

Riyazuddin and ors. Vs. State of U.P.

Riyazuddin and ors. Vs. State of U.P.

SooperKanoon Citation : sooperkanoon.com/487810

Court : Allahabad

Decided On : Jul-16-2001

Reported in : 2001CriLJ3907

Judge : R.B. Misra, J.

Acts : Evidence Act - Sections 114; Code of Criminal Procedure (CrPC) - Sections 161, 311, 482 and 540; Indian Penal Code (IPC) - Sections 302 and 304

Appeal No. : Cri. Misc. Application No. 2965 of 2001

Appellant : Riyazuddin and ors.

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : Syed Ali Murtaza, Adv.

Judgement :

ORDER

R.B. Misra, J.

1. Heard learned counsel for the applicants as well as learned counsel for the State.

2. The present criminal misc. application has been filed Under Section 482 of Cr.P.C. The applicants have prayed for quashing the order dated 12-12-2000 passed by the VIIIth Additional District and Sessions Judge, Kanpur Dehat in S.T. No. 443/99 State v. Fida Husain Under Section 304, I.P.C. Police Station Bilhore, District Kanpur Dehat and direct the Court below (Trial Court) to permit the applicants to recall and cross-examine the witnesses of fact PW 2 Zamil Ahmad and PW 4 Zalaluddin. It has further been prayed that this Court be pleased to stay further proceeding in Sessions Trial No. 443/99 (State v. Fida Husain) pending before the VIIIth Additional District and Sessions Judge, Kanpur Dehat during the pendency of the present application. It has been contended on behalf of the applicants that the learned Sessions Judge has failed to consider and appreciate that the necessary documents including site plan, statement of witnesses recorded Under Section 161, Cr.P.C. and Panchnama could not be furnished to the applicants and hence in absence of these necessary documents a fair trial could not be conducted. The applicants are facing a Session Trial No. 443/99, Under Section 304, I.P.C. Police Station Bilhore, District Kanpur in respect of the F.I.R. dated 18-7-1999 lodged in reference to the case Crime No. 299/99 Under Section 302, I.P.C. It has also been contended in para 6 of the affidavit that at the time of cross-examination, the counsel for the applicant at trial Court had no papers regarding the case including Site plan, statement of witnesses recorded Under Section 161 Cr.P.C. etc. An application on behalf of the applicants was given before the VIIIth Additional District and Sessions Judge, Kanpur Dehat for permitting the applicants to cross-examine the witnesses e.g. PW 2 Zamil Ahmad and PW 4 Zalaluddin. A supplementary affidavit dated 26-6-2001 has also been filed before this Court. In para 3 of this affidavit it has been submitted that earlier the PW 2 and PW 4 were examined on behalf of the accused/applicants by one learned counsel who left the brief on account of his poor health and ultimately the accused/applicants were left with no option except to engage a new counsel to look into the matter and for this purpose only, they moved an application for adjournment of the case. It has also been indicated in the affidavit that the applicants moved an application 18-11-2000 that one Sri Sayeed Naqvi has been engaged as a new counsel, who has felt that both the witnesses of facts namely P.W. 2 and P.W. 4 were important and material witnesses and have not been

examined properly by the earlier learned counsel appearing for the accused/applicants, whereas the result of the trial shall mainly depend upon their testimony therefore in the interest of justice they are required to be recalled by the Hon'ble Court. It has also been contended on behalf of the applicants in para 4 of the supplementary affidavit that the reasons for recalling them for the re-examination was that the new counsel appearing for the accused/applicants could not ascertain the questions which were to be asked by the earlier counsel. It has also been assured in para 5 of the supplementary affidavit that the applicants further undertake that they will not take any adjournment in examining the aforesaid witnesses and they are ready to bear the expenses to be incurred in recalling the aforesaid witnesses. Learned Sessions Judge in his order dated 12-12-2000 has not found any justification for recalling the witnesses P.W. 2 and P.W. 4 for re-examination and for cross-examination. In support of the contentions raised by the applicant learned Counsel has invited attention of this Court to the following cases.

(1) AIR 1981 SC 1861 : (1981) Cri LJ 1283 (1) (Mehrunissa v. State of Maharashtra) wherefor, non-supply of material documents referred to in grounds of detention - the detinue was prevented from making effective representation and the detention was vitiated on the fact that the detinue was not aware of contents of the documents. The reliance has been placed by the applicants.

(2) AIR 1991 SC 1346 : 1991 Cri LJ 1521 paras 9 and 10.

Para 9 :-

The very usage of the words such as 'any Court' 'at any stage', or 'of any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that this section is expressed in the widest possible terms and. do not limit the discretion of the Court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the Section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the

just decision of the case. Para 10 :-

It is cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties withholds any evidence which could be produced and which, if produced, be unfavourable to the party withholding such evidence, the Court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the Presiding Officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions whether discretionary or obligatory according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered or inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated. (3) 1999 (8) JT SC 155 Hoffman Andreas v. Inspector of Customs, Amritsar paras 6 and 8 are reproduced below (para 6) :

Normally, at this late state, we would be disinclined to open up a closed trial once again. But we are persuaded to consider it in this case on account of the

unfortunate development that took place during trial i.e., the passing away of the defence counsel midway of the trial. The counsel who was engaged for defending the appellant had cross-examined the witnesses but he could not complete the trial because of his death. When the new counsel took up the matter he would certainly be under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In such circumstance, if the new counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code after all the trial is basically for the prisoners and Court would afford the opportunity to them in the fairest manner possible. Para 8:-

For the aforesaid reasons, without entering into merits of the contentions raised before us we deem it necessary, in the interest of justice to afford an opportunity to the accused to further cross-examine the three prosecution witnesses who were already examined. We, therefore, set aside the conviction and sentence passed on the appellant and remit the case to the trial Court with the following directions :

The Court shall summon P.W. 1, P.W. 2 and P.W. 3 to be cross-examined again on behalf of the accused.

3. After perusing the documents available with the criminal miscellaneous application this Court feels that in the interest of justice some more opportunities are necessary to be given to the applicants.

4. In the facts and circumstances of the case the order dated 12-12-2001 is therefore set aside and learned Additional District and Sessions Judge (VIIth), Kanpur Dehat is hereby directed to invoke his power Under Section 311, Cr.P.C. to allow for re-examine/cross-examine the witness No. 2 Zamil Ahmad and P.W. 4 Zalaluddin on the particular specified date which shall be indicated and fixed at the pleasure and convenience of learned concerned District and Sessions Judge on the prescribed conditions and the cost and expenses to be specifically indicated for the purpose of re-examination/cross-examination. As assured on behalf of the

applicants that the co-operation shall be given in the case being adjudicated before the Sessions Trial and on the scheduled prescribed dates for re-examination/cross-examination. If the applicants are failed to obey their role it would be pleasure of the Sessions Judge not to provide further time for re-examination/cross-examination.

5. In view of the above observation the Criminal miscellaneous application is disposed off.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com