

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

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SooperKanoon Citation : sooperkanoon.com/490695

Court : Allahabad

Decided On : Nov-11-1999

Reported in : 2000CriLJ1342

Judge : Virendra Saran and M.C. Jain, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 311, 482 and 540;
Indian Penal Code (IPC) - Sections 307; Evidence Act - Sections 145

Appeal No. : Criminal Misc. Application No. 2730 of 1999

Appellant : Tahir and ors.

Respondent : State of U.P.

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : G.P. Dikshit, Adv.

Judgement :

M.C. Jain, J.

1. The present reference has been made by a learned Single Judge Hon'ble Mr. Justice B.K. Rathi to answer the following question :

Whether on the request of the accused the witnesses should be recalled for further cross-examination under Section 311 Cr.P.C. on the facts stated by them in the

affidavits filed subsequent to their statement recorded in the Court

2. It would be useful to give a brief account of the facts relating to this reference. The applicants are facing trial under Section 307 I.P.C. in S.T. No. 694 of 1996, State v. Chand before the Special Judge, E.C. Act, Muzaffarnagar. The evidence of the three prosecution witnesses, Rafiq, P.W.I, Aslam P.W. 2 and Akbar P.W. 5 was recorded as the witnesses of fact. Their evidence with cross-examination concluded long before 23-2-1999 when the applicants made an application to the trial Court that all these three eye-witnesses had filed affidavits denying the prosecution story and their statements recorded in the Court. The applicants made a prayer for recalling the witnesses for further cross-examination in the light of the averments made in the respective affidavits filed by these witnesses. The trial Court rejected such application of the applicants and aggrieved, they came up before this Court under Section 482 Cr.P.C. From the side of the applicants reliance was placed on the case of Sukhhan v. State, 1988 All.L.J. 175 and Amar Pal v. State of U.P. 1999 (38) A.C.C. 515, where, on similar facts and circumstances, request to recall witnesses for further cross-examination in the light of their subsequent affidavits had been allowed. Disagreeing with the view taken in each of the aforesaid two rulings by a learned Single Judge of this Court, Hon'ble B.K. Rathi, J. has made this reference to answer the question set out above.

3. We have heard learned counsel for the applicants and learned A.G.A. and have given our thoughtful consideration to the matter in the light of the relevant provisions of law. It is relevant to reproduce below Section 145 of the Evidence Act occurring in Chapter X which reads thus :

145 . Cross-examination as to previous statements in writing - A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matter in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

4. The Section provides that a witness may be cross-examined as to the previous statements made by him in writing or reduced into writing which are relevant to the

matters in question. There is no other provision in the Indian Evidence Act permitting the cross-examination of a witness with regard to his statement made subsequent to his already concluded evidence recorded in Court. Legislature, in its wisdom, has restricted cross-examination of witness as regards his previous statement only for the purposes of contradiction. The object is to test veracity of the witness with regard to his statement subsequently made in the Court. To be more clear, the purpose of such cross-examination relating to the previous written statement of a witness is two-fold. The one is to test the memory of the witness as to how far he is capable of remembering the past things and events and the second is to contradict him if he is saying something today, and on the same matter he had said something else in the past, and thereby the Court may be induced not to believe the testimony of the witness. Where his memory is to be judged, the purpose will not be served, if he is shown the writing and where the witness is to be contradicted, it will not be fair to him, if he is not given an opportunity to see the matter how it stands. What is required by the section is that the witness must be treated fairly and be afforded reasonable opportunity of explaining the contradictions after his attention has been drawn to them in a fair and reasonable manner. A witness may be asked any question, which, if answered, would qualify or contradict some previous part of that witness testimony, given on the trial of the issue, and if, that question is put to him and answered, the opposite party may then contradict him.

5. So far as the first object is concerned, that is fulfilled by asking a question on the previous statement of the witness. The witness may be asked without showing the writing to him or without proving the writing and if he testifies correctly, the matter ends there. Where he does not remember, then also the matter ends and the cross-examiner may draw the attention of the Court at the time of summing of the case that the witness could not remember his own written statement and what he has stated in the Court is merely a tutored statement.

