

**State Vs. Asha Ram @ Ashu Mal and Ors**

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**Court :** Rajasthan Jodhpur

**Decided On :** Nov-06-2015

**Appellant :** State

**Respondent :** Asha Ram @ Ashu Mal and Ors

**Judgement :**

1 IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

ORDER

1 S.B.CRL. REVISION PETITION NO.981/2015 State of Rajasthan & Ors. Vs. Asharam @ Ashumal & Ors.

2. S.B.CRL. REVISION PETITION NO.1000/2015 Miss Supriya. Vs. State of Rajasthan & Ors. Date of order :

6. 11.2015 HON'BLE MR. JUSTICE SANDEEP MEHTA. Mr. S.K. Vyas, G.A. a/w Mr.V.S. Rajpurohit, PP, for the State. Ms.Priti Jain, DCP (West), I.O. and Ms.Seema Hingoniya, ACP, present in person. Mr.P.C. Solanki, for the victim. Mr.M.R. Singhvi, Sr.Adv. ) for the respondents. Mr.S.R. Surana, Sr.Adv. ) Mr.N.K. Bohra ) Mr.Bhavit Sharma ) Mr.Ashwin Nayak ) Mr.Nishant Bora ) Mr.Pradeep Choudhary ) <><><> Reportable Heard learned counsel for the parties and perused the material available on record. These two revision petitions have been preferred by the State of Rajasthan and the victim complainant respectively being aggrieved of the order dated 4.8.2015 passed by the 2 learned Sessions Judge,

Jodhpur District in Sessions Case No.152/2013 whereby, the application preferred by the prosecuting agency under Section 173(8) Cr.P.C. for placing on record the call details of some mobile numbers and the certificate issued by the nodal officer of the service provider and also to examine witness Bhushan Kumar and the witnesses in support of the documents, was rejected. Facts in brief are that an F.I.R. No.122/2013 was registered against the accused respondents facing trial in this case on 21.8.2013 for the offences under Sections 342, 376(2) (f), 376D, 354A, 370(4), 506, 509/34, 109 and 120-B I.P.C., Sections 23 and 26 of the Juvenile Justice Act and Section 5(f) (g)/6, 7/8 and 17 of the POCSO Act. After initial investigation, an incomplete charge-sheet was filed against the accused on 6.11.2013 keeping the investigation pending under Section 173(8) Cr.P.C. The trial Court took cognizance of the offences against the accused on 27.11.2013. Charges were framed on 7.2.2014 and read over to the accused on 13.2.2014 who denied the same and claimed trial. The prosecution evidence commenced on 19.3.2014. A total of 43 witnesses were examined by the prosecution including the Investigating Officer Smt.Chanchal Mishra. The statement of the last prosecution witness Smt. Chanchal Mishra was started on 9.7.2015 and her examination-in-chief was completed on 3 22.7.2015. Presently, her cross examination is continuing. While the statement of Smt. Chanchal Mishra was still continuing, the Investigating Agency submitted a supplementary charge-sheet under Section 173(8) Cr.P.C. in the trial Court on 22.7.2015 wherein two additional pieces of evidence are proposed to be put up before the trial Court. The first part is by way of documentary evidence viz. the certified copies of the call details and the verification certificate of these call details issued by the nodal officer of the service provider. The other piece of evidence is in form of a statement of witness named Bhushan Kumar examined under Section 161 Cr.P.C. on 25.6.2015 who is also proposed to be examined as a prosecution witness at the trial. The application preferred by the prosecution was opposed by the accused before the trial Court. The trial Court rejected the said application by its order dated 4.8.2015, upon which, the State as well as the victim has approached this Court by way of these two revision petitions assailing the legality and validity of the said order. Learned Government Advocate Mr. S.K. Vyas a/w learned public prosecutor Mr.V.S. Rajpurohit, assisted by Ms.Priti Jain, DCP (West), I.O. and Ms.Seema Hingoniya,

