

Sridhar Vs. State of Karnataka

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Court : Karnataka

Decided On : Sep-13-2004

Reported in : ILR2004KAR4813; 2004(7)KarLJ518

Judge : A.C. Kabbin, J.

Acts : [Evidence Act, 1872](#) - Sections 159 and 160; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 465(1)

Appeal No. : Cr.P. No. 3077/2004

Appellant : Sridhar

Respondent : State of Karnataka

Advocate for Def. : P.M. Nawaz, HCGP

Advocate for Pet/Ap. : Sriyuths C.H. Hanumantharaya and ;G. Suresh, Advs.

Disposition : Petition allowed

Judgement :

ORDER

A.C. Kabbin, J.

1. What has been challenged in this petition filed under Section 482 of the Cr.P.C. is the ruling of XXI Addl. City Civil and Sessions Judge and special Judge for CBI

Cases for Bangalore City, holding that a witness, while he is being examined as a witness in a Court, is entitled to look into a mahazar for refreshing his memory.

2. In the trial of the petitioner for offences punishable under Sections 143, 147, 148, 149, 323, 307 read with 120B IPC and Sections 3 and 5 of the Explosive Substances Act, RW. 6-Narayanappa, former Police Inspector, Banasawadi Police Station, Bangalore City, was examined on 29.11.2002 to show that he had accompanied the raiding party and that he was present at the time of seizure of certain arms from the possession of the accused. After major portion of the examination-in-chief was over, with regard to the particulars of the weapons, vehicles, properties allegedly seized from the possession of each accused, the witness sought for permission to look into the mahazar and P.F. for the purpose of refreshing his memory, and that was objected to by the learned Counsel for the accused on the ground that the said witness was not a signatory to the mahazar and that mahazar having been prepared not under the supervision of that Police Officer and there being a separate statement of that witness recorded under Section 161 of Cr.P.C, the mahazar could not be looked into by that witness to refresh his memory.

3. After hearing the learned Counsel for the prosecution and the learned Counsel for the accused, the Court ruled that in view of latter part of Section 159 of the Indian Evidence Act, a witness could look into the mahazar for refreshing his memory. After the witness looked into the mahazar, he has given the details of the weapons seized from the possession of some of the accused, which portion of the deposition is the subject matter of challenge in the present petition.

4. It is argued by Sri C.H. Hanumantharaya, learned advocate for the petitioner that the witness P.W.6 has been examined as an eye-witness for the raid and since he was not the Investigating Officer, his deposition has to be taken like that of any other witness and that such person, while he is under examination as a witness is not entitled to look into the mahazar prepared not under his supervision, but under the supervision of some other police officer. He read out Section 159 of the Evidence Act and submitted that the said witness being neither signatory to the mahazar nor the person who wrote the mahazar, he has no right to refresh his

memory by looking into that document. He submits that Section 159 of the Evidence Act does not give any such right to a witness to refresh his memory, if the writing is made by someone else and it had not been read out to this witness when it was recorded.

5. Learned HCGP submits that the second part of Section 159 of the Evidence Act provides for a witness to refresh his memory by referring to the writing made by any other person and in the present case, the witness being one of the police officers, who had gone with the investigating officer, the mahazar having been drawn in his presence, he was entitled to look into that document to refresh his memory.

6. I have carefully perused the provisions of Sections 159 and 160 of the Evidence Act to consider the points urged by the Counsel.

7. Section 159 of the Indian Evidence Act reads as under:

'A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct'.

A perusal of the above provision makes it clear that before permitting a witness to refresh his memory while under examination, one of the following two conditions must be satisfied.

1. The writing must have been made by him contemporaneously with the incident or transaction to which he testifies or soon afterwards when the facts were fresh in his memory;

2. Where the writing has been made by some one else within the aforesaid time it must have been read by the witness or read out in his presence within the

aforesaid time and known to him to be correct i.e. he must have read it or it must have been read out in his presence when the facts were fresh in his memory and he had recognised the accuracy of the same.

8. Ordinarily, a witness deposes to facts from recollection of facts. But memory fades by efflux of time and therefore it becomes necessary sometimes that he should be allowed to assist his memory by looking into documents containing an account of them if there be any. This is known as refreshing memory. A reference to the written memoranda has the effect of reviving in the mind of the Witness recollection of facts known to him and recorded by him or recorded by someone else, but readout to him or in his presence, the accuracy of which had then been recognised by him.

9. Admittedly, the mahazar in this case had not been written by this witness P.W.6, nor was it written under his supervision. There was nothing in the case to show that it was read over in his presence and hearing and that the correctness of the same had been recognised by him, so that he is sure of the correctness of the facts stated therein. Therefore, conditions required under Section 159 of the Evidence Act to permit this witness to refresh his memory by referring to the contents of the mahazar had not been satisfied and the learned Sessions Judge was not right in permitting the witness to refresh his memory by referring to the mahazar in question.

10. Learned HCGP submits that in view of the provisions of Section 465(1) of Cr.P.C, this irregularity cannot be a ground to set aside the ruling of the Sessions Judge, since there is no failure of justice in the case. It cannot be said that the facts spoken to by the witness on the basis of a document not written by him or not read over by him contemporaneously at the time of writing the mahazar, would not cause prejudice to the case of the accused. Therefore, that portion of the deposition of PW-6, which was spoken to by him by referring to mahazar, requires to be excluded for the purpose of appreciation of evidence.

11. For the above said reasons, the petition is allowed and the ruling dated 02.09.2004 given by the learned Sessions Judge in Case No. S.C. 203/93, permitting P.W.6 to refresh his memory by looking into the mahazar is hereby set

aside. That portion of the deposition of P.W.6, which was given by him subsequent to the permission granted by the Court and by referring to mahazar be ignored by the learned Sessions Judge at the time of appreciation of evidence.

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