

Ranjan Dwivedi, Vs. State Through Cbi

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Court : Delhi

Decided On : Nov-22-2006

Reported in : 2009(93)DRJ278

Judge : J.M. Malik, J.

Acts : Evidence Act - Sections 80, 145 and 165; Code of Criminal Procedure (CrPC) - Sections 164, 219, 311, 386, 391, 428 and 482; Code of Civil Procedure (CPC) - Order 41, Rule 27

Appeal No. : Crl. M. Nos. 5786/1997, 5700 and 6300/1998 in Crl. A. Nos. 436 and 443/1976

Appellant : Ranjan Dwivedi, ;santoshanand and Sudevanand

Respondent : State Through Cbi

Advocate for Def. : Tiger Singh, Sr. Adv.

Advocate for Pet/Ap. : Arvind Kumar,; M.L. Lahoty,; Fieroze Ahmed,;

Judgement :

J.M. Malik, J.

1. This order shall decide the three above said applications moved by appellant Sudevanand. Application Crl. M. No. 5786/1997 was moved by appellant

Sudevanand, an Avdhoot in the Anand Marg Sect on 22.10.1997. The appellant was involved in bomb blast case, which killed L.N. Mishra at Samastipur on 02.01.1975 as well as in the present case, where the appellant was indicted along with others, for attempt to kill the then Chief Justice of India on 20.03.1975. During emergency, Anand Marg was banned. It is alleged that due to above said cases, the emergency was imposed by the ruling party.

2. Vikram, PW1, is a common approver in both the above said cases. The appellant was convicted on the basis of his statement. Vikram retracted his statement on 30.09.1978, which was recorded by the Jail Superintendent Danapur Jail, Patna by the order of Bihar Chief Minister. In his retracted confession, he gave a detailed statement as to how he was tortured by CBI to make false statements in both the above said cases. It is averred that the Supreme Court, vide its order dated 17.12.1979, without expressing any opinion on merits of the case, transferred the Samastipur case to Delhi. Vikram's transcript version of his retracted testimony has been placed on the record. The statement of H.L. Ahuja, Investigating Officer, PW151, reveals that he was cross-examined on the retracted testimony in the L.N. Mishra's case. In the retracted confession, Vikram has disclosed that certain parts of the conspiracy were common to both the cases. Although, the appellant was entitled to have joint trial of both the cases under Section 219 Cr.PC, yet, due to various facts including wide publicity, political situation, adamant nature of CBI and the prevailing internal conditions of the country, appellant could not get the benefit of joint trial. The statement given by Vikram in Samastipur case is contradictory to the facts stated in this case. Under these circumstances, it has been prayed that the retracted testimony of approver Vikram, affidavits of officials of Bihar Government and inquiry report of Former Justice Mr. V.M. Tarkunde, should be summoned from the Sessions Court pending in Delhi.

3. The second application CM No. 5700/1998 dated 16.09.1998 is under Section 391 Cr.P.C read with Section 482 Cr.P.C and Article 21 of the Constitution of India for recalling Vikram and recording his evidence. It is prayed that in the interest of justice appellant should be permitted to cross-examine him under Section 145 of Indian Evidence Act and to lead additional evidence.

4. The third application CM No. 6300/1998 was moved under Section 482 Cr.PC dated 15th October, 1998. In this application prayer is made that the record of the evidence of approver Vikram, cited as PW2 in Sessions case No. 121/1996 RC No. 175 titled CBI v. Santoshanand and Ors, which was pending in the court of the then Sessions Judge Sharda Aggarwal, be placed on the record of the present appeal. It is pointed out that the ban was lifted from Anand Marg in the year 1977. The retracted confession was duly tape recorded and transcript of which forms part of the record, which was marked PW2/Z1. It is contended that the record can be presumed to be true under Section 80 of the Evidence Act. The true certified copies of the complete evidence have been tagged with the application.

5. I have heard the counsel for the parties and perused the written synopsis submitted by them. The principal argument urged by the Learned Counsel for the appellants was that the present case hinges upon the circumstantial evidence, which is solely based on the testimony of approver Vikram. The impugned judgment was passed on 28.10.1976 during the period of emergency and the entire nation was under terror and tyranny. The attention of the court was drawn towards the following extract of the judgment of the Trial Court: The prosecution relies a great deal on account of the occurrence as given by Vikram approver. He has given a detailed account of activities of the conspirators including himself in relation to the object and scheme of conspiracy was sought to be achieved. The approver's narration of the event may be summarized as follows....