ACP and learned counsel Mr.P.C. Solanki vehemently contended that the call details and the certificate issued by the nodal officer of the service provider are vital pieces of evidence. They urged that 4 in the application preferred by the prosecution, a specific prayer was made to take the documents on record and also to examine the witnesses relating to the documents. They urged that the call details which are very material and relevant for a just decision of the case were earlier procured by the Investigating Officer during the course of investigation through email. The Investigating Agency's witnesses in their own capacity have already proved these call details but in absence of the certified copies supported by a verification certificate issued by the authorised officer of the service provider, such call detail records would probably be treated to be secondary evidence and could possibly be excluded from consideration at the time of final decision of the case. They submitted that though the certificate issued by the nodal officer and the certified call details had been collected by the Investigating Officer in February, 2014, the same were inadvertently not filed on the record of the trial Court because the investigation was still continuing and the Investigating Agency was hopeful of being able to collect evidence of more material witnesses in order to bring the true facts on the record. They contended that the witness Bhushan Kumar who is none other than the driver of the main accused Asharam could be located and tracked down only in the month of June, 2015 whereafter his statement was recorded under Section 5 161 Cr.P.C. and soon thereafter the final supplementary charge-sheet was filed. They further contended that mere failure of the Investigating Agency to file the documents and statements of the witnesses on record in time could not have been the sole ground for rejecting the supplementary charge- sheet filed before the Court under Section 173(8) Cr.P.C. It was further contended that if the evidence sought to be produced is necessary and essential for the just decision of the case, such evidence can be taken on record at any point of time till the judgment is pronounced. They contended that till now the prosecution evidence has not been concluded and, therefore, by no stretch of imagination, it can be said that the supplementary charge-sheet filed by the prosecution along with the documents and the statements of witnesses upon conclusion of investigation which was continuing under Section 173(8) Cr.P.C. is belated. They, therefore, contended that the trial Court committed a grave error of

facts as well as law in rejecting the final charge-sheet and while disallowing the prosecution to lead evidence in light of the facts collected during subsequent investigation. In support of their submissions, they relied on the following judgments :- (1) State of W.B. vs. Salap Service Station & Ors. reported in (1994) SCC (Cri) 1713. (2) Hasanbhai Valibhai Qureshi. vs. State of Gujarat reported in (2004) 5 SCC347 6 (3) Rama Chaudhary. vs. State of Bihar reported in AOR 2009 SC2308 (4) Anvar P.V. vs. P.K. Basheer and others reported in AIR 2014 SCW5695 They vehemently contended on the strength of the above judgments that the impugned order is bad in the eye of law and thus, deserves to be quashed and set aside. Per contra, learned Senior Advocates Mr.M.R. Singhvi and Mr.S.R. Surana along with learned counsel Mr.N.K. Bohra, Mr.Bhavit Sharma, Mr.Ashwin Nayak, Mr.Nishant Bora and Mr.Pradeep Choudhary vehemently opposed the submissions advanced by the learned counsel for the State and victim. It was submitted that the belated endeavor of the prosecution to file the documents and statement of the witness on record under the garb of pending investigation under Section 173(8) Cr.P.C. is nothing but an attempt to prejudice the defence of the accused. They contended that extensive cross examination has already been conducted from the witnesses in relation to the call details and, therefore, if at such a belated stage the call details and the certificate of the nodal officer are taken on record, then it will cause severe and grave prejudice to the defence of the accused. They further urged that the witness Bhushan Kumar whose statement was recorded by the Investigating Officer in June, 2015 is a cooked up witness and the attempt of the prosecution to supplement its evidence by the testimony of a witness examined under Section 161 Cr.P.C. for the first time after nearly two years of the incident was rightly turned down by the trial Court. They thus urged that the impugned order passed by the learned trial Judge whereby, the supplementary charge-sheet filed by the prosecution was not accepted and the prayer to take additional evidence was rejected does not call for any interference and the revision petitions deserve dismissal. I have heard the arguments advanced by the learned counsel for the parties and have gone through the order under challenge and the entire material available on record. So far as the prayer of the prosecution to examine the witness Bhushan Kumar is concerned, I have examined the statement of the said witness recorded under Section 161 Cr.P.C.

