

Arun and ors. Vs. the State of Maharashtra

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Court : Mumbai

Decided On : Mar-01-1977

Reported in : 1978CriLJ1168

Judge : Dighe, J.

Appellant : Arun and ors.

Respondent : The State of Maharashtra

Judgement :

ORDER

Dighe, J.

1. This is an application for transfer under Section 407 of the Cr. P.C. 1973 given by the applicants who are facing trial in the Court of the Additional Sessions Judge, Nagpur under Sections 307, 326, 149 and 148 of the I.P.C. Along with three others, the applicants are the accused in Sessions Case No. 99 of 1975 where the trial commenced on 6-12-1976, The prosecution examined 10 witnesses, On 10-12-1976 the accused were examined and the case reached the stage under Section 232 of the Cr. P.C. The learned Additional Sessions Judge heard the prosecution and the defence on the point of acquittal and has passed the impugned order. This order is titled 'judgment' and it runs into 12 paras covering six typed pages. The learned Additional Sessions Judge has come to the conclusion that there is evidence against the accused to show that they had

committed the offence and, therefore, she asked the accused to enter upon their defence if they wanted.

2. It is now alleged that by writing such a long order the learned Judge has already made up her mind and has come to a conclusion that the accused have committed the offence which thus prejudices the case of the accused so that even if they give defence evidence it would be difficult to make the Judge change her mind. It is alleged that this has created an apprehension in the mind of the applicants-accused. They say that the conclusions have already been arrived at and according to them in the interests of justice and fairplay it is necessary that the case be transferred from the Court of the Additional Sessions Judge, Nagpur, to some other Court. At the time of arguments a further request was made that only the operative order of transfer be communicated and the judgment dictated should be kept in a closed cover so that the transferee Judge should not be aware of the discussion working against the accused.

3. A look at the order would show that in the first five paras the prosecution story is summarised. Sixth para is devoted to the denial of the accused. The seventh para starts with the remarks that at that stage the learned Judge had to address herself to decide 'whether there is any evidence to show that the accused had committed the offence.' Mr. Salve appearing for the applicants says that thereafter the learned Additional Sessions Judge has started appreciating the evidence in details so as to find out the positive case. Points regarding the omission if any in the first information report and the medical officer's report are considered, but side by side the learned Judge has also taken into consideration the attack made by the defence counsel against the prosecution version highlighting the infirmities in the depositions or failure to examine persons or the fact of the absence of bloodstains and the case regarding whether there is a shift in the spot of occurrence.

4. Apart from considering this and the point whether there have been any Improvements, the learned Judge has also sought to consider the circumstances for not putting reliance on the infirmities pointed out by the defence. In the last para, the learned Additional Sessions Judge has expressed herself as follows : 'The above discussion would go to show that prosecution story cannot be

discarded at this stage. It shows that there is evidence against the accused to show that they had committed the offence. So as per Section 232, new Cr. P.C. I ask the accused to enter upon their defence if they want.'

5. The question for our consideration, therefore, would be whether by reason of this order of the learned Additional Sessions Judge does it appear to this Court that a fair and impartial enquiry or trial cannot be had in that Court. In other words, whether the alleged apprehension of the applicants is reasonable so as to necessitate the transfer of the case from the Court trying it to some other court.

6. Incidentally we will have to look to the function of Section 232 of the Cr. P.C. 1973. That section runs as follows:

232. If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal.' Under this section after examining the accused, provision is made to hear the prosecution and the defence on the point regarding acquittal. It is thereafter that the Judge has to consider whether there is no evidence showing that the accused committed the offence. In such a case it is obligatory upon the Judge to record an order of acquittal.

7. If we turn to Section 233 of the Code, it shows that where the accused is not so acquitted, he would be called upon to enter on his defence and adduce any evidence he may have in support thereof.

8. Section 232 of the Code could be contrasted with Section 289 of the Cr. P.C. 1898. That section is titled as 'Procedure after examination of witnesses for prosecution.' Sub-section (1) reads as follows:

289 (1). When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

The further sub-sections speak of the alternatives to be taken recourse to depending upon the reply of the accused. Under Sub-section (2), if the accused

does not mean to adduce evidence, the prosecutor has to sum up and the Court has to record a finding of not guilty if there is no evidence that the accused committed the offence. Under Sub-section (3) even if the accused had indicated his desire to adduce evidence and the Court considers that there is no evidence that the accused committed the offence, the Court may record a finding of not guilty.

9. It is to be observed that under Section 232, as it now stands, there is nothing to indicate that the question whether he means to adduce evidence has to be asked while exercising the powers under Section 232, On the contrary, the hearing of the prosecution and the defence on the point of acquittal is necessary. It is after considering the answers given by the accused in his examination and listening to the addresses of the prosecution and the defence that the Judge has to consider whether an order of acquittal should be passed.

