

State of U.P. Vs. Babu

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Court : Allahabad

Decided On : Mar-14-1990

Reported in : 1991CriLJ991

Judge : D.K. Trivedi, J.

Acts : Arms Act - Sections 25; ;Code of Criminal Procedure (CrPC) , 1974 - Sections 87, 242(2), 248, 251(A), 251(A)(7), 254(2), 255 and 350

Appeal No. : C.A. No. 772 of 1989

Appellant : State of U.P.

Respondent : Babu

Advocate for Def. : M.S. Kotwal, ;V.N. Tandan and ;H.N. Srivastava, Adv.

Advocate for Pet/Ap. : S.P. Misra, Adv.

Disposition : Appeal allowed

Judgement :

D.K. Trivedi, J.

1. The present criminal appeal filed by the State of U.P. is directed against the judgment and order of acquittal dated 27-7-89 passed by Shri S. B. Panday, II Addl. Munsiff-Magistrate, Unnao.

2. The Police submitted the charge-sheet against the opposite party under Section 25 of Arms Act. It is said that on 1-1-88 at about 1.00 p.m. in the night, the accused was arrested and from his possession one 'Addhi' of 12 bore and two live cartridges were recovered. Subsequently, the learned Magistrate acquitted the accused for want of evidence.

3. The lower Court's record of the present case shows that the first date of the evidence was 21-1-89 but as the accused was not present, therefore, the case was adjourned for 1-2-89. On 1-2-89, the prosecution moved an application for adjournment as the witnesses were not present. In the application, it was alleged by the prosecution that probably communication has not been made. The case was adjourned for 16-3-89 and thereafter on 26-4-89 but as the witnesses were not present, therefore, the case was adjourned for 28-6-89, On 28-6-89, the Presiding Officer was on leave and, therefore, the case was adjourned for 7-7-89. On 7-7-89, again an application was moved by the State stating that probably no communication has been made to the witnesses. The case was, therefore, adjourned for 21-7-89. On 21-7-89, the witnesses were not present and, therefore the prosecution moved an application praying that either summons be issued or coercive steps be taken against the witnesses. All these applications are on the record, but on these applications no order as been passed and only on the order sheet, it was mentioned that;

^okn iqdkjk x;kA eqfYte gkftj vk;sA xokgu ughavk;sA

vkns'k

okn fn- ---- dks okLrs lk{; is'k gksA

4. From the perusal of the order-sheet, it does not transpire that whether any summons has been issued to the witnesses or not? There is nothing on the record to show that whether any summons has been prepared and issued to the witnesses. The learned Magistrate did not even mention the fact that whether any Summons has bee issued to the witnesses or not? On the basis of the facts stated above, the State Counsel states that the order of acquittal passed by the learned Magistrate on 21-7-89 after closing the evidence of the prosecution is on the face

of it, illegal. The contention of the learned counsel for the appellant is that, it is also duty of the Magistrate to pass some orders on the applications moved by the State. He further pointed out that there is nothing on the record to show that any summons has been issued or handed over to the police persons for service and, therefore, in absense of these facts, the order for closing of the prosecution evidence could not be passed.

5. On behalf of the opposite party, it is alleged that there is no need to pass orders on the applications as the case was adjourned and the witnesses were directed to be summoned. According to him, it is the duty of the prosecution to produce the witnesses and as the prosecution has failed to produce the witnesses, therefore, the order passed by the learned Magistrate is correct order.

6. I have heard the learned counsel for the parties and have also perused the record. In my opinion the Magistrate acted in a very sketchy manner. It is not disputed that the prosecution has applied to the Magistrate for securing the attendance of the witnesses and, therefore, in my opinion, the Magistrate could not have closed the prosecution evidence for mere absence of the witnesses and it is the duty of the Magistrate also to make further efforts to secure their presence. It is also the duty of the Magistrate to pass some orders on the applications moved by the State as to whether the request made by the prosecution for issue of summons or warrant against the witnesses is proper request or not?

7. Before coming to the conclusion, it is necessary to see the necessary provisions of law in the Criminal P.C. Earlier in old Criminal P.C., the procedure prescribed in the casees instituted on police report, was under Section 251(A). For the purpose of this case Section 251(A)(7) of Cr.P.C. is relevant which runs as under:

'On the date so fixed, the Magistrate shall proceed to; take all such evidence as may be produced in support of the prosecution,

Provided that the Magistrate may permit the cross-examination of any witness to be deferred untill any other witness or witnesses have been examined or recall any witness for further crossreexamination.'

After coming into force of new Criminal P.C. a specific provision i.e. Section 242(2) comes into play which runs as under;

'The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing.'

It may be mentioned here that Section 87 of Cr.P.C. provides that the Court can issue warrant in lieu of, or in addition to, summons, Section 87 of Cr.P.C. run as under:

'Issue of warrant in lieu of, or in addition to, summons-- A court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, after record its reasons in writing, a warrant for his arrest--

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.'

8. Section 350 of Cr.P.C. further empowers the Court to prosecute the person and sentence him to fine if such person failed to appear on the date fixed by the Court.

9. Keeping in mind the above mentioned provisions of law, in my opinion a duty is also cast on the Court to take every steps for procuring the attendance of the witnesses. Even before coming into force of new Criminal P.C., the view of the High Court was that on the request of the prosecution as well as otherwise, it is the duty of the Court also to procure the attendance of the witnesses by issuing summons or otherwise. In a case of State of U.P. v. Gore Lal reported in 1977 (14) ACC 298 it was held that the, order of acquittal passed by the Magistrate for want of evidence is not valid order and it was his duty to take further steps for procuring the attendance of the witnesses through coercive measures. In another case Salik Singh v. Ram Prasad, reported in 1970 AWR 767, this Court again took the same

view that in warrant cases duty lies on the Magistrate to secure the attendance of the witnesses.

