

Rasik Behari Vs. the State of Uttar Pradesh

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Court : Allahabad

Decided On : Sep-29-1972

Reported in : 1973CriLJ1648

Judge : P.N. Baskhi, J.

Appellant : Rasik Behari

Respondent : The State of Uttar Pradesh

Judgement :

ORDER

P.N. Bakshi, J.

1. The applicant Rasik Behari Is being prosecuted for an offence under Section 7/16 of the Prevention of Food Adulteration Act From a perusal of the record it appears that Sri R. L. Trivedi. Food Inspector (F. W. 1) was examined under Section 252, Criminal P. C. on 8-7-1969 and the accused was examined on 22-7-1969. A charge was duly framed against the accused under Section 7/16 of the Food Adulteration Act It appears from the perusal of the order sheet that on 7-10-1969 in the presence of the accused the Court fixed 22-10-1969 for the prosecution evidence-On that day the witnesses did not come. On an application being made 21-11-1969 was fixed for prosecution evidence. On this date also the prosecution witnesses could not be produced. The date was therefore adjourned to 17-12-1969 for the aforesaid purpose. The case was again adjourned to 7-1-

1970 on which date the accused and his counsel were present The statements of prosecution witnesses Shyatn Babu (P. W. 2) and Ram Lakhan (P. W. 3) were recorded under Section 256, Criminal P. C. Both these witnesses were cross-examined by the defence counsel. The prosecution evidence was closed and the witnesses discharged. The Magistrate fixed 21-1-1970 for recording the statement of the accused under Section 342, Criminal P. C. and for the defence. The Hindi order sheet of 7-1-1970 runs thus-

Aaj yah mukadma banasri mulzim mai vakil pesh hua. Shyam Babu aur Ram Lakhan gawahon ke beyanat likhe gai, aur saboot samapt hua

Ata

Adesh hua ki waste biyan 342 wa safaf misil tarikh 21-1-1970 ko pesh howe.

2. Thereafter on 21-1-1970 the accused did not appear and it was ordered that 10-2-1970 be fixed for his statement under Section 342 and for his defence. The Hindi order sheet dated 21-7-1970 is quoted as under:-

Aaj yeh mukadma pesh hua. Mul-aim hazir nahin aya Daure ke mukam

Ata

Adesh hua ki waste bayan 342 wa safaf misil tarikh 10-2-1970 ko pesh ho.

3. On 10-2-1970 when the case was called for hearing an application was filed on behalf of the accused for recalling the prosecution witnesses. This application was rejected by the Sub-Divisional Magistrate. Auraiya. Aggrieved by this order. Rasik Behari filed a revision before the Additional Sessions Judge, Etawah which was dismissed on 25-4-1970. The applicant has now come to this Court in revision.

4. I have heard counsel for the parties. It is contended on behalf of the accused applicant that the Magistrate concerned acted illegally in refusing to recall the prosecution witnesses and In rejecting the application filed by him on 10-2-1970. Counsel for the State has urged that the order in question was perfectly legal and was amply justified. He submits that on the facts of this case, the accused could have a right to apply for recall of the prosecution witnesses under Section 257.

Criminal P. C. after he has entered upon his defence. I shall now examine the force of these contentions.

5. From a perusal of the record and the order sheet of which the relevant portions have been quoted above it is apparent that the proceedings in question had reached the stage of Section 256, Criminal P. C. The prosecution witnesses had been examined. The accused exercised his right of cross-examination. The Court then fixed a date for recording the statements of the accused under Section 342, Criminal P. C. and for his defence. The question for consideration therefore is as to what meaning should be attached to the expression. 'The accused shall then be called upon to enter upon his defence and produce his evidence.' We have therefore, to determine 'when the accused enters upon his defence.'

6. For a decision of this question It is necessary to examine the wordings of Section 342, Criminal P. C. Section 342, Criminal P. C. runs thus:-

For the purpose of enabling the accused to explain any circumstance appearing in the evidence against him the Court may at any stage of any inquiry or trial without previously warning the accused put such questions to him as the Court considers necessary and shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

7. According to this section the Court has a right to question the accused at any stage of enquiry or trial for enabling him to explain any circumstance appearing against him in evidence. This power of the Court is completely unfettered. It is discretionary and the exercise of this power is not subject to any limitations. But the second part of the aforesaid section makes it abundantly clear that it is obligatory upon a Court to question the accused with respect to the circumstances appearing against him generally after the witnesses for the prosecution have been examined and before he is called upon for his defence. The object of this part is that once the prosecution evidence is closed and the Court is in possession of all the facts appearing against the accused the Court shall put all the circumstances to the accused and question him in order to give him an opportunity to enter upon his defence or in other words to produce his defence witnesses. Thus we find that

while on the one hand a Court has unfettered discretion to question the accused generally at any stage of the enquiry or trial, on the other hand it is bound by law to question him after the close of the prosecution and before he enters upon his defence.

