

Bachatar Singh Vs. State of Orissa

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Court : Orissa

Decided On : Jun-25-1996

Reported in : 82(1996)CLT447; 1997CriLJ702; 1996(II)OLR74

Judge : P.K. Mohanty, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 311; Evidence Act - Sections 133 and 137

Appeal No. : Criminal Misc. Case No. 1510 of 1995

Appellant : Bachatar Singh

Respondent : State of Orissa

Advocate for Def. : Addl. Standing Counsel

Advocate for Pet/Ap. : B.S. Mishra-1, K.N. Pattnaik, M.R. Mishra, P.K. Mohanty, A.K. Mohanty, R.N. Panda, S.K. Das, B.B. Sarangi and P.K. Rath

Judgement :

P.K. Mohanty, J.

1. The petitioner, an accused in G.R. Case No. 3213 of 1937 in the Court of the Judicial Magistrate First Class, Bhubaneswar, for alleged commission of an offence under Section 279/ 304A, IPC has challenged the order of the Magistrate

directing the defence counsel to furnish the correct address of PW

2. The accused-petitioner filed an application under Section 311, Cr PC to recall PW 1 and PW 4. The learned Magistrate, on perusal of the evidence of PW 1, having found that the cross-examination has not been effectively done and there is every chance that the defence may be prejudiced if PW 1 is not recalled for further evidence by the defence specially when the present advocate was engaged much after the date of examination of PW 1 and as such had no occasion to cross-examine properly. The application was allowed vide order dated 7-7-1994 and summons were directed to be issued on PW 1 and PW 4 for further examination fixing it to 29-7-1994.

It appears from the order of the learned Magistrate dated 9-5-1995 that summons issued to witness Dillip Rao (PW 1) were returned back with report that he is not available in the address and his present whereabouts was not known. It is further noted that PW 1 was examined, cross-examined and discharged on 22-1-1992 and on the prayer of the accused, PW 1 was again summoned for his further cross-examination. The learned Magistrate in the circumstances has directed the defence counsel to furnish the present correct address of PW 1 by 19-5-1995, where after the summons would be issued to him and this direction is under challenge in this petition. It further transpires from the order-sheet dated 20-6-1995 that the learned Magistrate closed the prosecution case, since the defence could not furnish the correct address of PW 1 as directed earlier.

3. Mr. B. S. Mishra, learned counsel for the accused-petitioner submits that the defence counsel was engaged much after the examination of the witnesses and therefore excepting the address in the case diary, there is no other address available to the defence, counsel to furnish the present address of the witnesses in Court. It is the submission of Mr. Mishra that the direction of the learned Magistrate to the defence counsel to furnish the correct address of PW 1 is palpably illegal inasmuch as there is no reason or rhyme as to why the defence counsel would be in a position to furnish the address of a prosecution witness when the prosecution failed in their attempt to secure the attendance of the witness.

4. Section 311 of the Code of Criminal Procedure may be quoted hereunder:

'311. Power to summon material witness, or examine person present-

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.'

The second part of the section casts an obligation on the Court to summon and examine or recall and re-examine any such witness if his evidence appears to it to be essential to the just decision of the case. The object of the section is for the prevention of escape, of a guilty person due to carelessness of the prosecution or the Magistrate as the vindication of the innocence of the person wrongly accused owing to the carelessness and ignorance of the party. Therefore, the Court would be justified in exercising its discretion in recalling a witness under this section for the ends of justice and for the benefit of either the prosecution or the defence.

5. In a criminal trial cross-examination of witnesses is of utmost importance and it shall be in discovering the truth or otherwise and as to whether the witnesses are to be believed. A litigant has an unfettered right to cross-examine a witness against him unless he waives such right and he is to have the opportunity of cross-examining the witness whose testimony is to be used against him. Sections 137 and 138 of the Evidence Act provide for such examination and the order of examination. It is therefore manifest that evidence given by a party where the other party never had the opportunity either to cross-examine or to rebut such evidence by fresh evidence, such evidence is not legally admissible as evidence for or against him unless he consents that the evidence can be so used. The testimonial statements are required to be tested by cross-examination and has been so recognised as a cardinal principle but it need not necessarily be an actual cross-examination but an opportunity to exercise the right to cross-examine if so desired. As a necessary corollary where witness is not cross-examined and the party having the right to cross-examine a witness has not been afforded a chance

to cross-examine him, the evidence of such witness can not be used against him. In case, of course, where the party was afforded a chance to cross-examine, he has either failed or waived his right to cross-examine, the case may be different.

6. In the present case, the learned Magistrate vide order dt. 7-7-1S94 on consideration of the application of the accused-petitioner has come to a definite opinion that cross-examination of PW 1 has not been done by the party and there is every chance that the defence may be prejudiced in case, PW 1, was not recalled for further cross-examination by defence. On such consideration the learned Magistrate having issued the summons to the witness it was incumbent upon the Magistrate for enforcing the attendance of witnesses by the process provided under the Code of Criminal Procedure and if necessary to issue coercive process if in spite of summons being issued to the witnesses, the summon is either not served for reasons of absence or the address being insufficient and in any event the presence of the witness, recalled could not be secured. The learned Magistrate without taking recourse to the procedure laid down under law in procuring the attendance of the witness recalled by him, in his order dt. 9-5-1995 directed the defence counsel to furnish the present correct address of PW 1 within a stipulated date where after summons were to be issued. It is not understood as to how the defence counsel would be in a position to furnish the present correct address of a prosecution witness, the prosecution having failed to procure and produce the witness inasmuch as the summons issued by the Court having yielded no result. There is sufficient force in the submission of Mr. Misra, the learned counsel for the petitioner, that the defence counsel is not obliged under law to procure the attendance of prosecution witnesses or to furnish the particulars and whereabouts of the prosecution witnesses for the purpose of issuance of summons. Since the learned Magistrate has himself found that the defence may be prejudiced in case PW 1 was not recalled for further cross-examination by the defence for the reasons stated in the order it is not understood as to how he could have proceeded to close the prosecution evidence for non-supply of the address by the defence counsel. The learned Magistrate has failed to appreciate that it is the prosecution who has to furnish the correct particulars of its witness to be examined on its behalf and in the given address if the witness is not available the prosecution ought to have been called upon to submit the correct address or in the

alternative to produce the witness for necessary examination. If for some reason the prosecution has failed to produce the witness for cross-examination and the steps taken by the Court for appearance of the witness by issuing summons have not yielded any result, it was open to the learned Magistrate to take such other course or methods contemplated under law to procure his attendance but that having not been done and PW 1 having not been available for cross-examination to the defence counsel, the evidence of PW 1 is of no consequence and has to be ignored. The defence has a right to cross-examine the witness examined by the prosecution and in absence of an opportunity to cross-examine the witness, there remains no evidentiary value in his evidence recorded in examination-in-chief which could be utilised against him.

7. In view of the aforesaid finding, the order passed by the learned Magistrate dated 9-5-1995 and 20-6-1995 are not sustainable in law and therefore set aside. In case the learned Magistrate is of the opinion that the attendance of PW 1 cannot be ensured in the Court for cross-examination, the learned Magistrate shall proceed with the trial ignoring and expunging the evidence of PW 1 recorded in examination-in-chief. It is further directed that the trial be completed without any further delay and preferably within a period of 3 months hence.

8. In the result, the petition succeeds to the extent indicated above.