during further investigation. The witness was examined as late as on 25.6.2015 i.e. after nearly two years of the occurrence. Suffice is to say that there is no material on the record of the case which can satisfy the Court that the witness was not available to the Investigating Officer earlier. That apart, the evidence which the prosecution desires to lead from the mouth of this witness is repetitive in nature and admittedly, large number of witnesses giving similar testimony have already been examined at the trial. Thus, on the face of record, the veracity and relevance of this witness is absolutely 8 doubtful. Therefore, the trial Court was absolutely justified in rejecting the prayer of the prosecution to examine this witness at this belated stage. Now coming to the second part of the prayer made by the prosecution. In the supplementary charge-sheet and the application under Section 173(8) Cr.P.C. filed on behalf of the prosecution, it is specifically mentioned as below :- egksn;]. mijksDr fo"k;kUrZxr fuosnu gS fd eksckby ua- 09321933400 dh dkWy fMVsy 1-05-2013 ls 30-08-13 rd o 09303752153 o 09329836250]. 09354719340]. 09303805181]. 09329993499]. 09321354965]. 07804907062 dh 01-08-13 ls 30-08-13 rd dh dkWy fMVsy izekf.krlqnk dz-l- 1 ls 333 e; uksMy vf/kdkjh dk izek.k i= bl izdj.k ds izkfEHkd vuql/a kku vf/kdkjh Jherh papy feJk }kjk izklr fd;k x;kA mDr izdj.k esa uksMy vf/kdkjh }kjk tkjh lqnk izek.k i= o izekf.kr lqnk dkWy fMVsyksa dh izekf.kr izfr;ka e; izek.k i= ds lk{; gsrq izLrqr dj fuosnu gS fd mDr rF;ksa ls lEcU/kr xokgu dks lk{; gsrq crkSj xokg ryc Qjek;k tkos rFkk lkFk gh iwoZ esa izLrqr vkjksi i= dh fujUrk esa layXu djus dh d`ik djsA mYys[kuh; gS fd mDr i=koyh eu~ lgk;d iqfyl vk;qDr ifpe lhek fgxksfu;ka dks fnukad 24-10-2014 dks fu;ekuqlkj pktZfyLVuqlkj izklr gksus ij eu vuqla/kku vf/kdkjh }kjk xokg Hwk"k.k dqekj ls vuql/a kku dj c;ku fy;s xokg Jh Hkw"k.k dqekj us izdj.k dh ?.kVuk ds ckjs esa lk{; fn;kA vr% izdj.k esa iw.kZ vkjksi i= vUrxZr /kkjk 1738 esa isk dj fuosnu gS fd xokg Jh Hkw"k.k dqekj o vU; nLrkostkruqlkj dks Hkh lk{; gsrq ryc fd;k tkosA dkxtr fjdk MZ ij fy;s tkosA layXu iwjd nLrkostkr& 1- izekf.krlqnk dkWy fMVsy dze l-1 ls 333 rdA2 c;ku odZ A3 izek.k i= odZ A9lwph iwjd xokgu 1- fgykbZUI dE;wfudsku fyfeVsM Jh fou; dqekj 'kekZ }kjk fnukad 06-01-14 dks izek.k i= tkjh fd;kA2 Jh Hkw"k.k dqekj ftuds 161 lrvkjhlh ds c;ku fy;s x;sA3 vuqla/kku vf/kdkjh lhek fgaxksfu;k vkjih,l lgk;d iqfyl vk;qDr ifpe tks/kiqjA The trial Judge whilst examining the application totally missed the prayer made by the prosecution to examine the witnesses as per the documents which were sought to be filed along with the supplementary charge-