10. Keeping in mind the principle enumerated by the Court, the legislature now provided specific provisions enabling the prosecution to move an application or make a request to Court for issue of process for procuring the attendance of the witnesses through summons or otherwise. In any case if, the prosecution moved an application for issue of summons, then it is the duty of the Magistrate to issue summons and further to look that summons sent by the Court is also served on the witnesses. If the witnesses failed to appear even after service of summons, then the Magistrate can take resort to provisions of S.87 of Cr.P.C. which provides that the Magistrate can take coercive steps in order to secure the attendance of the witnesses.

11. The Magistrate cannot act in an arbitrary manner and acquit the accused on the ground of want of evidence. It is the duty of the Magistrate to see that whether in compliance of the order passed by the Court; summonses have been issued to the witnesses or not? Secondly, it is further duty of the Court to see on the next date fixed that whether the summons had been actually sent to the witnesses or not? and if, the summonses have been sent to the witnesses then, whether the said summonses have been served on the witnesses or not? If the Magistrate comes to the conclusion that the summonses have, already been sent but not served on the witnesses due to some technical defects, then he should direct the office to send the summons again after removing the said defects. Lastly, if he comes to the conclusion that the witnesses had failed to appear even after service of the summons then, he can take resort to provisions of Section 87 of Cr.P.C. In my opinion without complying all the above mentioned facts, the Magistrate cannot throw his responsibility and acquit the accused for want of evidence. The above mentioned question has also been considered by this Court in a case *Jhunjhun v. State of U.P.* reported in 1981 (18) ACC 340, Allahabad High Court took a view that under Section 242(2) of Cr.P.C., the action of the Magistrate acquitting the accused for want of evidence is not proper. The similar point also cropped up before Madras High Court and Full Bench of Madras High Court in a case of *State v. Virappan*, reported in AIR 1980 Mad 260 : (1980 Cri LJ (NOC) 155, observed

that:

'If the prosecution had made an application for issue of summonses to its witnesses either under Section 242(2) or 254(2), it is the duty of the Court to issue summonses to the prosecution witnesses and to secure the witnesses by exercising all the powers given to it under the Cr.P.C. and it still the presence of the witnesses could not be secured and the prosecution also either on account of pronounced negligence or recalcitrance does not produce the witnesses after the Court had given it sufficient time and opportunities to do so, then the Court being left with no other alternative, would be justified in acquitting the accused for want of evidence to prove the prosecution case, under Section 248, in the case of warrant cases instituted on a police report and under Section 255, Cr.P.C. in summons cases.'

12. Even, in absence of any specific provisions of law, it is the duty of the Court to see that his orders be complied with. If the Court passes an order of summoning of the witnesses, then it is also the duty of the Court to see that whether in compliance of the said order any step has been taken by the office or by the prosecution.

13. In the instant case as pointed out above, the Court passed an order that the witnesses be summoned and, thereafter, on the next date of hearing when the witnesses failed to appear and prosecution moved an application stating that probably because communication has not been made, therefore, the witnesses did not appear but in spite of this fact the learned Magistrate did not even look into the application and passed an order on the order sheet in a routine manner that case be fixed on 21-7-89 and witnesses be summoned. The prosecution moved at least three applications but no order has been passed on these applications. The Magistrate has not looked into the file that whether any summons has been sent or not? In the lower Court's record, I did not find any summons on the record. Finally, the case was listed on 21-7-89. On the said date, the A.P.O., moved an application stating that probably because no communication has been made to the witnesses, therefore, case be adjourned. He further prayed that either summons be issued or coercive steps be taken for securing the attendance of the witnesses.

No doubt, the said application appears to be printed one and also has been moved by the prosecution in a routine manner without disclosing the names of the witnesses but the Magistrate before whom the application was moved should have passed some orders on this application. The prosecution has mentioned in this application that all the witnesses mentioned in the charge sheet be summoned. In any case, it is the duty of the Magistrate to pass specific orders on these applications. From the perusal of the file it appears that the learned Magistrate was interested in disposal of the case and not to promote the interest of justice. There are other cases also in which the learned Magistrate without applying his mind acquitted the accused for want of evidence.

14. The learned counsel for the opposite party pointed out that coercive methods cannot be taken as there is no compliance of Section 87 of Cr.P.C. Section 87 of Cr.P.C. no, doubt empowers the Court to issue warrant even before issue of summons if he came to the conclusion after recording its reasons in writing that he has absconded or will not obey the summons or fails to appear after service of the summons. In the instant case as pointed out above no step has been taken for issue of summons nor any such fact mentioned above has been stated. Therefore, in my opinion, the application of provisions of Section 87 of Cr.P.C., does not arise. However, the matter is not in dispute in the present case, as the Magistrate has not passed any order for issue of warrant. Before parting with the case I may observe that the Magistrate should keep in consideration the provisions of law.

15. In view of the facts stated above, I am of the opinion that the order of acquittal dated 21-7-89 passed by the II Addl. Munsif-Magistrate, Unnao is illegal and liable to be set aside. No doubt, the accused was prosecuted only under Section 25 Arms Act which is a petty offence but as the Magistrate committed as manifest error on the point of law resulting in a flagrant miscarriage of justice, therefore, in my opinion, the order passed by the learned Magistrate is liable to be set aside and case be remanded for trial in accordance with law.

16. In the result, the impugned order is, hereby, set aside and the case is sent back to the Court of the II Addl. Munsif-Magistrate, Unnao for decision in the light of the observations made in this order.

17. The present criminal appeal is allowed accordingly.

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