It was submitted that a scrutiny of the entire Trial Court's judgment clearly goes to show that the conviction of the appellants was obtained by the prosecution, purely on the basis of the evidence given by the approver as if he was completely a reliable witness and his words were gospel truth. Other portions of the judgment also place reliance on his testimony every now and then. The emergency was withdrawn in March 1977 and the ban from Anand Marg was lifted on the same day.

6. Secondly, the then Chief Minister of Bihar ordered confidential inquiry vide his top secret letter No. 946 dated 30.08.1978 to the then Prime Minister with copies to DIG, CID, Shri Shashi Bhushan Sahai of Bihar. Sh. S.B. Sahai made an inquiry.

Sh. Jaldhar Dass @ Vikram was asked to give his statement in question-answer form, which was recorded in the tape recorder and then it was given to the Vigilance Department. The statement of Vikram was recorded on 30.09.1978 at Danapur Sub-jail in presence of Dr. D. Ram, Superintendent, Danapur Hospital, Ex-officio, Jail Superintendent and Shri Haider Ali, Jailor. In that inquiry, Vikram has completely denied his part and disclosed that he had made statement in the Sessions Court on the dictates of CBI. He explained that he was mercilessly beaten and he was made to make a false statement. He disowned his statement given to the Court of Additional Sessions Judge, Delhi in May, 1976. He also stated that he had made statement under Section 164 Cr.P.C. at the behest of CBI officials. The transcript of his statement clearly goes to show that it was not given under threat or coercion by the Superintendent of Jail and officers of the Bihar Government. Appellant had no opportunity to cross-examine him when he appeared in the court. In L.N. Mishra's case when he appeared as PW2, he admitted his voice and the statement recorded on 30.09.1978, which was exhibited in that case as Ex. PW-2/Z1.

7. Counsel for Sudevanand drew my attention towards an authority reported as *Rajeshwar Prasad Misra v. State of West Bengal* AIR 1965 SC 1887 wherein it was held that :

Para 8 ...The protection however, is only as long as the conviction or acquittal stands. But the Code contemplates that a retrial may be ordered after setting aside the conviction or acquittal (as the case may be) if the trial already held is found to be unsatisfactory or leads to a failure of justice. In the same way, the Code gives a power to the Appellate Court to take additional evidence, which for reasons to be recorded, it considers necessary.

8. He also cited another authority reported in *Ram Bhau and Anr. v. State of Maharashtra* : 2001 CriLJ2343 wherein it was observed:

Be it noted that no set of principles can be set forth for such an exercise of power under Section 391, since the same is dependent upon the fact situation of the matter and having due regard to the concept of fair play and justice, well-being of the society.

Incidentally, Section 391 forms an exception to the general rule that an appeal must be decided on the evidence which was before the Trial Court and the powers being an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice. Be it noted further that the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under Section 391 since the same avoids a de novo trial. It is not to fill up the lacuna but to subserve the ends of justice. Needless to record that on an analysis of the Civil Procedure Code, Section 391 is thus akin to Order 41 Rule 27 of the Civil Procedure Code.

9. All the three counsel for the appellants heavily relied upon latest authority reported in *Zahira Habibulla H. Sheikh and Anr. v. State of Gujrat* AIR 2004 SC 3114. My attention was drawn towards certain paras and same are quoted in the written submissions as follows:

(i) Section 391 of the Code is intended to subserve the ends of justice by arriving at the truth and there is no question of filling any lacuna in the case on hand. The provision though a discretionary one is hedged with the conditions about the requirement to record reasons.(para 23)

(ii) Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.(Para 39)

(iii) Failure to give fair hearing violates minimum standards of due process of law, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial. Fair trial must be to find out truth and prevent miscarriage of justice. Money power, muscle power and political power has become the order of the day. If the ultimate truth is to be arrived at, the eyes and ears of justice have to be protected. (Para 42, 43 and 44)

(iv) Section 311 of the Code is equivalent to Section 391 of the Code and it has been held that the second part of the section does not allow any discretion but obligates and binds the Court to take necessary steps if the fresh evidence to be obtained is essential to the just decision of the case.(Para 47)

(v) Section 391 is an exception to an ordinary Rule of Section 386 for seeing that justice is done (Para 50, 51 and 52)

(vi) Introduction of additional evidence does not necessarily lead to conclusion that the judgment of the Trial Court was wrong. It is submitted that if the Court finds that witness is willing to speak the truth before it, the power Under Section 391 of the Code is to be exercised (Para 62).