sheet under Section 173 (8) Cr.P.C. The call details are vital pieces of evidence and have already been taken on record by the trial Judge. However, such call details were admitted in form of copies received by the Investigating Officer through email. Thus, in all probability, they would fall in the definition of secondary evidence and the possibility of such documents being rejected from being considered as admissible piece of evidence cannot be ruled out. The Hon'ble Supreme Court in the case of Anvar P.V. (supra) held that secondary evidence of electronic record would be inadmissible unless requirements of Section 65B of the Evidence Act are satisfied. In this background, this Court is of the firm opinion that the trial Court during the course of the earlier proceedings, whilst allowing the call details to be taken on record was required to be watchful as to whether the documents in form of electronics record (call detail records) 10 which were endeavoured to be proved by the prosecution were admissible in evidence or not. It goes without saying that it is expected of the trial Court to allow only such documents to be proved and taken on record which are relevant and essential for the just decision of the case. Once the trial Court allows a relevant document to be taken on record, then it goes as a corollary that such documents must conform to the requirements of Evidence Act. Viewed in light of the observations made by the Hon'ble Supreme Court in the case of Anvar P.V. (supra), it is evident that unless primary evidence is taken regarding the documents in form of electronics record viz. call detail records, they would be inadmissible in evidence. Therefore, once, the call details were admitted in evidence then as being relevant material, it was the bounden duty of the trial Court to have ensured summoning of the relevant witnesses to prove the call details as per law particularly, Section 65B of the Evidence Act. Following the celebrated judgment in the case of Zahira Habibullah Sheikh & Anr. vs. State of Gujarat and Ors. reported in AIR 2004 SC3114 the Hon'ble Supreme Court in the case of Himanshu Singh Sabharwal v. State of M.P. reported in AIR 2008 SC1943 held that the Court should not merely be a bystander to the proceedings and it observed as under :- "8. This Court has often emphasised that in a criminal case the fate of the proceedings cannot 11 always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community as a community and harmful to the society in general. The concept of fair trial entails

familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society is not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an over-riding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators."

No party should be allowed to suffer merely because of the negligence of its counsel. Therefore, this Court is of the firm opinion that if at all the prosecution had faltered in giving the requisite admissible evidence to prove the material and relevant call details, then the trial Court should have been vigilant and should have summoned the original documents and relevant witnesses to prove the same. 12 In the case of Rama Chaudhary (supra), the Hon'ble Supreme Court held that the prosecution is entitled to produce any person as a witness even though such person is not named in the earlier charge-sheet. Following the judgment rendered by the Hon'ble Supreme Court in Hasanbhai Valibhai Qureshi (supra) in Rama Chaudhary's case (supra), the Hon'ble Supreme Court held as below :- "9. The above said provision also makes it clear that further investigation is permissible, however, reinvestigation is prohibited. The law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out a further investigation even after filing of the charge-sheet is a statutory right of the police. Reinvestigation without prior permission is prohibited. On the other hand, further

investigation is permissible.

10. From a plain reading of sub-section (2) and sub-section (8) of Section 173, it is evident that even after submission of police report under sub-section (2) on completion of investigation, the police has a right to "further" investigation under sub-section (8) of Section 173 but not "fresh investigation" or "reinvestigation". The meaning of "Further" is additional; more; or supplemental. "Further" investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether. Sub-section (8) of Section 173 clearly envisages that on completion of further investigation, the investigating agency has to forward to the Magistrate a "further" report and not fresh report regarding the "further" evidence obtained during such investigation.

11. As observed in *Hasanbhai Valibhai Qureshi vs. State of Gujarat and Others*, (2004) 5 SCC347 the prime consideration for further investigation is to arrive at the truth and do real and substantial justice. The hands of investigating agency for further investigation should not be tied down on the ground of mere delay. In other words, the mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial as well as effective justice.

12. If we consider the above legal principles, the order dated 19.02.2008 of the trial Court summoning the witnesses named in the supplementary charge-sheet cannot be faulted with. It is true that after enquiry and investigation charges were framed on 11.03.2004 and thereafter in the course of trial about 21 witnesses were examined. In the meantime, Police submitted supplementary charge-sheet with certain new materials and on the basis of supplementary charge-sheet, the prosecution filed an application on 12.01.2008 in a pending Sessions Trial No.63 of 2004 to the trial Court for summoning the persons named in the charge-sheet for their examination as prosecution witnesses. On a careful perusal of the application, the trial Court, by order dated 19.02.2008, allowed the same and has summoned those witnesses named in the supplementary charge-sheet."

