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Court : Guwahati

Decided On : May-02-2007

Judge : I.A. Ansari, J.

Appellant : Mariamun Nessa and ors.

Respondent : State of Assam and anr.

Disposition : Petition dismissed

Judgement :

I.A. Ansari, J.

1. The material facts giving rise to the present revision may, in brief, be set out as follows:

(i) The present petitioners are facing, as accused, trial on a charge framed against them under Section 304 read with Section 34 IPC. During the course of the trial, prosecution examined two witnesses, PW1 being a doctor, who claimed to have conducted postmortem examination on the deadbody of Jalaluddin, who had been allegedly killed by the present petitioners in furtherance of their common intention, the accused-petitioner No. 1 being the widow of the said deceased, namely, Jalaluddin @ Bakul Mia. The second witness (PW2) examined by prosecution is Abdul Bari, brother of the said deceased. In his evidence, this witness (PW2) has deposed that accused Mariamun Nessa is the widow of the said deceased,

accused Musttafa Ahmed is the husband of his niece and accused Jehirul Islam is his daughter's husband. In his evidence, PW2 has deposed that on the day of occurrence, in the morning, on hearing hue and cry raised from the house of the deceased, when he went there, he found Jalaluddin lying dead with mark of condensed blood on his neck, whereupon police was informed, for, they suspected some foul-play on account of the fact that there were some marks on the neck of the said deceased. It is in the evidence of PW2 that he made enquiries from his two nieces, namely, Farhana Begum and Nazma Begum (i.e., daughters of deceased Jalaluddin) and they told him that their mother, accused Mariamun Nessa, and accused Mustafa Ahmed had strangulated Jalaluddin to death by means of a muffler. According to the evidence of PW2, his said two nieces also told him that their mother, Mariamun Nessa, had threatened to kill them if they disclosed the occurrence to anyone and, therefore, they had not told anyone as to how their father had died. In his evidence, PW2 has clarified that his said two nieces told him about the occurrence after his statement had already been recorded by the police. In his evidence, the doctor deposed that he found eyes and mouth of the deceased closed, tongue protruded, one non-continuous bluish mark around the neck between the chin and cricoid cartilage and there was bluish colouration of the skin at the face, lip and ear. According to the doctor, cause of death of the deceased was suffocation resulting from the injuries sustained.

(ii) After the evidence of PW1 and PW2, as indicated above, was recorded, prosecution filed a petition seeking to get Farhana Begum and Nazma Begum (the two daughters of the said deceased) examined as witnesses on the ground that in the light of the evidence of PW2, the said two daughters of the deceased were eye witnesses to the occurrence and their examination, as witnesses, was necessary for a fair trial. This was objected to by the accused on the ground that (a) the said two daughters of the deceased had not been cited as witnesses in the charge-sheet, that (b) in his statement recorded by police, PW2 had not disclosed about the fact that the said two daughters of the deceased had made any such statement to PW2 as PW2, now, claims to have been made by the said two daughters of the said deceased and that (c) without examining those, who have already been cited as witnesses in the charge-sheet, prosecution cannot be legally allowed to examine the said two female witnesses, whom they have sought to

examine by taking recourse to Section 311 Cr.P.C.

(iii) By order, dated 21.2.2007, passed, in Sessions Case No. 62/2006, learned Additional Sessions Judge (Adhoc), Karimganj, overruled the objections raised by the defence and decided to examine the said two daughters of the deceased as witnesses in exercise of its powers under Section 311 Cr.P.C., the reason shown for such examination being that it is obligatory, on the part of the Court, to summon, examine or re-call or examine any person as witness if his evidence is essential for just decision of a case and that this power to examine a person as a witness can be exercised at any stage of any enquiry or trial or other proceeding and that the Court shall ensure that the liberty to examine the witness is not used by the party for filling up a lacunae in that case or that such calling and examination shall not cause any prejudice to the accused. The learned trial Court also pointed out that in the light of the evidence of PW2, the two daughters of the said deceased were allegedly eye witnesses to the occurrence, and, hence, in such circumstances, their examination was necessary for a fair and just decision of the case. For the reasons so assigned, the learned trial Court decided to call the said two daughters of the deceased as witnesses. It is the order, dated 21.2.2007, aforementioned, which stands impugned, in the present revision, by the accused-petitioners.

2. I have heard Dr. B. Ahmed, learned Counsel for the accused-petitioners, and Mr. V.S. Sinha, learned Additional Public Prosecutor, Assam.

