

Valsamma Vs. Satheesh Kumar

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Court : Kerala

Decided On : Jan-12-2001

Reported in : 2001(1)ALD(Cri)763; 2001(1)ALT(Cri)218; 2001CriLJ1574

Judge : Mr. R. Rajendra Babu, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 278, 311, 313 and 540; Negotiable Instruments Act - Sections 138

Appeal No. : Crl. R.P. No. 901 of 2000

Appellant : Valsamma

Respondent : Satheesh Kumar

Advocate for Def. : M. Narendra Kumar, Adv.

Advocate for Pet/Ap. : T.M. Abdul Latheef, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

R. Rajendra Babu, J.

1. This revision at the instance of the accused in C.C. 348/97 before the Judicial 1st Class Magistrate's Court, Kanjirappally, is challenging the order in C.M.P.

6156/2000 allowing the complainant to be examined further under S. 311 Cr.P.C.

2. The respondent/complainant filed the complaint alleging the commission of an offence under S. 138 of the Negotiable Instruments Act. According to the allegations in the complaint, the revision petitioner had issued a cheque for Rs. 30,000/- and the same was dishonoured when presented for encashment and though the accused accepted the notice demanding the repayment of the amount, he did not reply or pay off the amount and hence the complaint was filed. But when the complainant was examined as PW. 1, he imposed that the amount given to the accused was Rs. 16,000/-. The accused raised a contention that the transaction between the parties was for an amount of Rs. 15,000/- and that amount was repaid and that he had not issued a cheque for Rs. 30,000/-. Later the complainant filed C.M.P. 6156/2000 under S. 311 Cr.P.C. for recalling the complainant for giving further evidence for correcting the above statement that the accused borrowed Rs. 16,000/- was an inadvertent mistake committed during the examination and hence the complainant wanted to correct the above mistake. The court below allowed the petition and ordered to recall the complainant for further examination. The above order is under challenge in this revision.

3. The learned counsel for the petitioner argued that the deposition given by the witnesses relating to the amount borrowed by the accused cannot be allowed to be corrected by invoking S. 311 Cr.P.C. The learned counsel for respondent/complainant submitted that it was not in the form of making a correction of the statement given by the complainant, but it was in the nature of giving an opportunity to explain the circumstances and to clarify the accidental mistake. It was further submitted that a notice was issued on the petitioner regarding the dishonouring of the cheque and demanding the payment of Rs. 30,000/- the cheque amount and that the above notice was accepted by the petitioner and even then no reply had been sent disputing the amount covered by the cheque. But when the complainant was examined as PW. 1, a suggestion was made to the effect that the transaction between the parties was for an amount of Rs. 15,000/- and the above amount had been repaid also, though no document were produced to substantiate the above contention.

4. The main argument advanced by the learned counsel for the petitioner was that an admission made in the deposition by the complainant cannot be allowed to be corrected in re-examining the complainant after closure of the evidence and S. 311 Cr.P.C. cannot be invoked for filling up the lacuna in the prosecution case. Reliance was placed on a decision of the Supreme Court in *Hussain Umar v. Dalipsinghji* (AIR 1970 SC 45). That was a case where the defence filed a petition to recall one witness (PW. 50). According to the defence, the above witness wanted to say that he had given false evidence earlier. There was no affidavit from the above witnesses or other material to show that the evidence let in by the above witnesses was false. In the above circumstances the court disallowed the petition filed under S. 540 Cr.P.C. (corresponding to the present S. 311) seeking permission to examine the witnesses. Regarding the inherent powers of the court the Supreme Court held:

'The Court has inherent power to recall a witness if it is satisfied that he is prepared to give evidence which is materially different from what he had given at the trial'.

In *State of Kerala v. Ayyappan Gopalan* (1965 KLT 894) this Court had considered the scope of S. 540 of the old Code of Criminal Procedure and held:

'S. 540 gives unrestricted powers of summoning or recalling any witness if his evidence appears essential to the just decision of the case. It is in the interests of justice that a guilty person should be convicted just as it is in the interests of justice that an innocent person should be acquitted. If the court thinks that in order to give a just finding it is necessary to examine a witness, then it could not be an improper exercise of the powers of the court to summon that witness under S. 540 merely because the evidence supports the case of the prosecution and not that of the accused. The section gives fullest discretion to recall a witness at any stage of a trial and makes it imperative for him to do so, if he considers further evidence essential to the just decision of the case. But the Court must bear in mind that when examining court witnesses the prosecution and the accused must be equally entitled to cross-examine that witness and if the evidence of the court witness is prejudicial to the accused he should be questioned again under S. 342 for giving

any explanation and an opportunity to rebut the evidence, if need be. Subject to these twin rules dictated by fair play and justice there can be no other restriction for the exercise of the discretion by the Court.'

