

Nagaraj Vs. the State

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Court : Chennai

Decided On : Sep-12-2013

Judge : P.Devadass

Appellant : Nagaraj

Respondent : The State

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

12. 09.2013 CORAM: THE HON'BLE MR.JUSTICE P.DEVADASS
Crl.O.P.No.21676 of 2013 and M.P.No.1 of 2013 Nagaraj ... Petitioner Vs The
State rep. by its Inspector of Police, Udumalpet Town Police Station, Udumalpet,
Thiruppur District. ... Respondent Prayer: Petition filed under Section 482 of the
Criminal Procedure Code to set aside the order dated 03.07.2013 passed in
Crl.M.P.No.1030 of 2013 in S.C.No.23 of 2013 on the file of the Principal District
and Sessions Judge, Thiruppur. For Petitioner : Mr. R.Kumaravel For
Respondents : Mr.C.Emalias Addl. Public Prosecutor

ORDER

Accused/petitioner seeks to set aside the order dated 30.7.2013 passed by the
Principal Sessions Judge, Thiruppur in Crl.M.P.No.1030 of 2013 in S.C.No.23 of
2013.

2. Heard both sides.

3. Nagaraj, the petitioner is being prosecuted before the said Judge, for offences under Sections 376(2) (f) of IPC and Section 5(c)(m) r/w Section 6 of the Protection of child from sexual offences Act,2012 and 294(b) IPC. He is facing serious charges.

4. Petitioner is in jail. He is being produced before the Court from time to time. Prosecution examined P.Ws.1 to 20. Their deposition has not been tested by cross-examination. In the circumstances, petitioner filed a petition in CrI.M.P.No.1030 of 2013 under Section 311 Cr.P.C.

5. On 30.7.2013, the learned Judge passed the following (impugned) order. "30.7.2013 Heard. P.W.1 to 20 were examined on various dates in this Court. This petition has been filed through an advocate. The advocate concerned is not present today. The petitioner could not explain the circumstances which will entitle him for recalling the witnesses. Omission to cross examine then and there and filing application to recall all witnesses particularly 20 witnesses in this case cannot be encouraged for any reason. Hence, this petition is dismissed." xxxxxxxxxxxxxx Principal Sessions Judge, 6. Accused persons, who were alleged to have committed offences are entitled to be defended by a lawyer of his choice. This right of defence is guaranteed under Article 22(1) of Constitution of India. Close on the heels is Section 303 Cr.P.C., This is a basic human right guaranteed to the accused persons. This right is further strengthened by Section 304 Cr.P.C., which mandates providing of legal assistance to accused persons at the expenses of the State.

7. It is a matter of 'access to justice'. It is not a matter to be found fault with the lawyer, who was not present on that day.

8. From the records, it is seen that as many as 20 witnesses were examined. At that time, the accused did not have the assistance of a lawyer. It is his constitutional right. If a person, who is prosecuted for capital charges, is not defended by a lawyer, any amount of opportunity given to him will be illusory as 'hearing him without the assistance of a lawyer is like hearing a deaf and dumb person'. Hearing the accused persons without assistance of a lawyer is not giving him real opportunity.

9. Section 311 Cr.P.C. gives opportunity to the defence/accused as well as to the State/prosecution to bring to the Court the evidence which is very essential to render a just decision. It could be resorted to at any stage of the case, however, before pronouncing the judgment. It is a dimension of principles of natural justice, namely, 'hear before condemn'. The 'hearing' will be 'mere formality' if reasonable opportunity is not given.

10. This is the position during pre and also post constitutional era. It flows from Article 21, Constitution of India, which guarantees 'life' and 'personal liberty' to every one. They can be taken away 'only' by a 'procedure' established by law. The procedure must be 'fair and reasonable'. Thus, when there are provisions affecting or taking away one's personal freedom, the procedure must have statutory birth and it must be fair and also reasonable.[See Maneka Gandhi Vs. Union of India (1978(1) SCC248)].

