

SalauddIn Sarkar Vs. State

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Court : Delhi

Decided On : May-05-1999

Reported in : 81(1999)DLT47

Judge : S.N. Kapoor, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 386 and 391; [Indian Penal Code \(IPC\), 1860](#) - Sections 279, 304A and 338

Appeal No. : Crl. Rev. No. 479 of 1998

Appellant : SalauddIn Sarkar

Respondent : State

Advocate for Def. : Akshay Bipin, Adv.

Advocate for Pet/Ap. : Amardeep Singh and; Suresh Pathak, Adv

Disposition : Revision petition allowed

Judgement :

S.N. Kapoor, J.

1. Heard. The accused/applicant was convicted under Sections 304-A, 279 and 338, IPC. The appeal was allowed by the learned Additional Sessions Judge expressing doubts on the identity of the driver responsible for the accident and

remanded the matter on 10th July, 1996 with the following observations.

'The Investigating Officer has then gone to the Hospital, where he is alleged to have recorded the statement of the complainant showing that accused appellant was also present in the Hospital where she as lying admitted for being mentioned as the driver of the offending vehicle in her statement Ex. P.P.-W-1/A. It has come in the evidence of Smt. Sarojini Swami that she is not conversant with Hindi language. The statement of Smt. Swami Ex. P.W.-1/A which is the basis of the FIR has been recorded in Hindi, which is signed by her in broken English. It becomes doubtful that the driver who was not shown arrested by the Police Officer at the spot was in fact present in the Hospital for being allegedly identified by the lady victim. In this background the submission of learned defense Counsel as well as the learned Additional Public Prosecutor condemning the conduct of the Investigating Officer, S.I. Sat Pal Singh in not serving notice Under Section 133, Motor Vehicles Act upon the owner of the Maruti Van becomes very relevant, not only this Sh. Sat Pal Singh did not bother to record the statement of Smt. Anju Arora to find out as to who was her driver if she was not herself the driver of the Maruti Van nor he cited her as a prosecution witness. The learned Addl. P.P. who conducted the case in the Trial Court was also not conscious of the interest of justice towards the victim as well as the accused in not making application before the Trial Court for summoning Smt. Anju Arora as a Court witness and in not getting proper answers by declaring the Investigating Officer hostile by confronting him with documents prepared by him. I am thus of the opinion that due to aforesaid act of omission and commission mostly committed by the Investigating Officer miscarriage of justice has resulted.'

2. The learned Counsel for the petitioner assails this order and the subsequent proceedings on the ground that under Section 386 the Appellate Court could either reverse the findings and sentence and acquit or discharge the accused or order him to be tried by a Court of competent jurisdiction subordinate to such Appellate Court. It is apparent that the case has not been remanded for retrial. It has been remanded to record additional evidence. As such the order could not be justified under Section 386. It is submitted by the learned Counsel that under Section 391 of Cr.P.C. also the order could not be justified. If the Appellate Court wanted to

take further evidence it could either take such evidence itself or direct it to be taken by a Magistrate. In case evidence is sought to be recorded by the M.M. then appeal ought to be kept pending. He submits that thus neither provisions of Section 386 nor Section 391 have been complied with. Consequently, order dated 10.7.1997 could not be justified.

3. Even after recording evidence by the Metropolitan Magistrate no material evidence relating to identification of the driver of the vehicle which caused accident was brought on record. But the learned M.M. convicted the accused. Unfortunately, the Additional Sessions Judge on hearing appeal against the second conviction upheld the conviction but reduced the sentence to one year.

4. It appears probably that neither from the side of the petitioner nor from the side of the State the impact of the first order was considered. If the order of remand was illegal all the subsequent proceedings would also be vitiated.

5. It appears that the subsequent orders cannot be justified even otherwise. Learned Counsel for the petitioner submits that appellant has been convicted and sentenced punishment for two years under Section 338, IPC and for six months under Section 279, IPC. It is submitted by learned Counsel that the matter is covered by *Rajdeo Sharma v. State of Bihar*, : 1998 CriLJ4596 . The accused was convicted on 24th September, 1998. Since the second trial was over on 25th September, 1998, while the judgment of *Rajdeo Sharma v. State of Bihar* (supra) was announced in October, 1998 and it will not have retrospective application but only prospective application. However, this may have some bearing, if this Court modifies orders of first Appellate Court and treats this order for recording additional evidence under Section 391 of Cr.P.C. then question arises whether it would be a retrial or recording evidence in pending appeal and if so, its effect. Recording of additional evidence under the orders of Appellate Court by the learned Metropolitan Magistrate would amount recording of evidence in appeal. But it is also true that appeal is nothing but continuation of trial though at different level.

6. From the statements of Ms. Anju Arora and SI Satpal it is apparent that it is not clarified as to who was driving at the time of accident, i.e., 9th November, 1991. SI

Satpal tried to find out the whereabouts of the driver but could not trace him and Manju Arora could not give the address of the driver. The learned Counsel for the petitioner refers to the observations of the first Appellate Court dated 10th July, 1996 referred to above and learned Counsel rightly submits that if observations of the Appellate Court dated 10th July, 1996 are considered Along with the additional evidence, the accused is entitled to benefit of doubt even after considering all the evidence recorded illegally or otherwise.

7. Learned Counsel for the State found himself in most unenviable position for he found himself neither in a position to support the order dated 10th July, 1996 under Section 386 nor under Section 391. He also found himself not in a position to support the conviction leaving aside the technicalities in view of the observations of the First Appellate Court taking into consideration the additional evidence which has been recorded.

8. For the foregoing reasons, I think that this revision petition has to be accepted. The revision petition is allowed accordingly. The order of conviction and sentence dated 3rd December, 1998 is hereby set aside and the petitioner is acquitted of offences under Section 279/338/304-A, IPC.

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