(vii) In case of defective investigation, the Court has to be circumspect in evaluating the evidence and to ensure truth, may take recourse to Section 311, or at later stage, to Section 391 of the Code (Para 64).

(viii) The Appellate Court has to consider background of principles Under Section 311 and 391 of the Code read with Section 165 of the Evidence Act and for taking additional evidence or for retrial, the Court has to look at the investigation if it was dishonest, faulty or arbitrary. Appellate Court has to decide itself whether additional evidence would be proper or retrial.(Para 73 and 76)

10. It is pointed out that evidence of Vikram as given before Dr. D. Ram and Sh. Haider Ali was not available when he was examined as approver PW1. It is pointed out that it should be summoned in accordance with the law laid down by the Apex Court in Bhagwan Singh v. State of Punjab 1952 SCR 1952 and Binay Kumar Singh v. State of Bihar : 1997 CriLJ362 .

11. It was pointed out that the evidence recorded in tape recorder is admissible in evidence in view of Apex Court's authorities reported in Rama Reddy v. V.V. girl : [1971]1SCR399 and Ram Singh v. Col. Ram Singh : AIR 1986 SC3 . During the transfer of the trial of L.N. Misra's case from Bihar to Delhi, S.B. Sahai, DIG had filed an affidavit in the Supreme Court that in the said inquiry he was associated by Sh. D.P. Ojha, S.P. Vigilance and Sh. K.P. Sinha, DSP, CID and the above said

tape recorded conversation between the Doctor and approver Vikram lodged in Danapur Sub-jail was a part of that inquiry.

12. The relevant portion of the report submitted by Justice V.M. Tarkunde dated 15.02.1979 runs as follows:

Bikram told the doctor and the jailor that his confessional statements are utterly false and that those statements were the result of extreme physical tortures including electric shocks inserting tubes in his nose, hanging upside down, etc. to which he was subjected. At a later date Bikram was interrogated by the Chief Secretary of the Bihar Government who went to Danapur Sub Jail for the purpose and met Bikram alone in his cell. Some time later he was examined by the DIG SB Sahai also. Both the Chief Secretary and Mr. S.B.Sahai were satisfied that Bikram's confessional statements were the result of torture. Mr. Sahai saw scars left on Bikram's body due to the torture to which he was subjected.

It was further stated:

Since their conviction in the Chief Justice's attempted murder case is mainly based on the false evidence of Bikram as an approver, a request should be made to the Delhi High Court that their appeals should be brought up for hearing at an early date and it should be further made clear that the prosecution will not rely on Bikram's evidence at the hearing of the appeals.

It is also pointed out that in the counter affidavit of Haider Ali, Assistant Jailor of Danapur Jail before the Supreme Court of India it was mentioned (i) ever since the approver was lodged in Danapur Sub-jail on 31.01.1977 many CBI officers namely B.R. Puri, H.L. Ahuja, M.P. Singh used to visit and meet the approver. They always insisted that their arrival and departure should not be mentioned in jail gate register. They also brought their lawyers namely Sh. Mahadeo Prasad Singh and one Sh. Choubey of Banaras. Regular payments were made to the approver. Although, mother of the approver was permitted to meet her son, yet, at the instance of the CBI officers, the approver himself refused to meet his mother. After three months he met his mother and he was found to be disturbed because he had met his mother against the advise of CBI officers. Thereafter, some officers of

Bihar Vigilance Department met Vikram in presence of Dr. D. Ram, Superintendent, Haider Ali tape recorded their conversation with the approver and the tape recorded conversation was handed over to the officers of the Vigilance Department. Chief Secretary, Bihar visited Danapur Sub-jail on 21.10.1978 and talked to the approver alone in his ward for about half an hour. Then DIG also met the approver. A list of articles was supplied to the approver and cash was paid to him by the CBI officers from time to time. List of funds in his possession was prepared at the behest of the Chief Secretary. Dr. Dukhan Ram, Medical officer-cum-Superintendent, Danapur Sub-jail has also filed counter affidavit before the Hon'ble Supreme Court to the similar effect.