3. Appearing on behalf of the accused-petitioners, Dr. Ahmed has submitted that without, first, examining all the material witnesses mentioned in the charge-sheet, the learned trial Court ought not to have allowed the said two daughters of the deceased to be examined as witnesses, particularly, when their names had not appeared in the charge-sheet. In such circumstances, contends Dr. Ahmed, calling of the said two persons as witnesses by the impugned order is bad in law and cannot be allowed to stand good on record, for, their examination, according to Dr. Ahmed, would cause serious prejudice to the accused. This apart, according to Dr. Ahmed, there was no material for the learned trial Court to conclude that the examination of the said two daughters of the deceased was essential for a just

decision of the case. Support for the submissions, so made, is sought to be derived by Dr. Ahmed from the decisions in Jokhan Jha v. Ram Saran Jha and Ors. reported in 1967 Cri. LJ 1444, Munga Ram and Ors. v. State of Uttar Pradesh : [1964]8SCR133 , Zahira Habibullah Sheikh (5) and Anr. v. State of Gujarat and Ors. reported in : 2006 CriLJ1694 , Smt. Santosh Kumari and Ors. v. State reported in 1973 Cri.LJ. 1651 and R. Srinivasan and Ors. v. G. Shanmugha Vadivu reported in 1984 Cri.LJ. 377.

4. Resisting the submissions, made on behalf of the accused-petitioners, learned Addl. Public Prosecutor contends that in the facts and circumstances of the present case, examination of the said two daughters of the deceased was essential for a just decision of the case and in such circumstances, merely because of the fact that the witnesses mentioned in the charge-sheet had not been examined, calling of the said two daughters of the deceased, as witnesses, cannot be legally objected to by the accused-petitioners.

5. Because of the reason that it is the scope of Section 311 Cr.P.C., which needs to be understood, in its proper perspective, in order to effectively dispose of this revision, Section 311 Cr.PC is reproduced hereinabelow:

311. Power to summon material witness or examine person present: Any court, at any stage of any enquiry, 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 it to be essential to the just decision of the case.

6. A careful reading of Section 311 would show that this Section consists of two parts; whereas the first part is discretionary, the second part in mandatory, for, the first part of Section 311 makes it clear that any Court, at any stage of enquiry or trial or other proceedings, summon any person as a witness or examine any person, in attendance, though not summoned as witness or recall and re-examine any person already examined; the second part of Section 311 Cr.PC requires that the Court shall summon and examine or recall or re-examine any such person if his evidence appears it to be essential to the just decision of the case.

7. What becomes transparent from a reading of Section 311 Cr.PC is that the power to examine a witness under Section 311 Cr.PC can be exercised at any stage of the proceeding and it is, therefore, incorrect to suggest that it is only after the witnesses, who are cited in a charge-sheet, are already examined that the power to examine a witness, under Section 311 Cr.PC, can be exercised. As a matter of fact, while at the end of a trial, it is the bounden duty of the Court to examine, recall and re-examine any person, whose evidence appears to the Court essential to a just decision of the case, Section 311 Cr.PC. permits the Court to summon any person as a witness or examine any person in attendance, though not summoned, as witness, recalled and re-examined any person already examined if his evidence is considered essential in arriving at a fair and just decision of the case. There is, therefore, a noticeable difference between the two parts of Section 311 Cr.PC. The Court has the discretion to exercise its power under the first part, for, the Court may disagree to summon and examine a person as a witness, whose name does not appear in the charge-sheet; but the Court is under a duty to examine, under the second part, any such witness, whose evidence appears to the Court as essential for just decision of the case. As no exercise of even discretionary power can be arbitrary or whimsical, there must be foundation laid in order to enable a Court to exercise power even under the first part of Section 311. It is, thus, clear that the foundation for calling a person as a witness or for recalling and re-examining a person as a witness must be laid, under Section 311 Cr.PC. before the Court summons a person to appear as witness.

8. In the backdrop of the law as indicated above, when I turn to the facts of the present case, I find that according to the medical evidence on record, which may or may not be correct, the deceased had been strangulated to death. In the light of the medical evidence so available on record, when the evidence of PW2 is considered, it becomes abundantly clear that according to PW2, the said two daughters of the deceased had told him that they had seen their mother, Mariamun Nessa, strangulating, their father, Jalaluddin, to death by means of a muffler. The evidence, so given by PW2, may or may not be true. The fact, however, remains that the evidence of PW2 is that these statements were made to him by his said two nieces after the police had already recorded his statement. In

such circumstances, examination of said two daughters of the deceased was imperative for the purpose of determining the truth. In the face of these facts, there can be no escape from the conclusion that the learned trial Court had not only the power, but also good and sufficient reasons for deciding to summon the said two daughters of the deceased and examine them as witnesses. Merely because of the fact that the remaining witnesses, mentioned in the charge-sheet, had not been examined, it was not impermissible for the learned trial Court to examine the said two daughters of the deceased, as witnesses, when their evidence was found essential to a just decision of the case. Because of what have been pointed out. I do not find that the impugned order suffers from any infirmity, factual or legal. None of the decisions, relied upon by Dr. Ahmed, shows that the exercise of powers, in the context of the facts of the present case, by the learned trial Court, is contrary to law. This revision is, therefore, wholly without merit and must fail.

9. In the result and for the reasons discussed above, this revision is not admitted and the same shall accordingly stand dismissed.

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