

Arjun Ram Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Apr-23-2007

Reported in : RLW2007(3)Raj2081

Judge : H.R. Panwar, J.

Appellant : Arjun Ram

Respondent : State of Rajasthan

Disposition : Petition allowed

Judgement :

H.R. Panwar, J.

1. By the instant criminal misc. petition under Section 482 Cr.P.C., the petitioner complainant has challenged the order dated 14.7.2005 passed by Additional Sessions Judge (Fast Track), Nagaur (for short 'the trial Court' hereinafter) in Sessions Case No. 20/2005 whereby the trial Court dismissed the application filed by the petitioner under Section 311 Cr.P.C.

2. I have heard learned Counsel for the parties.

3. It is contended by learned Counsel for the petitioner that the trial Court fell in error in not summoning two material witnesses who examined and treated the petitioner complainant for the injuries caused to him by the accused non-petitioner.

These material witnesses are Professor Dr. T.C. Jain of Sawai Mansingh Hospital, Jaipur and Dr. C.P. Swarnkar of Mathura Das Mathur Hospital, Jodhpur.

4. Learned Counsel appearing for the accused non-petitioner submits that these witnesses have not been cited in the list of witness by the prosecution and therefore, they cannot be summoned or called to prove the investigation carried out by them. Learned Counsel has relied on decisions of this Court in Ganpat Ram v. The State of Rajasthan 1992 Cr.LR. (Raj.) 602, Hanuman Ram v. State of Rajasthan and Ors. 2001 Western Law Cases (Raj.) UC, 621 and in Kailash v. State of Rajasthan and Ors. S.B. Criminal Revision Petition No. 436/03 decided on 22.7.2004.

5. The facts giving rise to the instant criminal misc. petition are that a crime report was registered on the Parcha Bayan of the petitioner Ex. P. 25 while the petitioner was at hospital at Nagaur. The police ensued the investigation. The injured petitioner was taken to the hospital at Jodhpur and thereafter at Sawai Mansingh Hospital, Jaipur. The petitioner suffered the following injuries vide Ex. P-14 at the hands of the accused non-petitioner:

1. Lacerated wound with charred margin bleeding, 5 mm x 5 cm on base of nose near inner canthus of right eye.
2. Lacerated wound with fresh blood, 4 mm x 2 mm on neck- 5 cm above medial end of left clavicula.
3. Lacerated wound with fresh blood and charred margin 3 mm x 2 mm on chest wall, 3 cm below middle of left clavicula.
4. Lacerated wound with fresh blood, 5 mm x 2 mm on chest wall 3 cm below middle of right clavicula.
5. Lacerated wound with fresh blood, charred margin, 2x2 mm on chest wall 7 cm below middle of right clavicula.
6. Two penetrating wounds on surface of right shoulder 2x2 cm on ant. aspect of right shoulder.

7. Complain of decreased vision Rt eye.

6. Initially, the petitioner was examined by Medical Jurist Dr. Dharam Chand Bardiya, PW-12 at Nagaur. The petitioner suffered as many as seven injuries including the pallet injury in the right eye. He also suffered gun-shot injuries on the chest and the x- ray report Ex. P. 18 reveals that there were multiple pallets in the chest, right shoulder, around chest, right eye and various parts of the body resulting in lose of vision in the right eye as stated by PW-12 Dr. Dharam Chand Bardiya. He stated that he referred the petitioner to Jodhpur S.N. Medical College and S.M.S. Medical College, Jaipur vide Ex. P. 20. The petitioner was examined by Dr. C.P. Swarnkar of Mathura Das Mathur Hospital S.N. Medical College, Jodhpur as also by the Professor T.C. Jain of S.M.S. Medical College and Hospital, Jaipur. The examination record is available on record. Despite the record being available with the police and filed along with the challan papers before the trial Court, the doctors who examined the petitioner injured at M.D.M. Hospital, Jodhpur and S.M.S. Medical College and Hospital, Jaipur namely Dr. C.P. Swarnkar and Professor Dr. T.C. Jain have not been included in the list of witnesses. The burden to prove the examination conducted by these two doctors is on the prosecution and unless these doctors are produced to prove the reports prepared by them, it cannot be said that the reports would be deemed to have been proved and therefore, the injured petitioner moved before the trial Court to summon these doctors who are material witnesses in the case. The trial Court declined to summon these witnesses on the ground that the names of these persons have not been included in the list of witnesses.

7. In *Jamatraj Kewalji Govani v. State of Maharashtra* : 1968 CriLJ231 the Hon'ble Apex Court, while considering the provision of Section 540 of the Old Cr.P.C. (corresponding to Section 311 of the Code), held that Section 540 is intended to be wide as the repeated use of the word 'any' throughout its length clearly indicates. The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word 'may' in the first part and of the word 'shall' in the second firmly establishes this difference. 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. There are, however, two aspects of the matter which must be distinctly kept apart. The first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly. There is, however, the other aspect namely of the power of the Court which is to be exercised to reach a just decision. This power is exercisable at any time.

