

presence of the doctor and the Investigating Officer in the Court. We fail to understand as to why the presence of the official witnesses, namely, the doctors and the Investigating Officer, could not be procured by the learned trial Court and why the said witnesses could not be examined by the Court.

22. With regard to the above, it needs to be noted that the manner in which the prosecution has been conducted and the manner in which the learned trial Court has dealt with the case are wholly unsatisfactory. In a case as serious as the present one, it was the duty of the prosecution to bring on record every material fact so that the learned trial Court could have reached a finding based on consideration of all the relevant facts.

23. Coupled with the above, the learned trial Court, to our dismay, appears to have been merely recording the evidence without being aware of the duty, which a trial Judge is required to discharge, and the role, which a trial Judge is required to perform, inasmuch as the learned trial Judge has not, in the present case, exercised its powers under Section 311 of the Code of Criminal Procedure, which mandates the Courts to call or recall or examine a witness, if the witness's evidence appears to the Court essential to just decision of the case.

24. Bearing in mind the above aspects of the present appeal, we, now, turn to the scope of Section 311 of the Code of Criminal Procedure, its aims and objectives. For the purpose of a clear understanding of what Section 311 of the Code of Criminal Procedure aims at conveying, appropriate it is that the provisions, embodied in Section 311 of the Code of Criminal Procedure, are carefully taken note of. Section 311 of the Code of Criminal Procedure is, therefore, reproduced hereinbelow :-

œ311. Power to summon material witness, or examine person present: Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.?

25. A patient reading of the Section 311 of the Code of Criminal Procedure clearly shows that this Section is divided into two parts. While the word, used in the first part, is, *may*, the word used, in the second part, is, *shall*. It would, therefore, logically follow that the first part of Section 311 of the Code of Criminal Procedure is permissive in nature and gives a discretion to a criminal Court to act, at any stage, of enquiry, trial or other proceeding, in one of the three ways, namely, (1) to summon any person as a witness, or (2) to examine any person in attendance, though not summoned as a witness, or (3) to recall and re-examine any person already examined.

26. The second part of Section 311 of the Code of Criminal Procedure is, however, mandatory in nature and casts an obligation on the court (i) to summon and examine or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

27. The language, employed in Section 311 of the Code of Criminal Procedure, clearly shows that this Section is couched in widest possible terms and do not limit the discretion of the Court in any manner. However, the wider the power, more cautious shall be the exercise thereof. No exercise of power, in a judicial proceeding, can be arbitrary and, more so, the power to call or recall a witness.

28. Whereas the first part of Section 311 of the Code of Criminal Procedure, as already indicated above, gives a discretion to the Court to call, recall and re-examine any person as a witness, the second part of this Section does not really give any discretion to the Court; rather, it clarifies that if a Court forms the view, in the facts of a given case, that the evidence of the person, who is sought to be called, recalled or re-examined, is essential to the just decision of the case, it would be mandatory for the Court to call, re-call or re-examine such a person as a witness. This mandatory exercise of power can also be undertaken to obtain fresh evidence provided that the Court forms a view, as indicated hereinbefore, that bringing of such fresh evidence on record is essential to the just decision of the case.

29. Though the law requires the parties to produce, before the court, the best available evidence, the fact remains that even in a criminal trial, prosecution as

well as defence has the right to choose their witness or witnesses and also choose as to what evidence they would adduce. Nonetheless, they are bound to adduce the best available evidence. The Court has no power to compel either the prosecution or the defence to examine any particular witness. This embargo placed on the powers of the Court, i.e., the limitation of not directing either the prosecution or the defence to examine any particular witness as their witness, is sought to be balanced by the Legislature with the help of the provisions contained in Section 311 of the Code of Criminal Procedure inasmuch as the Legislature has, with the help of Section 311 of the Code of Criminal Procedure, empowered the criminal court to call, recall or re-examine any person as witness. The only rider, which Section 311 of the Code of Criminal Procedure attaches to the exercise of this power, is that a criminal court cannot call, recall or re-examine any person as witness unless examination of such a person is, in the opinion of the Court, essential to a just decision of the case. If, however, the court is of the view that evidence of a particular witness is necessary for reaching a just decision of the case, the court, either on its own or on the application of any of the parties concerned, call, recall or re-examine any witness as long as it does not cause prejudice to any of the parties concerned or does not give an undue advantage to any of such parties.

30. The kind of power, which Section 311 of the Code of Criminal Procedure vests in a Court, is not peculiar to the criminal law inasmuch as similar provisions have been made even in respect of civil courts in the form of Order X, Rule 2, Order X, Rule 14 and Order XVIII, Rule 17.

31. Even Section 165 of the Evidence Act recognizes courts power to put any questions to any witness, at any time, which appears to the Judge as necessary for just decision of the case or in order to discover or obtain proof of relevant facts.