13. Lastly, it is submitted that there is no legal bar that such an application cannot be moved in the year 1997, when those appeals were pending. Sudevanand remained in jail for 11 years, he came out in the year 1987 from jail. He was under mental shock, was suffering from various ailments, got medical treatment, in the later years, he could apply his mind to his appeals, met his counsel Arvind Kumar and consequently applications were moved in October 1997. As such there is no delay in moving these applications.

14. Counsel for Santoshanand has also submitted the written arguments which are to the similar effect. It is pointed out that it took approximately ten years for disposing of the instant applications as appeal did not come up for hearing. It was explained that approver's statement is corroborated by PWs 2, 4, 5, 6 and 57.

15. The counsel for Ranjan Dwivedi drew my attention towards Zahira Habibulla H. Sheikh case. In para 21 it was held:

No one including the State can be allowed to take advantage of its own wrong and thereby make capricious exercise of powers in favor of the prosecution to fill in the lacuna, overlooking completely the obligation cast on the Courts also to ensure that the truth should not become a casualty and substantial justice is not denied to victims as well.

He also drew my attention towards para Nos. 42, 43, 48, 50 and 64 of Zahira Habibulla H. Sheikh case, where stress was laid on fair trial, the request of the

witness for re-examination should be accepted only in exceptional cases or extraordinary circumstances, scope of Section 391 Cr.P.C, and consequences of the defective investigation. The Learned Counsel also referred to an authority reported in *Lakshmi Ammal and Ors. v. Chakravahthi and Ors.* 1999 (1) SCC 237.

16. He further pointed out that statement of approver Vikram by the trial Court is inherently incredible. Under Section 164 the Magistrate asked the approver, 'are you liar'. The last submission made by the Learned Counsel for the appellants was that, although, Vikram has retracted from his statement, yet, no action was initiated against him as provided under Cr.P.C.

17. On the other hand, following submissions were made by the counsel for C.B.I. Although, the testimony of Vikram is of infinite importance, yet, it cannot be said that it is the only evidence against the accused persons. Jai Nand, PW2 was the Jamadar who was traveling along with the Ex-Chief Justice on the day of incident. Then there are testimonies of Tilak Raj Bhatia, PW4, an old Anand Margi, Charan Singh, PW5, a taxi driver, Inder Singh, PW6 driver of the Chief Justice, Mr. Raj Singh, PW57, Brig. R.L. Jaitley, PW69. The counsel for the respondent has produced the following authority reported in *Rambhau and Anr. v. State of Maharashtra* : 2001 CriLJ2343 , the head note of which runs as follows:

The purpose of introduction of Section 391 (earlier Section 428) in the statute book has been for the purpose of making it available to the court not to fill up any gap in the prosecution case but to oversee that the concept of justice does not suffer. No set of principles can be set forth for an exercise of power under Section 391, since the same is dependant upon the fact situation of the matter and having due regard to the concept of fair play and justice, well being of the society. Additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused. It is not a disguise for a retrial or to change the nature of the case against the accused.

He also cited another authority reported in *Sheshanna Bhumanna Yadav v. State of Maharashtra* 1970 SCC 337.

18. After mulling over the record and respective arguments of all the counsel, I find force in the arguments of the appellants in a measure. There is another side of the coin which ought not to be overlooked. In *Satyajit Banerjee and Ors. v. State of W.B. and Ors.* : 2005 CriLJ648 , it was held:

25. Since strong reliance has been placed on the Best Bakery Case (Gujarat Riots Case- *supra*) it is necessary to record a note of caution. That was an extraordinary case in which this Court was convinced that the entire prosecution machinery was trying to shield the accused i.e. the rioters. It was also found that the entire trial was a farce. The witnesses were terrified and intimidated to keep them away from the court. It is in the aforesaid extraordinary circumstances that the court not only directed a *de novo* trial of the whole case but made further directions for appointment of the new prosecutor with due consultation of the victims. Retrial was directed to be held out of the State of Gujarat.