8. Reading Section 342, Criminal P. C. along with Section 256, Criminal P. C. the conclusion is inevitable that when the examination and cross-examination and re-examination if any of the prosecution witnesses is over under Section 256 of the Criminal Procedure Code the accused must be questioned by the Court under Section 342. Criminal P. C. with regard to the circumstances which have appeared against him in the evidence led by the prosecution. After the statement of the accused has been recorded under Section 342. Criminal P. C. he is called upon to enter upon his defence by the production of such witnesses If any. as he may choose to place before the Court. When this stage of the case is reached and the accused has entered upon his defence by the production of evidence If any he is also given an additional right under Section 257, Criminal P. C. of applying to the Magistrate to Issue any process for the attendance of any witness for the purpose of examination or cross-examination or 'the production of any document or other thing.' The Magistrate in those circumstances shall issue process and give another opportunity to the accused for cross-examination for the above purpose unless he finds that the application is vexatious and has been made to delay or defeat the ends of justice.

9. In a Full Bench decision of the Madras High Court *Varisai Rowther v. The Crown*. AIR 1923 Mad 609 : (24 Cri LJ 547) his Lordship Mr. Justice Devadoss has expressed himself thus:-

It may be taken as settled law that the omission to examine the accused under Section 342, Criminal Procedure Code, generally on the case after the prosecution witnesses have been examined is an illegality and not an irregularity which vitiates the whole trial The non-compliance with the first portion does not render a trial illegal or the proceedings irregular; and under the second portion it is the duty on the Court to question the accused and that after the witnesses for the prosecution have been examined and before he is called on for his defence. Chapter XX of the

Criminal Procedure Code relates to the trial of summons cases by Magistrates- Chapter XXI relates to the trial of warrant cases by Magistrates. Chapter XXII relates to summary trials and Chapter XXIII relates to trials by High. Courts and Courts of Sessions. Under Section 245 the Magistrate may if he thinks fit examine the accused but he is not bound to do so. Under Section 253 the Magistrate may examine the accused if he thinks necessary. Section 342 is in the Chapter containing general provision as to inquiries and trials. Under Section 209 which is in the Chapter relating to inquiry preliminary to commitment, the Magistrate may if he thinks necessary 'examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him.' Section 342 makes the examination of the accused obligatory only in cases where the accused is called on for his defence. A Magistrate may discharge an accused without framing a charge in which case his non-examination would not vitiate the proceedings. But where a Magistrate or Judge in a sessions trial finds that the prosecution has made out a case which the accused has to meet then it is incumbent upon the Magistrate or Judge to question the accused generally on the case for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him- It may be taken that the stage at which the examination is to be held is before the accused is called on for his defence.... Under Section 245 of the Code of 1898 the duty was cast upon the Court to ask the accused whether any of the prosecution witnesses should be recalled for cross-examination. He has therefore an undoubted right to have all or any of the prosecution witnesses recalled for cross-examination after the charge is framed and after he exercises such right the evidence of any of the remaining witnesses for prosecution should be taken and after cross-examination and re-examination they should be discharged. So then if a Magistrate frames a charge against the accused before the examination of all the prosecution witnesses is over he shall ask the accused whether he wishes to recall any or all the prosecution witnesses for cross-examination and after such cross-examination he shall take the evidence of the remaining prosecution witnesses. It is only after that, that the accused shall be called upon to enter upon his defence and he can be said to enter upon his defence only when he begins to adduce evidence on his behalf.. The accused in a warrant case has three opportunities of cross-examining the prosecution

witnesses: once before the charge is framed, secondly under Section 256 and thirdly after he has entered on his defence. He can apply (to the Magistrate under Section 257 to issue process for compelling the attendance of one or more of prosecution witnesses for cross-examination.

As expressed above, I am in full agreement with the view expressed by the Madras High Court.

9-A. In *Sudaman v. Emperor* : AIR1927 All475 Ash-worth. J. observed as follows -

The accused should be examined just before he enters on to his defence and produces his witnesses i. e. after all the prosecution witnesses have been completely done with....

In *B. Madhava Shanoi v. Moktyar Sahib* AIR 1957 Mys 9 (2) : (1957 Cri Lj 208). Justice Padmanabiah observed thus:-

Sub-section (1) of Section 342 contemplates two stages at which an accused can be examined. The use of words 'may' and 'shall' in two parts of the section goes to show that under the first portion the Court may at any stage of the inquiry or trial examine the accused but it must do so after the evidence for the prosecution is over and before the accused is called upon to enter on his defence.

10. Applying the principles laid down in the decisions mentioned above. I have no doubt in my mind that the application filed by the applicant Rasik Be-hari on 10-2-1970 for recalling the witnesses for cross-examination could only have been made at the stage of Section 257, Criminal P. C. As mentioned above it is clear from the order sheet that a date had been fixed for recording his evidence under Section 342, Criminal P. C. Thereafter he will enter upon his defence; and thereafter a stage will arrive under Section 257, Criminal P. C. when a right will accrue to him again, for applying for recalling the prosecution witnesses for cross-examination. The application filed by the accused dated 10-2-1970 is therefore not maintainable at the present stage. I have no doubt in my mind that when such an application is moved at the appropriate stage, the Court will not hesitate in passing suitable orders thereon.

11. For the reasons given above. I do not find any force in this revision which is hereby dismissed.

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