

Umesh Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Jun-01-2004

Reported in : RLW2004(4)Raj2336; 2004(4)WLC214

Judge : Sunil Kumar Garg, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 391

Appeal No. : S.B. Criminal Revision Petition No. 240 of 2004

Appellant : Umesh

Respondent : State of Rajasthan

Advocate for Pet/Ap. : D.D. Kalla, Public Prosecutor; Rajesh Panwar, Adv.

Disposition : Petition allowed

Judgement :

Sunil Kumar Garg, J.

1.This Criminal revision petition under Section 397 Cr.P.C. has been filed by the accused petitioner on 20.4.2004 against the order dtd. 5.4.2004 passed by the learned Additional Sessions Judge No. 3, Jodhpur in Criminal Appeal No, 35/2003 by which the learned additional Sessions Judge rejected the application filed by the petitioner under Section 391 Cr.P.C.

2. It arises in the following circumstances:

i) That on 23.1.1998, a FIR was lodged by Kailash Dadhich against the accused petitioner with the Police Station Udai Mandir, Jodhpur for offences under Sections 279 and 304A I.P.C. alleging inter alia that on 20.1.1998 Kailash (P.W.2) and Chhotu Singh (hereinafter referred to as the deceased) reached Caltex Petrol Pump, Jodhpur at about 9.45 p.m. where a scooter No. RJ- 19-6M/2979 which was being driver by the accused petitioner came there and the scooter dashed against the deceased after coming on wrong side, as a result of which he fell down and became unconscious as he received injuries on his head and thereafter Kailash (P.W.2), Umesh (accused petitioner) and Rameshwar Dadhich (P.W.3) took the deceased to Mahatma Gandhi Hospital and on 23.1.1998, the deceased died in the hospital.

ii) On that FIR, police started investigation and after investigation the police filed challan against the accused petitioner for offences under Sections 279 and 304A I.P.C. on 28.6.99.

iii) That after trial, the accused petitioner was convicted and sentenced for offence under Sections 279 and 304A I.P.C. By the learned Judicial Magistrate, 1st Class No. 4, Jodhpur through judgment and order dtd. 18.2.2002.

iv) That against the judgment and order dtd. 18.2.2002, the accused petitioner filed an appeal before the learned Sessions Judge, Jodhpur which was transferred to the Court of Additional Sessions Judge No. 3, Jodhpur being criminal appeal No. 35/2003.

v) During pendency of appeal, an application was moved on behalf of the accused appellant before the learned additional Sessions

Judge under Section 391 Cr.P.C. For production of Entry No. 1888 of the OPD register dtd. 20.1.1998 in which it was mentioned as to in what manner the deceased was admitted in the hospital and by whom, he was admitted in the hospital and since it was not produced during the trial, therefore, it maybe taken on record as it is very much necessary to decide the fate of two witnesses,

namely, P.W.2 Kailash and P.W.3 Rameshwar and if that document is taken on record, these two witnesses cannot be regarded as eye witnesses because the deceased was got admitted by the accused petitioner himself and not by these two witnesses as alleged by them, meaning thereby that they were not present at the time of occurrence.

vi) That the learned Additional Sessions Judge rejected that application inter alia holding that copy of OPD Register dtd. 20.1.98 could have been produced by the accused appellant during trial.

vii) Aggrieved from the order dtd. 5.4.2004, this revision petition has been preferred by the accused petitioner.

3. In this revision petition, the main submission of the learned counsel for the accused petitioner is that as per entry No. 1888 mentioned in OPD register dtd. 20.1.1998 of M.G. Hospital, it is very much clear that the deceased was got admitted in the hospital by the accused petitioner and not by P.W.2 Kailash and P.W.3 Rameshwar and the name of the deceased was initially shown as unknown, but later on his name was entered as Chhotu Singh and he was admitted and thus, they were not the eye witnesses and for proving this fact, production of this document is very much material and hence the impugned order dtd. 5.4.2004 by which application under Section 391 Cr.P.C. was rejected is liable to be set aside and this revision petition deserves to be allowed.