26. The law laid down in the 'Best Bakery Case' in the aforesaid extraordinary circumstances, cannot be applied to all cases against the established principles of criminal jurisprudence. Direction for retrial should not be made in all or every case where acquittal of accused is for want of adequate or reliable evidence. In Best Bakery case, the first trial was found to be a farce and is described as 'mock trial.' therefore, the direction for retrial was in fact, for a real trial. Such extraordinary situation alone can justify the directions as made by this Court in the Best Bakery Case(*supra*).

27. So far as the position of law is concerned we are very clear that even if a retrial is directed in exercise of revisional powers by the High Court, the evidence already recorded at the initial trial cannot be erased or wiped out from the record of the case. The trial judge has to decide the case on the basis of the evidence already on record and the additional evidence which would be recorded on retrial.

19. The request for leading additional evidence cannot be accepted for the following reasons. This case is hanging fire for the last more than 30 years. It had come to the knowledge of the appellants that the approver had retracted from his statement, in the year 1978. The instant applications were moved after a lag of more than twenty years. There was no so called terror or tyranny after the

emergency was lifted in the year 1977.

20. It must be borne in mind that the appellants are not ordinary people. One of the appellants is an advocate, Supreme Court. The other two belong to a well known Sect. No lucid Explanationn is forthcoming for such an inordinate delay. It is, however, explained that Sudevanand remained in jail for 11 years, was under mental shock and could not move applications even after 10 years from the date of his release on bail from the jail. The namby-pamby Explanationn given by the appellant does not create propitious conditions for the appellants.

21. The above said inordinate delay and other reasons specified above differentiates this case from Best Bakery case. Inaction and passivity on the part of the appellants is unfathomable. In the Best Bakery case besides the reasons mentioned above the witnesses had come forward themselves immediately and spontaneously. In the instant case, although, a galaxy of witnesses as detailed above deposed in this case, yet, the witnesses have no grouse against them. The case of the appellants swirls around the approver only. According to a Latin legal phrase, 'Delays in law are hateful'. If I permit the appellants to lead further evidence it would entail a lot of time. I am loath to encourage further procrastination in this case. It is well said that procrastination is the thief of time. The concern of the Court is to dispose of this appeal as soon as possible. Such like delays tarnish the image of the country and judiciary.

22. In Mishrilal and Ors. v. State of M.P. and Ors. 2005 VI AD (S.C.) 35 it was held:

In our opinion, the procedure adopted by the Sessions Judge was not strictly in accordance with law. Once the witness was examined in-chief and cross-examined fully, such witness should not have been recalled and re-examined to deny the evidence he had already given before the court, even though that witness had given an inconsistent statement before any other court or forum subsequently. A witness could be confronted only with a previous statement made by him. At the time of examination of PW2 Mokam Singh on 6.2.1991, there was no such previous statement and the defense counsel did not confront him with any statement alleged to have been made previously. This witness must have given

some other version before the Juvenile Court for extraneous reasons and he should not have been given a further opportunity at a later stage to completely efface the evidence already given by him under oath. The courts have to follow the procedures strictly and cannot allow a witness to escape the legal action for giving false evidence before the court on mere Explanationn that he had given it under the pressure of the police or some other reason. Whenever the witness speaks falsehood in the court, and it is proved satisfactorily, the court should take a serious action against such witnesses.

23. The observations made by the Apex Court in authorities reported in *Khujji v. State of M.P.* : 1991 CriLJ2653 , *Mohan Lal Shamji Soni v. Union of India and Anr.* : 1991 CriLJ1521 , *Anil Sharma and Ors. v. State of Jharkhand* : 2004 CriLJ2527 , *State v. Madhya Pradesh v. Badri Yadav and Anr.* 2006 III A.D. S.C 636 apply on all fours to the view taken by this Court.

24. At the same time, the court has to be empirical and practical in confronting reality. The court is aware that its paramount duty is to winnow truth from falsehood. The last application moved by the appellant for considering the record, certified copies etc Under Section 80 and other provisions under the Evidence Act, report of Justice V.M. Tarkunde and other documents which may be admissible under the Evidence Act has to be permitted. This prayer is being kept open and would be considered as per law.

25. Succinctly stated, the applications for leading further evidence which would have entailed further time are hereby dismissed, but the third application for considering those documents which have already been placed on the record as per law, is hereby permitted. The case is fixed for final arguments on 6th December, 2006 at 12.15 P.M. The case would be taken up on day to day basis.

+Crl. A. 443/1976

List along with Crl. A. 436/1976 on 6th December, 2006.