8. In *Rajendra Prasad v. Narcotic Cell through its Officer-in-charge, Delhi* : 1999 CriLJ3529 while considering the provision of Section 311 of the Code, the Hon'ble Apex Court held that 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 guided and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case. It was further held by Their Lordships that 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 proved. 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. 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.

9. In *Mahipal v. State of Rajasthan* 2001 (2) R.Cr.D. 411 (Raj.), an application to summon the Tehsildar who recorded the statement of the deceased, was allowed by the trial Court and a challenge to that order was made. In that case, while upholding the order of the trial Court, it was held that the court has ample power to summon a witness.

10. In *Mohan Lal Shamji Soni v. Union of India and Ors.* AIR 1991 (Suppl. 1) SC 271, while interpreting Section 311 Cr.P.C. held as under:

The very usage of the words such as 'any court', 'at any stage' or 'of any enquiry, trial or other proceedings', 'any person or any such person', clearly spells out that this section is expressed in the widest possible terms and do not limit the discretion of the court in any way. However, the very width requires a corresponding caution that the discretionary power should be invoked as the exigencies of justice require and exercised judicially with circumspection and consistently with the provisions of the Code. The second part of the section does not allow for any discretion but it binds and compels the court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case.

11. In *Shailendra Kumar v. State of Bihar and Ors.* 2002 (1) Crimes 197 (SC), while considering the provisions of Section 311 of the Code, the Hon'ble Supreme Court held that bare reading of this Section reveals that it is of very wide amplitude and if there is any negligence, laches or mistake by not examining material witnesses, the Courts function to render just decision by examining such witnesses at any stage is not, in any way impaired, relying on earlier decision of the Apex Court in *Rajendra Prasad v. Narcotic Cell* : 1999 CriLJ3529, wherein the Hon'ble Supreme Court held that after all, the 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 amongst the parties performed better.

12. Section 311 Cr.P.C. empowers the power of the Court to summon material witness, or examine person present and provides that any Court may, at any stage

of 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. Thus, it is clear that Section 311 Cr.P.C. allows the Court to invoke its inherent powers at any stage, so long as the Court retains seisin of the criminal proceedings without qualifying any limitation or prohibition. Needless to say that trial of any court reaches to its finality when the order or judgment is pronounced and until then the Court has power to invoke the provisions of Section 311 Cr.P.C.

13. In *Ganpat Ram v. The State of Rajasthan* (supra) this Court while considering the provisions of Section 311 Cr.P.C. held that the object of this Section is to enable the Court to arrive at the true conclusion irrespective of the fact that the prosecution or the defence has failed to produce some witness (es) which is necessary for the just and proper disposal of the case. But this discretion, vested in the trial Court, has to be exercised judiciously and with great caution and circumspection. Though wide powers have been given to the Court, but these powers are to be exercised within the limits and are not meant to be exercised/used for the purpose of enabling the prosecution to fill-up the gaps left by the prosecution in its case. If the prosecution neglected to elicit essential facts to prove the charges against the accused then the powers vested under Section 311 Cr.P.C. cannot be invoked to rectify the latches of the prosecution and to fill-up the lacunae left by it. In the present case, the arguments were heard and the case was fixed for pronouncement of the judgment. No request was made by the prosecution to recall and reexamine the witness. It appears that while dictating the judgment, the Court might have come across the gaps left by the prosecution and in order to fill-up those gaps, the Court in exercise of the powers conferred upon the Court under Section 311 Cr.P.C. may have ordered for recalling the witness. It is not the intention of Section 311 Cr.P.C. to recall and re-examine the witness to fill-up the gaps and lacunae left by the prosecution.

14. In *Hanuman Ram v. State of Rajasthan and Ors.* (supra), this Court held that it is the public prosecutor who is incharge of a criminal case. The complainant

cannot be permitted to assess merits of the case over and above the assessment of the public prosecutor. On this count, complainant's revision is not considered to be of merit because his wisdom has the effect and colour of a man who is the words of the Supreme Court cannot be permitted to wreck vengeance.

15. In *Kailash v. State of Rajasthan* (supra) this Court passed the short order which reads as under:

This is complainant's revision against the order dated 17.5.2003 passed by the Additional Sessions Judge (Fast Track), Nagaur rejecting the application filed by the APP under Section 311 of the Cr.P.C. It appears that the learned Addl. Public Prosecutor filed an application for examination of Dr. Surajmal who had given the opinion about age of the prosecutrix. It is found that instead of several opportunities the witness was not produced. The evidence regarding the age of the prosecutrix has already been taken on record.

16. The decisions relied on by the learned Counsel for the accused non-petitioner turn on their own facts and in view of the various decisions of Hon'ble Supreme Court referred herein above, in my view, the decision relied on by the learned Counsel for the accused non-petitioner are of no help to the accused non-petitioner.