In the case of Salap Service Station (supra), the Hon'ble Supreme Court held that the Court has no power to reject the supplementary charge-sheet outright without taking it on the file. On going through the impugned order, it is evident that the Court was principally swayed by the fact that the supplementary charge-sheet and the documents sought to be produced therewith were being filed with a great delay. In this Court's opinion, the trial Judge, while rejecting the 14 supplementary charge-sheet and the prosecution's prayer for examining witnesses to prove the relevant and material documentary evidence on the sole ground of delay, was totally oblivious of the salutary provisions of Section 311 Cr.P.C. While deciding the application filed by the prosecution, the learned trial Judge did not advert to the issue as to whether or not, the documents sought to be filed and proved by the prosecution under Section 173(8) Cr.P.C. are material pieces of evidence. The law is well settled that the trial Court is under a duty to see that no lacuna is left in the case on account of the negligence of a party before it. The lacuna if any brought around on account of negligence of a prosecutor or even the defence counsel is required to be cured and filled in by allowing additional evidence at any time before the judgment is pronounced as held by the Hon'ble Supreme Court in the case of Rajendra Prasad v. Narcotic Cell through its officer-in-charge, Delhi reported in AIR 1999 SC2292 while observing as below:- 6. It is a common experience in criminal Courts that defence counsel would raise objections whenever Courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act by saying that the Court could not 'fill the lacuna in the prosecution case. 'A lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans 15 are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a Court cannot fill up.

7. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No party

in a trial can be foreclosed from correcting, errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

8. The very same decision, *Mohanlal Shamji Soni v. Union of India*, AIR 1991 SC1346:

1999. Cri LJ1521(supra), which cautioned against filling up lacuna has also laid down the ratio thus (Para 27): "It is therefore clear that the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.' 9. Dealing with the corresponding section in the old Code (Section

540) *Hidaya-tullah, J.*

(as the learned Chief Justice then was) speaking for a three-Judge bench of this Court had said in, *Jamatraj Kewalji Govani v. State of Maharashtra*, (1967) 3 SCR415: (AIR 1968 SC178:

1968. Cri LJ231, as follows (Para 14 of AIR and Cri LJ): "It would appear that in our criminal 16 jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in Court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the Court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the Court is right in thinking that the new evidence is necessary by it for a just decision of the case."

10. Chinnappa Reddy, J.

has also observed in the same tone in, *Ram Chander v. State of Haryana*, AIR 1981 SC1036: (1981 Cri LJ609.

11. We cannot therefore accept the contention of the appellant as a legal proposition that the Court cannot exercise power of re- summoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered laches only when the defence highlighted them during final arguments. The power of the Court is plenary to summon or even recall any witness at any stage of the case if the Court considers it necessary for a just decision. The steps which the trial Court permitted in this case for re- summoning certain witnesses cannot therefore be spurned down nor frowned at."

The argument advanced by learned counsel for the accused that the defence of the accused has been disclosed and thus, they would be prejudiced if additional evidence in furtherance of the supplementary charge-sheet under Section 173(8) Cr.P.C. is allowed, is misconceived. The accused will have a right to cross examine the witness i.e. nodal officer of the service provider when he comes in the witness box. In the 17 opinion of this Court, merely because a witness is being produced to prove such documents, of which copies have already been admitted on record in their secondary form, no prejudice would be caused to the accused. The accused would have an unfettered right to cross examine the new witnesses when they come in the witness box but there is no possibility of prejudice being caused by such evidence being produced. As an upshot of the above discussion, this Court is of the firm opinion that the order dated 4.8.2015 rejecting the prayer of the prosecution for filing supplementary charge- sheet and to record evidence of the nodal officer of the service provider for proving certified copies of call details and the certificate is absolutely bad in the eye of law to that extent and is thus quashed and set aside. The trial Court is directed to allow the prosecution to file certified copies of call details and the certificate of nodal officer on record with the supplementary charge-sheet and to lead evidence in support of such call details and the certificate. However, it is made clear that if the prosecution desires to file the call details in addition to the certificate of the nodal officer then, the entire call

details for the relevant period without any filtering shall be filed on record and shall be allowed to be proved by summoning the nodal officer of the service provider. The order passed by the learned trial Court is upheld and affirmed 18 to the extent, the prayer made by the prosecution for examining the witness Bhushan Kumar was rejected. These two revision petitions are partly allowed in the above terms. Stay petitions also stand disposed of. (SANDEEP MEHTA), J.

/S.Phophaliya/

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