32. We may pause here to point out that a trial Judge is not merely a recording machine of evidence given by the witnesses nor can he be a silent spectator to the evidence produced by the parties. Though a trial Judge must not drop the mantle of a Judge and assume the role of a prosecutor or a defence counsel, the fact remains that his duty is to reach the truth and Section 165 of the Evidence Act

gives the Judge adequate power and authority to put any question to any witness at any time • be it during the course of examination-in-chief or cross-examination or at the end of any such examination or re-examination, which, to the Judge, appears to be necessary to a just decision of the case and in order to discover or obtain proof of relevant fact.

33. Though a Judge must not usurp the function of a counsel, he needs to participate, in the trial, in such a manner as would ensure that the evidence, adduced by the parties, is legal and such evidence becomes clear, complete and intelligible. A Judge, who, while presiding over a trial, merely records evidence without caring to conduct examination of the witnesses in order to ensure that evidence on record becomes intelligible, must be held to have not performed his duty as warranted by law. A Judge is not merely an observer. It is his duty to explore, within permissible limits, the truth.

34. If, therefore, a Judge finds that the examination of a witness is not being conducted in such a way as to unfold complete truth, it is not only right for the Judge, but his duty it is to intervene and put such questions as may be warranted and permissible within the ambit of Section 165 of the Evidence Act.

35. A Judge cannot behave like a passive agent, when a case is tried before him. He has the power and also the duty to question the witnesses in order to elicit relevant materials.

36. A case cannot be allowed to suffer for failure of any of the parties to elicit relevant materials from a witness. It is to discover the truth and bring, on record, the relevant facts that a Judge has been vested with the power to put questions under Section 165 of the Evidence Act. It is with this object in view that the Judge has been vested with the power to call any witness or recall any witness at any time suo motu or at the instance of any of the parties if it becomes necessary to a just decision of the case.

37. If the prosecution omits to bring out any relevant fact or the defence elicits from a witness, in the cross-examination, a statement, which is obscure or incomplete, the defence does not acquire (the Judge must bear in mind) a vested

right in such limited cross-examination. It is the duty of the Judge to remove such obscurity or incompleteness by putting appropriate question. 38. In fact, emphasizing what role a Judge should play in a trial, the Supreme Court, in *Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble* [MANU/SC/ 0677/2003 : (2003) 7 SCC 749], observed:

œ34. The courts exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial, i.e., to get at the truth, and oblivious to the active role to be played for which there is not only ample scope but sufficient powers conferred under the Code. It has a greater duty and responsibility, i.e., to render justice in a case where the role of the prosecuting agency itself is put in issue.?

(Emphasis is supplied)

39. From the position of law laid down, in *Shakila Abdul Gafar Khan* (supra), it becomes transparent that a Court is not a tape-recorder, which has to merely record evidence. Far from this, when the Courts object is to do justice, it cannot overlook the necessity to reach the truth. Hence, while a Court cannot assume the role of a party to a case, it nevertheless has the duty to remove vagueness or obscurity from a witnesss evidence so that the evidence becomes intelligible to a Court of law.

40. No wonder, therefore, that the Supreme Court, in *Jamatraj Kewalji Govani v. State of Maharashtra* [MANU/SC/0063/1967 : AIR 1968 SC 178], observed that these two sections, (i.e., Section 311 of the Code of Criminal Procedure and Section 165 of the Evidence Act) confer jurisdiction on the judge to act in aid of justice. Dealing With the corresponding section in the old Code (Section 540) Hidayatullah, J. (as the learned Chief Justice then was), speaking for a three-Judge Bench of the Supreme Court, in *Jamatraj Kewalji Govani* (supra), observed as follows:

It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the enquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new Evidence is needed by it for a just decision of the case.?

41. The observations, made by O. Chinappa Reddy, J. in *Ram Chander v. State of Haryana* [MANU/SC/ 0206/1981 : AIR 1981 SC 1036] are also to the same effect as the observations in *Jamatraj Kewalji Govani* (supra).

42. However, as already pointed out earlier, the wider the power, more cautious has to be its exercise. The power, under Section 311 of the Code of Criminal Procedure, cannot, therefore, be uncanalised, uncontrolled or arbitrary. Section 311 of the Code of Criminal Procedure is neither limited by any particular stage of a criminal proceeding nor is it conditioned by any specific circumstance. The principle, underlying Section 311 of the Code of Criminal Procedure, is that the evidence, to be obtained, shall appear to the court essential to a just decision of the case.

43. It is for the reason, as indicated above, that in *Mohanlal Shamji Soni v. Union of India* [MANU/SC/0318/1991 : (1991) Supp (1) SCC 271], the Supreme Court has held that the aid of Section 311 of the Code of Criminal Procedure should be invoked only with the object of discovering relevant facts or obtaining proof of relevant facts in order to render a just decision in a given case.

