

State of Rajasthan and anr. Vs. Kishore Singh and ors.

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Court : Rajasthan

Decided On : Jan-24-1974

Reported in : 1974WLN60

Judge : P.N. Shinghal, J.

Appeal No. : S.B. Criminal Revision Petition Nos. 563 of 1972 and 86 of 1973

Appellant : State of Rajasthan and anr.

Respondent : Kishore Singh and ors.

Disposition : Petition allowed

Judgement :

P.N. Shinghal, J.

1. These two are petitions for a revision of the order of Additional Sessions Judge, Jhalawar, dated October 24, 1972, by which he did not allow the prosecution to examine those witnesses who had not been examined on its behalf in the committing court and closed its evidence.

2. A complaint regarding the alleged commission of offence under Section 342, 323, 354 and 376/511 was filed by Smt. Kanchan in the court of Munsif-Magistrate, Jhalawar, on March 17, 1971, against the five non-petitioners. The learned Magistrate sent it to the police for investigation. In the meantime he

registered the case on May 1, 1971 against non-petitioners Kishore Singh and Ram Narain & dismissed the complaint against the remaining three accused. He did not, however, proceed to record the evidence against the two accused and thought it proper to wait for the report of the police.

3. The police presented a charge-sheet against all the five accused (the present non-petitioners) in the court of the learned Magistrate, on October 13, 1971. The same day he made an order directing that the procedure prescribed for the trial of a private complaint would be followed by him in respect of the complaint and the charge-sheet, because the accused has made a request that that would be convenient for them. It was therefore directed that the case would proceed in accordance with the provisions of Section 208 Cr.P.C. The Prosecuting Sub-Inspector of police was, however, associated with the consolidated inquiry of the two cases.

4. Three prosecution witnesses were examined in the committing court as complainant Smt. Kanchan and the Prosecuting Sub-Inspector did not want to examine any other witnesses at this stage. The case was therefore reserved for arguments. The learned Magistrate passed some other orders, but it is not necessary to refer to them as they do not bear on the present controversy. He ultimately made an order on July 13, 1972 committing all the five accused (non-petitioners) to the Court of Sessions. In the calendar which was sent to the Court of Sessions in accordance with the requirement of Rule 28 of the General Rules (Criminal), 1952, the names of eight prosecution witnesses were mentioned, and the Magistrate informed the Court of Sessions that he would be in a position to secure the attendance of those witnesses within a period of 8 days.

5. It appears that although seven witnesses of the prosecution were present in the court on October 23, 1972, the learned Additional Sessions Judge recorded the statement of two of them, and admitted in evidence the statement of Dr. G.D. Sharma (who was not among those seven witnesses) on his file. An application was then made before him on behalf of the accused stating that it was not permissible for the prosecution to examine those witnesses who had not been examined in the committing court. The learned Additional Session Judge took up

the application for consideration on October 24, 1972, and made an order directing that it was not permissible for the prosecution to examine any other witness. The evidence of the prosecution was therefore closed, and the case was fixed for recording the statements of the accused and their witnesses. Both the complainant Smt. Kanchan and the State have approached this Court for a revision of that order on the ground that; it has been made in contravention of the provisions of Section 286(2) of the Code of Criminal Procedure.

6. The short question which therefore arises for consideration is whether it was permissible for the prosecutor to examine the remaining witnesses even though they had not been examined in the court of the committing Magistrate

7. Sub-section (1) of Section 286 of the Code of Criminal Procedure provides, inter alia, that the prosecutor shall open his case by reading from the Indian Penal Code the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused. When that has been done, Sub-section (2) becomes applicable and it provides as follows:

(2). The prosecutor shall then examine his witnesses.

It will thus appear that while under Sub-section (1) of Section 286 the prosecutor states shortly by what evidence he expects to prove the guilt of the accused, Sub-section (2) provides for the examination of the persecution witnesses. It is not disputed that in his opening address under Sub-section (1) of Section 286 the prosecutor stated, in short, that he expected to prove the guilt of the accused by the evidence of the witnesses mentioned in the aforesaid calendar. There was therefore no reason why it should not have been permissible, under the law, for him to examine all these witnesses. It is not in controversy in this court that they had been summoned at the instance of the court of Sessions and were in attendance in that court on the date when the impugned order was passed by it.

8. The view which I have taken is fortified by a decision of their Lordships of the Supreme Court in *Bhagwan Singh v. State of Punjab* : [1962]3SCR483 , Their Lordships have taken the view that it is not the law that no witness who was produced in the committal proceedings can be examined at the trial.

9. It may also be mentioned that a similar point arose for consideration before a Full Bench of the Lahore High Court in *Mt. Niamat v. Emperor* AIR 1936 Lah 533, it was held by their Lordships that the law contemplates the calling of evidence in the Sessions Court which has not been produced before the committing Magistrate, and that Section 286(2) pieces no restriction upon the counsel for the prosecution. It has therefore been held that the prosecution is at liberty to examine witnesses in the Sessions Court which it has not produced in the court of the committing magistrate, and that the prosecution is not debarred from producing any evidence which it has not produced in the committing Magistrate's court. The decision has held the field, and has been followed In *re B.K. Narayana Reddi* AIR 1941 Mad. 324. It has been held in that case that under Section 286 Cr.P.C. the prosecution is not confined to the witnesses examined before the committing Magistrate but may examine other witnesses as well in the Court of Sessions It is true that the State is not entitled to have fresh witnesses summoned for the purpose of their evidence, but if the prosecution has even additional witnesses ready and available for giving evidence, their evidence can be taken without any legal objection The decisions in *Mt. Niamat v. Emperor* AIR 1936 Lah 533 and In *re B.K. Narayana Reddi* AIR 1941 Mad 324 have been followed in *Jagat Ram and Anr. v. State* 1968 Cr.L.J. 60. In that case their Lordships have taken support from the observations of their Lordships of the Supreme Court in *Bhagwan Singh v. State of Punjab* : 1952 CriLJ1131 and have held that there is nothing in the Code of Criminal Procedure which precludes the prosecutor from producing the witnesses other than those who had already been examined in the committing court, and that Section (2) of Section 286 allows the prosecutor to produce his witnesses without any limitation irrespective of the fact whether those witnesses were examined in the committing court.

10. It is thus beyond controversy that the prosecutor can examine witnesses other than those who had been examined in the court of the committing Magistrate, if their attendance has been secured, or they are otherwise present, in the Court of Sessions for the purpose of recording their evidence. The learned Additional Sessions Judge failed to appreciate the provisions of the law correctly, and I have no doubt that the impugned order is quite illegal and must be set aside. It is a matter of regret that although *Bhagwan Singh v. Stated of Punjab* :

[1962]3SCR483 was cited before the Additional Sessions Judge, he did not care to examine it, and it is not surprising that he missed the opportunity to appreciate the true scope of Section 286(2) Cr.P.C, It appears that Gaoesha v. State 1954 RLW 37 was also cited before the learned Additional Sessions Judge, but he again failed to read it carefully. He should have appreciated that the correct application of the law of procedure is of considerable importance and that, in turn, made it obligatory on his part, as an Additional Judge of his Court of Sessions, to examine the point carefully and to arrive at a correct decision.

11. The revision petitions are allowed, the impugned order of the learned Additional Sessions Judge dated October 24, 1972 is set aside and he is directed to allow the prosecutor to examine his witnesses, in accordance with the law, in the light of the observations made above, from the stage which had been reached when the evidence of the prosecution was closed on October 24, 1972.

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