

State of M.P. Vs. Ganesh

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Court : Madhya Pradesh

Decided On : Feb-09-2000

Reported in : 2000(2)MPHT69

Judge : S.P. Khare, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 61, 62, 87, 173, 231(1), 242(2), 242(3), 309, 311 and 378; [Indian Penal Code \(IPC\), 1860](#) - Sections 324; [Constitution of India](#) - Article 21; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 251A(7)

Appeal No. : Criminal Appeal No. 2715/99

Appellant : State of M.P.

Respondent : Ganesh

Advocate for Def. : Z.M. Shah, Adv.

Advocate for Pet/Ap. : Yogesh Dhande, Panel Lawyer

Disposition : Appeal allowed

Judgement :

S.P. Khare, J.

1. This is an appeal by the State under Section 378 of the Code of Criminal Procedure, 1973 (hereinafter to be referred to as the Code) challenging the Order of acquittal passed by Shri M.K. Saini, Judicial Magistrate First Class, Burhanpur on 12-2-1999 in Criminal Case No. 384 of 1996.

2. The charge-sheet as per Section 173 of the Code was submitted by the police on 17-4-1996. Charge under Section 324 I.P.C. was framed on 2-11-1996 against accused Ganesh for voluntarily causing hurt to Bhaulal by a sharp weapon. He pleaded not guilty. The case was fixed for evidence on 10-2-1997 and the Magistrate directed that the summons be issued to the prosecution witnesses. The same Order was repeated on 10-2-1997, 13-5-1997, 20-10-1997 and 21-7-1998 as the summons were not issued. The summons were issued for the first time on 11-1-1999. The case was fixed on 12-2-1999 for evidence. On that date five prosecution witnesses including complainant Bhaulal were present. The case was taken up at 4.55 P.M.. The learned defence counsel submitted that it would not be possible for the Court to record evidence on that day. The prosecutor submitted an application requesting the Court to record the evidence on that day or to fix another date for examination of the witnesses who were present. The Court declined to do so and relying upon the decision of the Supreme Court in *Rajdeo Sharma v. State of Bihar*, AIR 1998 S.C. 3281 closed the evidence and acquitted the accused on the same date.

3. After hearing the learned counsel for both the sides this Court is of the opinion that the learned Magistrate has mis-construed the ratio of the decision of the Supreme Court in *Rajdeo Sharma* 's case. The Supreme Court in this case for effective enforcement of the right to speedy trial flowing from Article 21 of the [Constitution of India](#) gave certain directions. The relevant direction for the present purpose was (1) in cases where the trial is for an offence punishable with imprisonment for a period not exceeding seven years, whether the accused is in jail or not, the Court shall close prosecution evidence on completion of a period of two years from the date of recording the plea of the accused on the charges framed whether prosecution has examined all the witnesses or no within the said period and the Court can proceed to the next step provided by law for the trial of the case. The Supreme Court has clarified in *Rajdeo Sharma v. State of Bihar*,

1999 Cr.L.J. 4541 that the whole idea was to speed up the trial in criminal cases to prevent the prosecution from becoming a persecution of the person arrayed in a criminal trial. No trial can be allowed to prolong indefinitely 'due to the lethargy of the prosecuting agency or the State machinery' and that is the *raison d'être* in prescribing the time frame with which the prosecution evidence must be closed. It has been further clarified that the power of the Court as envisaged in Section 311 of the Code has not been curtailed by the Supreme Court. Neither in the decision of the seven-Judge Bench in A.R. Antulay's case AIR 1992 S.C. 1701 nor in Kartar Singh's case 1994 Cr.L.J. 3139 such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the Court under Section 311 of the Code. The Supreme Court further observed : 'We make it clear that if evidence of any witness appears to the Court to be essential to the just decision of the case it is the duty of the Court to summon and examine or recall and re-examine any such person'.