44. It is incumbent, on the part of the court, to take care to ensure that while exercising its powers under Section 311, Code of Criminal Procedure, it does not allow a lacuna, left by the prosecution or by the defence, to be fulfilled nor shall the exercise of power put the accused to disadvantage or cause prejudice to him or give an unfair advantage to the prosecution. Section 311 of the Code of Criminal Procedure can also not be utilized in such a way that it changes the nature of the case of either of the parties.

45. Failure of proper and effective management of a case by counsel cannot be treated as a lacuna of a party's case. In other words, a lapse, in the management of a case, is not to be regarded as a lacuna of a party's case. An oversight, in the management of the prosecution's case, is not a lacuna. It is not the duty of the trial Court to count errors committed by the parties in conducting their cases or to find out and declare as to who, among the parties concerned, performed better. A lacuna, in a complainant's or prosecution's case, would mean an inherent weakness or a latent wedge in the complainant's or prosecution's case. Explaining as to what can be regarded as a lacuna in a prosecution's case, the Supreme Court, in *Rajendra Prasad v. Narcotic Cell* [MANU/SC/ 0397/1999 : (1999) 6 SCC 110], observed:

7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the court could not fill the lacuna in the prosecution case. A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage *to err is human* is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such lapses or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up. 8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

(Emphasis is added)

46. Hence, when a defect arises, or crepts in, due to faulty management of the case by a partys Counsel or due to oversight or unmindfulness of a counsel, such a defect cannot, and shall not, be treated as a lacuna inherent in the case of the prosecution or the complainant.

47. Coupled with the above, the law provides enough power to the Courts to pursue entire Chapter-X of the Indian Penal Code, which deals with this aspect, by making it an offence not to execute summon or warrant for production of any accused or witness. Chapter-X also embodies penal provisions in order to ensure that if a person, on receiving summons or warrant, omits to appear in the Court • be such person an accused or a witness • he becomes liable for prosecution.

48. In the present case, learned trial Court appears to have not initiated proceedings for prosecution of the police officer, who was given the responsibility to execute the processes, and since the processes have not been proved to have been served or executed by the police officer concerned, presence of the doctors and the Investigating Officer could not be obtained. The manner in which the trial has been conducted by the learned trial Court, so far as obtaining of the presence of the witnesses is concerned, one cannot, but hold and observe that there is glaringly noticeable lapse and failure to exercise power lawfully vested in the Court.

49. If the conviction of the accused-appellants is maintained on the ground that the evidence adduced by the prosecution has remained unshaken, it may cause serious prejudice to the accused in the absence of examination of the material witnesses, namely, the doctor and the Investigating Officer. At the same time, if the accused-appellants are acquitted merely, because of the omission of the learned trial Court to discharge the duties, which it had in law, there would be serious miscarriage of justice.

50. We also find that the copy of Bhagwanpur Police Station Case No. 101 of 1986 has not been brought on record. We further find that the Investigating Officer, who recorded the statement of the informant (PW 8) and made the investigation and prepared inquest report, there is no description of the injury found on the body of the said deceased, whereas in other copy of the inquest report, injuries find

mentioned.

51. The remedy, therefore, lies in setting aside the impugned conviction of the accused-appellants and also the sentences, which have been passed consequence thereto, and, then, remand the case to the learned trial Court to obtain the presence of the doctor and the Investigating Officer concerned, as witnesses, examine them in accordance with law and, then, decide the case in the light of the evidence, which may be surface on record, so that the ends of justice are satisfied.

52. In the result and for the foregoing reasons, the impugned conviction of the appellants by the judgment, under appeal, as well as the impugned order of sentence are hereby set aside and the case is remanded to the learned trial Court for disposing of the same in accordance with law keeping in view the observations made by this Court in the preceding paragraphs of this judgment.

53. In order to avoid delay in the conduct of the trial, the learned trial Court shall not, unless it becomes wholly imperative, recall any witness merely for further cross-examination.

54. Coming to the question as to whether the appellants shall, on account of the fact that their conviction have been set aside, be set at liberty, we cannot ignore the fact that the important witnesses, namely, the doctor and the Investigating Officer, have not turned up to depose during the trial. 55. In the circumstances indicated above, it would be appropriate to keep, in custody, the accused-appellants, whose conviction and the consequential sentence have been set aside, until the time their trial is concluded and judgment is pronounced. The release of the accused-appellants shall, therefore, be governed by the outcome of the trial, which shall be held, on remand, in terms of the directions given above and until the time the trial is concluded, the accused-appellants shall be detained in custody unless, otherwise, directed by this Court.

55. The learned trial Court is also directed to expeditiously deal with the case and dispose of the same in accordance with law, preferably, within a period of three months from the date of receipt of the Lower Court Records along with a copy of

this judgment and order.

56. In terms of the above observations and directions, this appeal shall stand disposed of.

57. The Registry shall send back the Lower Court Records along with a copy of this judgment and order.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com