4. On the other hand, the learned counsel for the respondent has supported the order dtd. 5.4.2004 and submitted that same does not suffer from any basic infirmity or illegality and hence does not call for any Interfere by this

5. Heard and perusal the case file.

6. A bare perusal of the entry on which reliance has been placed by the learned counsel for the accused petitioner clearly shows that the deceased was first admitted as unknown and thereafter his name was shown as Chhotu Singh and he was brought in the hospital by the accused appellant and in that entry, there is no mention of the fact that P.W.2 Kailash and P.W.3 Rameshwar brought the

deceased in the hospital.

7. Section 391, Cr.P.C. Contemplates a further inquiry by taking additional evidence, when the conviction by the lower Court has been based upon some evidence which might legally support it, but which in the opinion of the appellate Court is not quite satisfactory.

8. The intention of the Legislature in enacting this Section is to empower the appellate Court to see that justice is done between the prosecutor and the person prosecuted, and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct finding, it would be justified in taking action under this Section.

9. As per provisions of Section 391 Cr.P.C., additional evidence can be allowed to be taken at the stage of appeal when there is likelihood of failure of justice. Though the Appellate Court has power to take additional evidence in a suitable case, yet the discretion should not be exercised to fill up gaps or lacuna in the prosecution evidence. For that judgment of Hon'ble Supreme Court in the case of *Bir Singh v. State of U.P.* (1), may be referred to.

10. If the Additional evidence is required to promote interest of justice, production of additional evidence should not be refused on the ground of delay. For that judgment of Hon'ble Supreme Court in the case of *State of Gujrat v. Mohan Lal Jitamalji Porwal* (2), may be referred to.

11. In the present case, the learned Magistrate has based the conviction of the accused appellant on the basis of statement of P.W.2 Kailash and P.W.3 Rameshwar treating them as eye witnesses. If the entries in the OPD register d(d. 20,1.1998 are taken into consideration, it really reflects on the testimony of these witnesses on the point whether they can be treated as eye witnesses or not.

12. Thus, the additional evidence sought to be produced by the accused petitioner before the Appellate Court cannot be brushed aside as irrelevant evidence and since it is documentary evidence and it clearly reflects on the testimony of two star eye witnesses, namely, P.W.2 Kailash and P.W.3 Rameshwar Lal, therefore, the

application filed by the accused petitioner under Section 391 Cr.P.C. should have been allowed. Apart from this, since the deceased was got admitted in the M.G. Hospital on 20.1.1998 and M.G. Hospital is a Government Hospital, therefore, entries made in the OPD register have some substantial value and from that point of view also, if the accused petitioner wanted to produce the OPD register dtd. 20.1.1998 in evidence, the learned Additional Sessions Judge should have looked the matter from that point of view and thus rejection of the application of the accused petitioner through order dtd. 5.4.2004 is illegal and has resulted in miscarriage of justice and thus rejection of the application of the accused petitioner on the ground of delay is manifestly illegal.

13. There is one more point that substantiates that the application filed by the accused petitioner under Section 391 Cr.P.C. should have been allowed. In the OPD register, the name of the deceased was shown as unknown and had P.W.2 Kailash and P.W.3 Rameshwar Dadhich would have been there, they would have mentioned the name of the deceased and making entry of the name of the deceased as unknown would not have arisen and this fact also leads to the conclusion that the application under Section 391 Cr.P.C. should have been allowed.

14. The High Court's power under Section 397 Cr.P.C. should be exercised only when there exists manifest illegality in the judgment or order or there is grave miscarriage of justice.

15. For the reasons mentioned above, in the present case, the order dtd. 5.4.2004 passed by the learned Additional Sessions Judge suffers from manifest illegality and there is miscarriage of justice and hence the order dtd. 5.4.2004 passed by the learned Additional Sessions Judge is liable to be quashed and set aside and this revision petition deserves to be allowed.

Accordingly, the, present revision petition is allowed and the order dtd. 5.4.2004 passed by the learned Additional Sessions Judge No. 3 Jodhpur is quashed and set aside and the application under Section 391 Cr.P.C. filed by the accused petitioner is allowed and the accused petitioner is permitted to lead the additional evidence as per his application under Section 391 Cr.P.C. before the learned

Additional Sessions Judge No. 3, Jodhpur after giving an opportunity of rebuttal to the prosecution.

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