17. Merely because the petition has been filed by the injured- complainant, it cannot be thrown unheard. For the reasons best known to the prosecution, if it did not produce the material evidence which goes to the root of the case, then the complainant cannot be said to be a person not aggrieved by such an act. I am fortified with my view by the decisions of the Hon'ble Supreme Court in *K. Pandurangan v. S.S.R. Velusamy and Anr.* : 2003 CriLJ4964 , wherein the Hon'ble Supreme Court held as under:

So far as the first question as to the maintainability of the revision at the instance of the complainant is concerned, we think the said argument has only to be noted to be rejected. Under the provisions of the Code of Criminal Procedure, 1973, the court has suo motu power of revision, if that be so, the question of the same being invoked at the instance of an outsider would not make any difference because

ultimately it is the power revision which is already vested with the High Court statutorily that is being exercised by the High Court. Therefore, whether the same is done by itself or at the instance of a third party will not affect such power of the High Court. In this regard, we may note the following judgment of this Court in the case of *Nadir Khan v. State (Delhi Admn.)* : 1976 CriLJ1721 .

18. In *Krishnan and Anr. v. Kishnaveni and Anr.* : 1997 CriLJ1519 , Three Judge Bench of the Hon'ble Supreme Court observed as under:

It is seen that the High Court has suo motu power under Section 401 and continuous supervisory jurisdiction under Section 483 of the Code. So when the High Court on examination of the record finds that there is grave miscarriage of justice or abuse of process of the Courts or the required statutory procedure has not been complied with or there is failure of justice or order passed or sentence imposed by the Magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensure. It is, therefore, to meet the ends of justice or to prevent abuse of the process that the High Court is preserved with inherent power and would be justified, under such circumstances, to exercise the inherent power and in an appropriate case even revisional power under Section 397(1) read with Section 401 of the Code. The Hon'ble Apex Court further held that it may be exercised sparingly so as to avoid needless multiplicity of procedure, unnecessary delay in trial and protraction of proceedings. The object of criminal trial is to render public justice, to punish the criminal and to see that the trial is concluded expeditiously before the memory of the witness fades out. The recent trend is to delay the trial and threaten the witness or to win over the witness by promise or inducement. These malpractices need to be curbed and public justice can be ensured only when expeditious trial is conducted.

19. The Apex Court further held as under:

Section 401 of the Code gives to every High Court power of revision. Sub-section (1) of the said section provides that in the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court

of Appeal by Sections 386, 389 and 391 and on a Court of Sessions by Section 307. Apart from the express power under Section 397(1), the High Court has been invested with suo motu power under Section 401 to exercise revisional powers. In addition, Section 482 saves inherent powers of the High Court postulating that 'Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.' Section 483 enjoins upon every High Court to so exercise its continuous superintendence over the Courts of Judicial Magistrates subordinate to it as to ensure that there is an expeditious and proper disposal of cases by such Magistrate. It is, therefore, clear that the power of the High Court to continuous supervisory jurisdiction is of paramount importance to examine correctness, legality, or propriety of any finding, sentence or order, recorded or passed as also regularity of the proceedings of all inferior Criminal Court.

20. The Hon'ble Supreme Court further held as under:

The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to meet out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397. However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior Criminal Court in its judicial process or illegality of sentence or order.

21. Thus, the legal position culled out from the aforesaid decisions of the Hon'ble Supreme Court is that Section 311 Cr.P.C. allows the Court to invoke its inherent powers at any stage, so long as the Court retains seisin of the criminal

proceedings without qualifying any limitation or prohibition. Needless to say that trial of any court reaches to its finality when the order or judgment is pronounced and until then the Court has power to invoke the provisions of Section 311 Cr.P.C.

22. In the instant case from the material available on record it is clear that the petitioner injured suffered injury on the right eye by gun-shot having suffered numerous pallet injuries and he was referred to the M.D.M. Hospital and S.N. Medical College, Jodhpur where he was examined by Dr. C.P. Swarnkar and report was prepared by him, thereafter he was referred to S.M.S. Medical College and Hospital, Jaipur where he was examined by Professor Dr. T.C. Jain who also made a report and the reports prepared by these doctors are on record and therefore, in order to prove those reports, these two persons are material witnesses and are essential to the just decision of the case. In the circumstances, therefore, the trial Court fell in error in declining to summon these two witnesses by the order impugned. The order, impugned, therefore, cannot sustain.

23. In the result, the criminal misc. petition is allowed. The order impugned dated 14.7.2005 passed by Additional Sessions Judge, (Fast Track), Nagaur in Sessions Case No. 20/2005 is set aside and the trial Court is directed to summon witnesses Dr. C.P. Swarnkar and Professor Dr. T.C. Jain and examine them affording an opportunity to the accused non-petitioner to cross- examine these witnesses.