Sham Sunder Vs. State

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Court : Delhi

Decided On : Mar-25-1996

Reported in : 1996CriLJ3376; ILR1996Delhi309

Judge : Mohd. Shamim and; P.K. Bahri, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 31, 311 and 391

Appeal No. : Crl.M. No. 1375/96 in Crl.A. No. 177/92

Appellant : Sham Sunder

Respondent : State

Advocate for Def. : R.D. Jolly, Adv.

Advocate for Pet/Ap. : K.B. Andley and; Vinod Yadav, Advs

Judgement :

P.K. Bahri, J.

1. During the course of the arguments being addressed in the regular Criminal Appeal, the present application has been moved by the State for permission to tender in evidence the supplementary CFSL report as well as to examine a link witness Constable Sukhpal who had taken the samples from the Moharrar Malkhana and had deposited the same with the CFSL office.

2. The short question which arises for consideration is whether this Court, at this stage, should permit such evidence to be taken which obviously is very material evidence for deciding the case. The powers which have been given to the Court are coughed in Sections 311 and 391 of the Criminal Procedure Code. These Sections are reproduced as follows :-

'311. Power to summon material witnesses 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.

391. Appellate Court may take further evidence or direct it to be taken :- (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XX, as if it were an inquiry.'

3. It is evident from the very reading of these provisions that the Court has power to examine any witness at any stage of the case if the evidence appears to the Court to be essential to the just decision of the case.

4. It has been urged on behalf of the appellant that in case such evidence is allowed to be led at this stage of the case, it would amount to permitting the

prosecution to plug the loopholes existing in the prosecution case. It has been urged that the Trial Court had given ample opportunities to the prosecution to examine the said witness which was always available with the prosecution but for reasons known to the prosecution, such evidence was not led, before the Trial Court.

5. We must express our unhappiness the way in which the criminal trial has taken place before the Sessions Court. The interest of justice as well as the Criminal Procedure Code require that the trial in such heinous offences should take place day to day and the trial should not take place in driblets. In the present case, we find that the trial has not taken place with the promptitude, as was required by the law. We find from the various orders passed by the Trial Court that the Trial Court was examining the witnesses in driblets and we adjourning the case without recording whether the witnesses have been served or not.

6. We have gone through the file and find that this Sukhpat constable, who was a very important witness for proving the fact that the case property in the present case had been taken out from the Malkhana and had been deposited in the CFSL office intact was being summoned on different hearings and in some of the hearings, he was duly served, yet in none of the orders it was recorded that witness has been served and has not appeared and some coercive process be issued to secure the presence of the witness.

7. It is true that even prosecutor had not, at any stage of the case, requested the Trial Court that any coercive process should be issued. There is no legal bar in Court itself issuing coercive processes against the witnesses who do not turn up despite being served. The Court, while trying the sessions case, has to keep in view that all important witnesses are examined so that just decision of the case is made.

8. We again find that the supplementary report of the CFSL was duly produced in the file by the prosecutor with an application and copy of that report was also supplied to the defense and the two CFSL reports were sought to be tendered in evidence in the testimony of the I.O. but while putting the exhibit marks, it appears that one exhibit mark was put on one CFSL report and second exhibit mark, which

was meant to be put on the supplementary CFSL report, was spot on the application which was sent by CFSL by the I.O. The supplementary CFSL report was available on the record but was not exhibited.

9. Now the question which arises for consideration is whether this Court should exercise the powers under the aforesaid provisions to exhibit the said CFSL report and also to permit the examination of the witness Constable Sukhpal.

10. A special bench of the Madras High Court in case of P. Varadurajulu Naidu v. Emperor AIR 1920 Mad 928 : 1919 (20) Cri LJ 455 while examining the provisions of Section 428 of the old Criminal Procedure Code of 1898, had laid down that an Appellate Court has jurisdiction under the aforesaid provisions to take additional evidence or direct additional evidence to be taken to supply a formal defect, but the power has to be exercised with great care and only when the Court is satisfied that the case is one of formal proof only.

11. A Division Bench of the Allahabad High Court in Ram Jeet v. The State, : AIR1958 All439 while interpreting the provisions of Section 540 of the Criminal Procedure Code, 1898, has held that the Section is manifestly in two parts. The first part gives purely discretionary authority to the Criminal Court; on the other hand, the second part is mandatory. The discretion given by the first part is very wide and its very width requires a corresponding caution on the part of the Court. But the second part does not allow for any discretion; it binds the Court to examine fresh evidence and the only condition prescribed is that this evidence must be essential to the just decision of the case. If this results in what is sometimes thought to be the 'filling of loopholes', that is a purely subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case and has to be determined by the court concerned.