6. The second part of the Section is of great importance. If a witness says something different than the written statement previously made, he is given an opportunity to explain the discrepancy by drawing his attention to those parts of the statement which are to be used for contradicting him.

7. Learned counsel for the applicants has invited our attention to the case of Mohd. Hussain Umar Kochra v. K.S. Dalipsinghji, AIR 1970 SC 45 (1970 Cri.L.J. 9). Wherein it was held that the Court has inherent power to recall a witness under Section 540 of the old Cr.P.C. (corresponding to Section 311 of the new Cr.P.C), if satisfied that he is prepared to give evidence which is materially different from what he had given at the trial. There can be no quarrel with this proposition that power of the Court is plenary to summon or even recall any witness at any stage of the case if it considers it necessary for a just decision. But the said ruling cannot be relied on as laying down the principle that a witness whose evidence has already concluded after cross-examination should be recalled for further cross-examination at the behest of the accused on the basis of the affidavit filed by him subsequently which is at variance to what he stated on oath before the Court. In the cited case of Mohd. Hussain Umar Kochra (supra) the defence plea was that the witness was repentant and wanted to say that he had given false evidence. The defence plea for recalling the witness for further cross-examination was rejected which was upheld by the apex Court, saying that there was no affidavit from the witness nor was there any material showing that his testimony was incorrect in any material particulars. It does not follow as a necessary corollary that if an affidavit had been filed by the witness, that would have made out a case for recalling him for further cross-examination.

8. It is well settled that the Court can always recall a witness at any stage if it is necessary in the interest of justice if there are good reasons to do so. Such a power is inherent in a Criminal Court for the reason that in a criminal trial every effort should be made to reach the truth. At the same time, the power to recall a witness cannot be made a tool in the hands of the accused to pray for recall of a witness for further cross-examination after his, evidence is concluded and the witness has been discharged, on the strength of an affidavit subsequently filed by him in contradiction with his statement earlier made in Court. The normal rule is that the discharge of a witness after cross-examination is the terminating point and there is no provision permitting filing of an affidavit by him. The power to recall a witness under Section 311 Cr.P.C. is to be exercised with circumspection only in a suitable case to advance the cause of justice. The Court may exercise the power in this behalf when there is some ambiguity in the testimony of a witness or there

is some strong justifiable cause to recall him. It is not possible to enumerate the variety of circumstances in which the Court may exercise such a power. It is pertinent to mention here that provision of Section 145 of the Evidence Act was not the subject matter of consideration before the Apex Court in the case of Mohd. Hussain Umar Kochra v. K.S. Dilipsinghji, AIR 1970 SC 45 (1970 Cri. L.J. 9) (supra).

9. If the witnesses are recalled subsequent to the conclusion of their evidence in Court at the behest of the accused on the basis of affidavits subsequently filed by them contradicting their previous statements made in court, it would be in violation of the provisions contained in Section 145, Evidence Act. We are afraid that if such a course is permitted perhaps there may be no end of any trial. It can also not be overlooked that the witnesses can be forced under threats or tempted and won over under pressure or for monetary gains to file affidavits subsequent to the conclusion of their evidence in Court, contradicting their previous statements and it could be so even after the cases reach the appellate stage. We are of the view that such a course cannot be permitted.

10. For the above reasons, our answer to the question referred is :-

The witnesses should not be recalled for further cross-examination under Section 311 Cr.P.C. on the facts stated by them in affidavits filed subsequent to their statements recorded in Court at the request of the accused. However, the Court has plenary power to summon or recall any witness at any stage under Section 311 Cr.P.C. if there exists justifiable reason to do so in the interest of justice but the Court should act with circumspection and exercise the power sparingly.

11. Let the matter with the above answer be placed before the Learned Single judge as per the rules of the Court.