11. As per Article 22(1) Constitution of India, persons accused of having committed offences are entitled to be defended by a legal practitioner of their choice. It is an extension of principles of natural justice, namely, 'hear before condemn'. This has been reiterated in Sections 303 and 304, Criminal Procedure Code, 1973. Section 303 Cr.P.C. reiterates the constitutional mandate enshrined in Article 22(1). Article 39-A, Constitution of India provides for providing legal aid to needy persons. Section 304 Cr.P.C directs the State to engage lawyer at its cost to defend a person accused of having committed sessions offences.

12. In P.SANJEEVA RAO Vs. STATE [2012 (3) MWN (CrI.) 49 (SC)], it is held that ".it is trite that the credibility of witnesses whether in a civil or criminal case can be tested only when the testimony is put through the fire of cross-examination. Denial of an opportunity to do so will result in a serious miscarriage of justice"..

13. In NATASHA SINGH VS. CBI (2013(5) SCC741, emphasising the observance of Human Right of accused persons in conducting trial, the Hon'ble Apex Court observed as under:- ".Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities

to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide: Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr., AIR 1958 SC376 Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors., AIR 2004 SC3114 Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors., AIR 2006 SC1367 Kalyani Baskar (Mrs.) v. M.S. Sampooram (Mrs.), (2007) 2 SCC258 Vijay Kumar v. State of U.P. & Anr., (2011) (8) SCC136 and Sudevanand v. State through C.B.I., (2012) 3 SCC387".

14. In MOHANALAL SHAMJI SONI VS. UNION OF INDIA (1991 Supp (1) 271), the Hon'ble Apex Court explained the extent and the scope of power of the Court to recall the witnesses as under:- ".The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair-play and good sense appear to be the only safe guides and that only the requirements of justice command examination of any person which would depend on the facts and circumstances of each case. 15. In MARIA MARGARDIA SEQUERIA FERNANDES VS. ERASMO JACK DE SEQUERIA THROUGH Lrs. (2012) (3) SCALE550, the Hon'ble Apex Court considering the essential purpose of any trial or enquiry is, discovery of the truth observed as under : What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice. 16. In this connection, in SANJEEVA RAO [2012(3) MWN(CRL) (49)], the Hon'ble Apex Court observed as under:- ". We are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the

prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself."

17. Now, in this case, the accused is being prosecuted for having alleged to have committed certain serious offences exclusively triable by a Court of sessions. The impugned order dated 30.7.2013 passed by the learned Principal Sessions Judge, Tiruppur shows that attempt has been made by the petitioner's counsel to recall the witnesses to cross examine them. Trial Court has not given any reasonable opportunity to the petitioner to defend his case. The accused has not been offered real/reasonable opportunity to defend himself by having the assistance of a legal practitioner. It will be infraction of his right of defence guaranteed to him under Section 303 Cr.P.C. read with Article 21, 22(1) Constitution of India.

18. Looking the matter in this perspective, the Order of the trial Court is not in accordance with law.

19. In the circumstances, the impugned order of the learned Principal Sessions Judge, Tiruppur, passed in C.M.P.No.1030 of 2013 in S.C.No.23 of 2013 is set aside. The learned Judge is directed to recall P.Ws.1 to 20 in a phased manner, give opportunity to the petitioner's counsel to cross examine the witnesses and after giving reasonable opportunity to both sides shall dispose of the case according to law at an early date. Accordingly, this criminal original petition is disposed of. Consequently, connected miscellaneous petition is closed.

12.09.2013 Index : Yes Internet : Yes Note: Issue order copy on 16.09.2013 To
1.The Principal Sessions Judge, Tiruppur. 2.The Inspector of Police, Udumalpet Town Police Station, Udumalpet, Thiruppur District. 3.The Public Prosecutor, High Court, Madras. P.DEVADASS, J.

rrg Crl.O.P.No.21676 of 2013 12.09.2013

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