12. Before we deal with the other judgments brought to our notice, we may mention that in the present case, the appellant is charged to have committed murder by administering poison which was allegedly brought in two containers out of which the liquid contained in one of the containers was administered to the deceased. The two containers as well as the glass in which the liquid was poured

and the deceased was persuaded to take that liquid from that glass and also the viscera of the deceased were sent to the public analyst for the opinion. This Satpal constable has taken the case property to CFSL a number of times. The first report came from CFSL which pertained to the viscera of the deceased which showed the presence of 'cyanide' and the supplementary CFSL report then came which also showed that the contents of the said container also contained cyanide poison. Neither the supplementary CFSL report was exhibited nor the link evidence of Constable Sukhpal was recorded in the Trial Court. Constable Sukhpal was served even for the crucial last date i.e. 18th May 1992 when the Court proceeded to close the evidence of the prosecution giving the opportunity to the prosecution to examine the remaining witnesses, if any, on the next date when the statement of accused was to be recorded. The Court has not even mentioned in the order that Sukhpal, witness, has been served and whether the witness is present or not. No coercive process was directed to be issued so that the witness could be present on the next date positively. It cannot be gainsaid that the said witness in the present case was very material evidence which could have enabled the Court to give a just decision in the case.

13. In Jamatraj v. State of Maharashtra, : 1968 CriLJ231 the Supreme Court has emphasised the mandatory nature of the part two of provision of Section 540 of the Old Criminal Procedure Code and has laid down that as the Section stands, there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bona fide of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution. The two aspects of the matter, which were directed to be kept apart by the Supreme Court, were that first the prosecution cannot be allowed to rebut the defense evidence unless the prisoner brings forward something suddenly and unexpectedly and other aspect is that the power of the Court which is to be exercised to reach a just decision and this power is exercisable at any time.

14. In case of Raghunandan v. State of U.P., : 1974 CriLJ453 , the Supreme Court has laid down that it is a duty of the Trial Court also to put questions to the witness

in that case, a doctor, to elicit the information on material points and if such questions are not put, the High Court could and should take further evidence on such matters by resorting to provisions of Section 540 of the Criminal Procedure Code. It was laid down that in a criminal case, the fate of the proceeding cannot always be left entirely in the hands of the parties. The Court has also a duty to see that essential questions are not so far as reasonably possible left unanswered. It was also laid down that in any event, it ought to have been dealt with by the High Court after taking appropriate additional expert medical evidence under Section 540 read with Section 428 of the Criminal Procedure Code.

15. So, the ample powers of the Court to examine the witnesses even at the appellate stage have been emphasised by the Supreme Court in the judgment mentioned above if the recording of the additional evidence is in just decision of the case.

16. The learned counsel for the defense, on the other hand, has argued that in the present case if such evidence is allowed to be led, it would not result in just decision of the case inasmuch as the appellant has been in jail for the last about eight years and moreover, such like evidence would amount to filling up the lacuna left in the prosecution case and he has drawn our attention to two judgments, one of the Supreme Court and another of the Bombay High Court.

17. In case of State of Rajasthan v. Daulat Ram, : 1980 CriLJ929 we find that it was an appeal against acquittal which was brought before the Supreme Court and the case was under Section 9-A of the Opium Act. It appeared that many link witnesses remained unexamined before the Trial Court, who were to prove that the sample which had passed through many hands had remained unhampered till it reached the public analyst. An application was moved before the Magistrate during the trial for examining the said witnesses but the application was rejected. In the High Court, an application was again moved for examining those witnesses but State had withdrawn that application. In the said matter, the Court had also found that the labels were not in order on the sample bottles and there was vacillating stand of the State with regard to examining those witnesses and thus, keeping those peculiar facts in view, the Supreme Court held that the onus was on

the prosecution to prove the entire case at the trial and the prosecution could not be allowed to fill up the gaps or lacunae left at the trial, at the appellate or revisional stage in that case. We do not find that this judgment would apply to the facts of the present case, as enumerated above.

18. In case of R. N. Kakkar v. Hanif Gafoor Naviwala, 1996 Cri LJ 365, a single Judge of the Bombay High Court had held that the Court was not justified in taking resort to the provisions of Section 31 of the Code of Criminal Procedure Code for allowing the production of evidence after the trial has been over inasmuch as the defense has also examined its witnesses. It depend on the facts of each case whether the Court should take resort to the provisions of Section 311 of the Code of Criminal Procedure in permitting the taking of additional evidence for just decision of the case. Mere fact that in a particular case, the Court feels that it would amount to filling up the lacuna left in the prosecution case would not mean that in another particular case where the offence being tried is a serious one like the murder offence, the Court should not exercise its power to examine the additional evidence under Section 311 when it is so apparent that the evidence left out is very material for deciding the particular case in a just manner.

19. Hence, we allow this application. Constable Sukhpal is present in Court but it would be in the interest of justice to examine him in presence of the accused. Let production warrants of the accused be issued for 27th March 1996 on which date this Constable will be examined and the State can tender in evidence the CFSL report which remained unexhibited in the Trial Court.

20. Application allowed.