10. Mr. Salve for the applicants makes out a case that there is no necessity of any order to be passed in case the Judge decides not to acquit the accused at that stage. According to him, it is sufficient if a mental note is taken. But on the other hand, it is absolutely essential to write an order of acquittal if the finding is that the accused is not guilty,

11. Mr. Garud appearing for the State has said that the Judge has to consider various aspects and when the two learned advocates address the Court it is upon consideration of those factors that the Judge has to arrive at a conclusion which will have to be indicated. He, therefore, says that a speaking order may have to be passed, under Section 232 of the Cr. P. C, 1973.

12. Although changes have been introduced in drafting Section 232 of 1973 of Cr. P.C. showing the absence of any questioning to the accused regarding whether he means to adduce evidence in defence and an obligation is cast to hear both the sides, the function of Section 232 of the Cr. P.C., to my mind, is very clear. The section is titled 'acquittal' and the record of an order is compulsory if the finding is of acquittal. Mr. Salve started attacking the impugned order by saying that the learned Judge has misconstrued the provisions and has virtually misdirected herself when in para 7 she has addressed herself the question 'whether there is

any evidence to show that the accused had committed the offence', instead of considering whether there is 'no evidence'. According to Mr. Salve, she has fallen in an error when she started finding out the evidence and elaborating it and even at the end remarking that there is evidence against the accused. It is, however, the way of approach to the expression that should make all the difference. As said by Mr. Garud for the State one cannot reach a conclusion of there being 'no evidence' unless the evidence is looked at and considered. According to him, the phrase 'whether there is any evidence', is a converse statement of 'whether there is no evidence' and, therefore, if the Judge has considered the evidence it should not be taken as erroneous,

13. I think the point will have to be answered not by looking only to the logical propositions but the stage and the function of the trial. It is no doubt true that to arrive at a conclusion that there is no evidence of having committed the offence 'evidence will have to be looked into, but its purpose will have to be noted, and that is to substantiate the order of acquittal. This introduces the consideration of the degree of evidence, the extent of its insufficiency and not the extent of its sufficiency in proof of the offence. The Judge has to make up his mind, whether the evidence produced is of such a nature as not at all linking the accused with the offence and not to find out whether it is trustworthy In the ultimate analysis. The moment there is some evidence, some good evidence, no order of acquittal can be passed. In such a case an elaborate order showing how the evidence clinches the accused is not necessary. In other words, appreciation of positive evidence differs in degrees and the moment a conclusion is reached that there is some positive evidence, the case is out of Section 232 of the Code. I do not feel that such a finding ought to be given by writing an elaborate order. Although it would be difficult to accept the contention of Mr. Salve that in all cases no order is necessary under Section 232 if there is no acquittal, because diverse situations may arise, for instance where a number of accused are concerned and conceivably against one or more accused alone there would be absolutely no evidence and such accused insists on an order, surely it can be said that a long order in the nature of a judgment is not at all expected when there is no acquittal. Interpreting Section 232 I find it predominantly showing the mental make up of the Judge trying the case, so that Upon all considerations when he has to take up a

decisive step, he is to record an order, otherwise he continues the trial. This situation bears close comparison with the provisions in Section 227 of the Code when an order for discharge is to be passed if the Judge after looking to the documents and hearing the submissions of the accused and prosecution comes to the conclusion that there is no sufficient ground to proceed. Otherwise he continues the trial. I do not think any order, other than bare noting of the indication to continue is necessary. Consequently under Section 232 when there is no acquittal almost always a small order on the order sheet or an order merely indicating that the trial has to proceed even inclusive of an order in every clear cases would be sufficient.

14. Pertinent question for our consideration in this petition, however, is to find out whether the prayer for transfer can be granted. The case made out is of prejudicial view and the apprehension that a fair and impartial enquiry cannot be had. For this purpose, we will have to find out the exact approach of the learned Additional Sessions Judge. Although in para 7 the learned Judge says she has to decide whether 'there is any evidence to show that the accused had committed the offence' and although she has ended with the remark that 'there is evidence against the accused to show that they had committed the offence', the entire discussion made by the learned Judge will have to be understood in finding out whether as is agitated by Mr. Salve she seems to have made up her mind. Statements in para 7 of the Judgment show that the learned Judge was alive of the stage with which she was dealing. She has in the last paragraph remarked that 'the prosecution story cannot be discarded at this stage' (underlining introduced). The discussion, therefore, she makes though elaborate is surely a prima facie discussion. During the course of appreciation she has indicated the major points made out by the prosecution and the major points of attack made out by the defence. In para 11 she has summarised by recognising the infirmities in the prosecution and she has also been aware of her duty to find out whether they go to the root of the case. I am unable to find out from the order written that she has directly or indirectly concluded at that stage that they do not so go to the root. The apprehension, therefore, is more illusory than real. In fact, it seems to me that because the learned Judge was tempted to write a long order occasion has been given to the applicants to speak about such an apprehension. Upon careful

reading of all the paras, I am unable to hold that it is such a reasonable apprehension that the learned Judge would not keep her mind open to the inferences that may arise after the defence evidence has been led. At the background of the entire order that consciousness could be seen. As such the application cannot at all be entertained, Hence the following order.

The application is dismissed.

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