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Court : Rajasthan

Decided On : Feb-20-2008

Reported in : 2008CriLJ2351

Judge : Narendra Kumar Jain, J.

Appellant : Mushtaq

Respondent : State of Rajasthan

Disposition : Petition allowed

Judgement :

ORDER

Narendra Kumar Jain, J.

1. Heard learned Counsel for the parties.
2. The accused-petitioner has preferred this criminal revision petition under Section 397 read with Section 401 of the Code of Criminal Procedure against the order dated 22-10-2007, whereby the trial Court closed the cross-examination of PW-10 Awaiz Hussain.
3. The revision petition was filed with a delay of 30 days, therefore, an application under Section 5 of the Limitation Act has been preferred for condonation of delay contending therein that the petitioner is in jail during the course of trial of the case,

therefore, he could not prefer the revision petition under the prescribed period of limitation hence he prayed that in the interest of justice the delay in filing the revision petition be condoned.

4. I have heard the learned Counsel for both the parties and, after considering their submissions as well as the reasons assigned in the application, I am satisfied that there is sufficient cause for condonation of delay and consequently the delay of 30 days in filing the revision petition is condoned. The application under Section 5 of the Limitation Act stands allowed. Heard learned Counsel for both the parties on merits of the revision petition.

5. The petitioner is facing trial before the trial Court under Section 302/34 of the Indian Penal Code. The petitioner is in jail. He engaged an Advocate but, during the trial of the case, his Advocate withdrew his 'vakalatnama' and he remained unrepresented in the trial Court. The statement of PW-10 Awaiz Hussain was recorded and in absence of the counsel for the accused-petitioner he could not be cross-examined. The accused-petitioner engaged another counsel Shri Farooq Khan, who filed his 'vakalatnama' in the trial Court on 10-10-2007. He moved an application under Section 311, Cr.P.C. for summoning PW-10 Awaiz Hussain for cross-examination. The trial Court was of the view that PW-10 Awaiz Hussain could not be cross-examined as the counsel for accused-petitioner withdrew his 'vakalatnama' on that date and consequently passed an order that PW-10 Awaiz Hussain be summoned for cross-examination on behalf of the accused-petitioner. However, the trial Court imposed a costs of Rs. 500/- and directed that the counsel for the accused-petitioner will be entitled to cross-examine PW-10 Awaiz Hussain only on payment of cost. The case was fixed for cross-examination of PW-10 Awaiz Hussain for 22-10-2007. On 22-10-2007 PW-10 Awaiz Hussain was present but the cost was not paid on behalf of the accused-petitioner as he was in jail. The trial Court closed the cross-examination of the witness. The trial Court also mentioned that accused does not want to cross-examine the witness and closed the prosecution evidence, and case was fixed for statement of the accused for 23-10-2007.

6. The learned Counsel for the petitioner contended that the accused-petitioner was in jail and he was facing trial under Section 302/34, I.P.C. which is of serious nature and it was not proper on the part of the trial Court to impose a cost for cross-examination of PW-10 Awaiz Hussain. He further submits that on the date of examination of PW-10 Awaiz Hussain, if the counsel for the accused withdrew his 'vakalatnama' then it was a duty of the trial Court to provide him service of Pleader at the State expenses by appointing amicus curiae or otherwise and cross-examination could not have been closed. He further submits that the order dated 22-10-2007 shows that only because of non-payment of cost the cross-examination of PW-10 Awaiz Hussain was closed which is per se illegal and the said order is liable to be set aside.

7. The learned Public Prosecutor has not seriously opposed the contention of the learned Counsel for the petitioner. I have considered the submissions of learned Counsel for both the parties and also examined the impugned order dated 22-10-2007. The order dated 10-10-2007 was also referred by the counsel for the petitioner during the course of arguments.

8. So far as the relevancy of prosecution witness PW-10 Awaiz Hussain is concerned, the trial Court itself was satisfied and vide order dated 10-10-2007 directed to re-summon PW-10 Awaiz Hussain for cross-examination by the counsel for the accused. However, the trial Court imposed the cost. Imposition of cost by the trial Court, in the facts and circumstances of the case, was absolutely unwarranted. If the counsel for the petitioner had withdrawn his 'vakalatnama' then it was a duty of the trial Court to provide legal aid to the accused at State expenses as provided under Section 304 of the Code of Criminal Procedure, and in absence of the counsel for accused, the cross-examination of PW-10 Awaiz Hussain could not have been closed. The order dated 22-10-2007 further shows that mainly because of non-payment of cost the trial Court closed the cross-examination of PW-10 Awaiz Hussain.

9. Section 311 of the Cr.P.C. provides that any Court may, at any stage of any 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.

10. There is no need to discuss the scope of Section 311 of the Cr.P.C. in the present case as the trial Court itself was satisfied that cross-examination of PW-10 Awaiz Hussain is necessary and it granted opportunity to the accused to cross-examine him but the question for decision in the present case is as to whether the trial Court was justified in closing the cross-examination of PW-10 as accused-petitioner, who was in jail, remained unrepresented before the Court on the date of examination of PW-10 as his counsel withdrew his 'vakalatnama'. Further was it proper and legal to impose the cost on the accused while allowing cross-examination of PW-10 while allowing his application under Section 311, Cr.P.C.

11. After considering the submissions of learned Counsel for both the parties, I am of the view that the trial Court was not justified in closing the cross-examination of PW-10 as accused-petitioner, who was in jail, remained unrepresented before the trial Court on the date of examination of PW-10 as his counsel withdrew his 'vakalatnama'. It was a duty of the trial Court to afford full opportunity to the accused. Either the 'vakalatnama' of the defence counsel should not have been allowed to be withdrawn or, in case, the trial Court allowed the same to be withdrawn, it was a duty of the trial Court to give proper opportunity to the accused to engage another counsel or to provide legal aid to the accused at the State expenses as provided under Section 304 of the Cr.P.C. The trial Court committed an illegality in closing the cross-examination of PW-10 in absence of counsel for the accused, who was in jail. This was a matter where the petitioner was facing trial under Section 302/34, I.P.C. The matter was of serious nature. Further when the accused engaged another counsel and application is moved on his behalf for re-summoning of PW-10 for cross-examination then it was not proper, justified and legal on the part of the trial Court to impose the cost on the accused while allowing cross-examination of PW-10 while allowing his application under Section 311 of the Cr.P.C. Passing of conditional order was not proper in such matters.

12. Consequently, the revision petition is allowed. The impugned order dated 22-10-2007 passed by the trial Court is set aside. The application under Section 311 of the Code of Criminal Procedure is allowed. The trial Court is directed to summon PW 10 Awaiz Hussain and allow the learned Counsel for the accused-petitioner to cross examine him.

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