The question whether the statement made by a witness can be allowed to be corrected under S. 278 Cr.P.C. had been considered by the Supreme Court in *Mir Mohd. Omar & Ors. v. State of West Bengal* (AIR 1989 Supreme Court 1785). That was a case where the prosecutor filed a correction slip to correct the statement made by a witness and the trial Court allowed to make the typographical errors but refused to allow corrections on the earlier version given by the witness. The above order was challenged before the High Court and High Court allowed the witness to be re-examined. The above order was challenged in the Supreme Court by the accused. There it was held:

'The object of S. 278 is two fold: firstly to ensure that the evidence of the witness as recorded is accurate and secondly to give the witness concerned an opportunity to point out mistakes, if any. If the correction suggested by the witness is one which the Judge considers necessary he will make it at once as required by sub-s. (1) but if the correction is such that the Judge does not consider necessary, sub-s. (2) requires that a memorandum of the objection be made and the Judge add his remarks, if any, thereto. In the present case, the learned trial Judge corrected all the typographical errors which he considered necessary but refused to carry out the substantive part of his deposition. The section is not intended to permit a witness to resile from his statement in the name of correction. The learned trial Judge was justified in refusing to effect the charge which he thought was intended to change the earlier version'.

It was further held:

'We equally see no justification for the High Court for giving liberty to the prosecution to file an application for re-examination of PW.34. In fact it will be seen from the operative portion of the impugned order the High Court proceeds on the assumption that PW. 34 would be recalled for further examination Here again it may be noted that the prosecution has closed the evidence. The accused have been examined under S. 313 of the Code, The prosecution did not at any stage

move the trial Judge for recalling PW. 34 for further examination. In these circumstances, the liberty reserved to the prosecution to recall PW. 34 for re-examination is undoubtedly uncalled for.'

In *Rajendra Prasad v. Narcotic Cell* (AIR 1999 SC 2292) the Supreme Court considered the question whether the witness can be re-examined invoking S. 311 Cr.P.C. There it was held:

'The contention that the Court cannot exercise power of re-summoning any witness if once that power was exercised, cannot be countenanced as a legal proposition, 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.'

It was further held:

"The conventional concept is that Court should not permit lacuna in prosecution evidence to be filled up. But then what is meant by lacuna in a prosecution case has to be understood before deciding the case. A lacuna in prosecution is not to be equated with the fall out 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 are prone. A corollary of any such laches or mistakes during the conduct of a case cannot be understood as the lacuna which a Court cannot fill up. 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 oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be fore-closed 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'.

5. In the present case, the complaint was filed alleging that the petitioner issued a cheque for Rs. 30,000/-. Though the petitioner received the notice issued by the complainant demanding the repayment of the amount covered by the cheque, no reply was sent. When complainant was examined, a statement was made by him that the petitioner borrowed Rs. 16,000/-. The prayer of the complainant was not for making a correction of the above statement in the deposition, but for re-examination of the witnesses to explain the circumstance and to establish that it was only a mistake. The above statement made by the petitioner would remain in the evidence. It is not a case where the complainant was trying to fill up a lacuna in the prosecution case. When he says that it was an accidental mistake in giving evidence, opportunity has to be given to explain the circumstances. The petitioner would definitely get an opportunity to cross examine the complainant and to establish his contention or to elicit the true facts. If the court finds that in order to have a just and correct finding it is necessary to examine or re-examine a witness, S. 313 empowers the court to summon the above witnesses. It was not a case where the complainant was trying to fill up the lacuna in the prosecution case. He was seeking permission for explaining the circumstances or explaining a mistake committed while giving the evidence. The court has power or discretion under S. 311 Cr.P.C. to recall the witness at any stage of the trial if it considers necessary for a just decision of the case. The Court below is fully justified in allowing the above petition for further examination of the complainant invoking S. 311 of the Cr.P.C. Hence I find no reason to interfere with the order of the court below and this revision has only to be dismissed.

6. In the result this revision petition is dismissed.