4. In the present case the summons were not issued to the prosecution witnesses even after the repeated orders by the Magistrate. It was his duty to see that his Order is complied with by his staff. The mistake or negligence of the staff, the Reader or the Mohurriar is also the mistake or negligence of the Court as it is the duty of the Court to exercise effective control over its staff. It is apparent that the period of two years passed after the framing of the charge because of the dormant attitude of the Court and its staff. The summons appear to have been issued by the Court for the first time on 27-1-1999 i.e., after the expiry of more than two years of the date of framing of the charge. There was no lethargy of the prosecuting agency or the State machinery. On 12-2-1999 the complainant who was the victim of the alleged crime and four other witnesses were actually present in the Court in response to the summons issued by it but they were not examined as the Court was busy in taking up other cases upto 4.45 P.M.. Therefore, the proper course was to adjourn the case for the next day as per Section 309 of the Code and to record the evidence on that day. The Magistrate committed an illegality in refusing to record the evidence of the material witnesses who were present on the next day. The evidence could not be closed for the inability of the Magistrate to record evidence due to paucity of time.

5. It has been observed by the trial Magistrate in the impugned judgment that the prosecution did not 'produce' the witnesses. As mentioned above, after framing of the charge the Magistrate had directed that summons be issued to the prosecution witnesses. The word 'produced' in Section 242(3) of the Code must be interpreted in right perspective. The presence of the witnesses in the Court should be secured according to law. The word 'produced' has been used in Section 231(1) also which relates to trial before the Court of Session Chapter VI of the Code deals with Process to Compel Appearance. Section 61 provides that every summons issued by a Court shall be in writing, in duplicate, signed by the presiding officer in such Court, or by such other officer as the High Court may, from time to time, by the rule, direct, and shall bear the seal of the Court. Section 62 lays down how the summons are to be served. According to this Section every summons shall be served by a police officer, or subject to such rules as the State Government may make in this behalf, by an officer of the Court issuing it or other public servant. It is thus clear from Sections 61 and 62 of the Code that the summons are required to be issued by the Court and then these are to be served by the police officer. In case the summons are served on the witnesses and they do not appear, the Court has been authorised to issue warrants as per Section 87(b) of the Code. Thus the Court has ample power under the Code to secure the attendance of the witnesses. It is necessary for the Court to exercise these powers to see that the witnesses whose evidence is essential to the just decision of the case are brought before the Court.

6. In *State of Orissa v. Sib Charan Singh*, AIR 1962 Orissa 157, the Court was interpreting the word 'produced' used in Section 251-A (7) of the Code of 1898 which corresponds to Section 242(3) of the Code of 1973. In that case it was argued on behalf of the State that it is not possible to produce any witness in the Court except through the legal process of issuing summons or warrants etc.. The Court held that there is much force in this contention. The word 'produced' in Sub-section (7) of Section 251-A cannot be given any restricted meaning as to saddle the prosecution with the entire responsibility of producing the evidence. A duty also is cast upon the Courts for enforcing attendance of the witnesses by the process provided in the Code. The Courts are not therefore absolutely powerless when the parties fail to produce evidence relevant in a case. On the other hand the

power of the Court in this respect is very wide and the Court may at any stage of the proceedings summon any witness in Order to determine the truth or otherwise of the facts of a case under trial before it. In fact it is one of the duties of the Court to enforce attendance of the witnesses even by coercive process, merely because the prosecution could not produce the witness before the Court, that by itself, cannot be a ground to acquit the accused persons without making efforts to secure the presence of the material witnesses before the Court. To the same effect is the decision in *State of Bihar v. Polo Mistri*, AIR 1964 Patna 351.

7. In *State of Mysore v. Narasimhe Gowda*, AIR 1965 Mysore 167, it has been held that when once the summons were issued for securing the attendance of the prosecution witnesses, the Court had also to see that the prosecuting agency had exercised due diligence in the execution of those processes and to render further assistance in suitable cases by issue of warrant where the witnesses summoned and served have failed to attend the Court. In warrant cases where the law required the State to undertake the burden of prosecuting the offenders in public interest to ensure law and order, the Court also had the responsibility to see that justice was done by a fair and speedy trial. Passing orders of discharge or acquittal without just and sufficient grounds would be contrary to law and against public interest. In *Paban Chandra v. Dulal Ghosh*, AIR 1965 Calcutta 387, in a case instituted on police report, Magistrate ordered that the summons should be issued on the prosecution witnesses, but after certain adjournments, without taking any step for procuring attendance of witnesses on whom summons were issued, he proceeded further and after examining the accused who pleaded not guilty passed an Order of acquittal, it was held that the Order of acquittal was unwarranted by law and must be set aside. It was held that it is the duty of the Magistrate to see whether the Order passed by him for securing the attendance of the witnesses has been carried out or not. In *State v. Nandkishore*, AIR 1967 Rajasthan 228 it has been held that the word 'produced' in Sub-section (7) of Section 251-A of the Code includes the bringing forward of the witnesses by the prosecution at its own instance or through the process of the Court whom it desires to examine at trial.

8. This Court has also held in *State of M.P. v. Bandu*, 1995 (II) MPWN 78, that closing of evidence without any effort to secure attendance of the witnesses is miscarriage of justice. In *Virendra v. State of M.P.*, 1994 (II) MPWN 251 it has been observed that if the witness does not turn up after service of summons, coercive method should be adopted against him. The case cannot be closed for want of his evidence. The same view has been taken by this Court in *Nathibai v. Bhura*, 1991 M.P.L.J. 952. In this case also it has been held that it is the duty of the Court to issue process to compel the attendance of the witnesses. In that case the acquittal of the accused on the ground that the prosecution failed to produce evidence was set aside.

9. In the Code of 1973 the word 'produced' in Section 242(3) has the same meaning as it was assigned to that word by the judicial decisions in Section 251-A (7) of the Code of 1898. Section 242(2) provides that 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. This provision did not exist in the Code of 1898. Now the prosecution is authorised to make an application for issue of summons to its witnesses. An oral prayer or a request in the charge-sheet can also be treated as an application for summoning the witnesses. The provisions of the Code do not permit the police officer or the prosecutor to catch hold of the collar of the witness, drag him to the Court and put him in the witness-box. The attendance of the witnesses can be secured only through the mode recognised by law that is, by issuing and serving the summons and warrants. While it is the duty of the Court to issue process, it is the obligation of the police to serve the summons and warrants on the prosecution witnesses. Most of the delay occurs either because the summons are not issued, because of the negligence of the Court staff or these are not served by the police in time on the witnesses. There has to be a co-ordination in this respect so that cause of justice does not suffer.

10. The decision of the Supreme Court in *Rajdeo Sharma v. State of Bihar*, AIR 1998 S.C. 3281 lays emphasis on speedy trial of criminal cases. The trial Judge or a Magistrate is bound to see that the presence of the prosecution witnesses is secured through legal process. It must be ensured that the summons are issued in

time and these are properly served. The prosecution case cannot be closed without making genuine and sincere efforts to secure the attendance of the prosecution witnesses whose evidence is essential for just decision of the case. Now the duty of the Court has become heavier because in view of the decision of the Supreme Court referred above, the trial has to be completed within a time frame. This case does not lay down that the prosecution evidence should be close without any genuine efforts by the Court to secure the presence of the witnesses. There must be speedy trial. That is the Constitutional right of the accused. At the same time justice must be done to the person who claims to be the victim of the offence at the hands of the accused. The interest of both the sides must be safeguarded. The victim of the crime should not become a forgotten soul. He must have a feeling that the system of administration of justice exists for him also. The entire edifice of the administration of criminal justice would crumble if the victim of the offence is not permitted to ventilate his grievance before the Court by offering his evidence. Hon'ble K.T. Thomas, J., observes in *State of Gujrat v. High Court of Gujrat*, (1998) 7 SCC 392: 'A victim of crime cannot be a forgotten man in the criminal justice system. It is he who has suffered the most. Criminal justice would look hollow if justice is not done to the victim of the crime'. In the same strain is the Lecture of Hon'ble Dr. Justice A.S. Anand (as his lordship then was) on 28-9-1997 at Hyderabad (1998) 1 SCC 3 Journal Section, in which he says that victims are unfortunately the forgotten people in the criminal justice delivery system. Their interest in getting the offender punished cannot be ignored or completely subordinated. The victim should not be treated as 'Mr. Nobody'. It humiliates and frustrates a victim of crime when the offender goes unpunished.

11. This appeal is allowed. The impugned judgment is set aside and the case is sent back to the trial Magistrate for trial. The prosecution witnesses shall be summoned and their evidence shall be recorded by the Court. The respondent shall appear before the trial Magistrate on 1-3-2000. The case shall be disposed of within six months of the date of this order. A copy of this Order be sent to all the sub-ordinate Judges and Magistrates in the State as it has been found during the Course of inspection that numerous cases are being consigned to the record room after recording the acquittal of the accused persons without any sincere or genuine efforts to secure the attendance of the witnesses. A copy of this judgment be also

sent to the Director, Judicial Officers Training Institute.

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