

Devkinandan Sharma Vs. the State of Rajasthan

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Court : Rajasthan

Decided On : Jul-20-1992

Reported in : 1993(3)WLC281; 1992WLN(UC)552

Judge : B.R. Arora, J.

Appeal No. : S.B. Criminal Misc. Petition No. 370 of 1991

Appellant : Devkinandan Sharma

Respondent : The State of Rajasthan

Disposition : Petition allowed

Judgement :

B.R. Arora, J.

1. This miscellaneous petition is directed against the order dated April 20, 1991, passed by the Additional Sessions Judge No. 2, Udaipur, by which the learned Additional Sessions Judge dismissed the revision petition, filed by the petitioner.

2. Accused-petitioner is facing trial for the offences under Sections 457 and 380 I.P.C. in the Court of the Munsif and Judicial Magistrate, First Class, Kherwada since 1981. The challan in this case was presented in the Court of the learned Magistrate in the year 1981 and the process for examining the witnesses were issued in the year 1982, and PW 1 Dinesh Kumar was examined by the Court on

14.8.1985. PW 2 Pritam Singh was examined on 13.7.1987 and PW 3 and PW 4 were examined on 11.11.1987. PW 5, PW 6, PW 7 and PW 8 were examined on 27.5.88. After examining eight witnesses by the prosecution, only the Investigating Officer Shri Mohan Lal Soni remained to be examined, but he did not appear inspite of the bailable warrant issued to secure his attendance. On 28.5.88, since Mohan Lal Soni was not present and, therefore, bailable warrant was issued and the matter was reported to the higher authorities to get the service of the bailable warrant effected on Mohan Lal Soni so that he may be examined, but inspite of the Court's specific orders, the witness, viz., Mohan Lal Soni, was not produced and the case was adjourned for recording his evidence

on 20.7.88, 5.11.88, 5.1.89, 31.1.89 and 10.3.89. On 10.3.89. the learned Assistant Public Prosecutor moved an application under Section 311 Cr.P.C. for recalling and re-examining certain witnesses. Mohan Lal Soni was not present on that day, also, and, therefore, he could not be examined and the matter was adjourned to 12.4.89. On 12.4.89, Mohan Lal Soni was not present and, therefore, his evidence was closed. However, the learned Magistrate observed that on the next date of hearing, i.e., on 3.5.89, if Mohan Lal Soni appears then his statement may be recorded, otherwise the statement of the accused under Section 313 Cr.P.C. may be taken. The learned Magistrate, also, considered the application under Section 311 Cr.P.C, filed by the Assistant Public Prosecutor and rejected the same. On 3.5.89, Mohan Lal Soni was not present, but the statement of the accused could not be recorded under Section 313. Cr.P.C. and the case was adjourned to 8.6.89. On 8.6.89, the Presiding Officer was on leave, but Mohan Lal Soni was present and, therefore, the case was adjourned to 5.7.89 and although Mohan Lal Soni was bound-down by the Court to appear on the next date but he did not appear on that day. Mohan Lal Soni did not appear on 5.7.89, 9.8.88, 3.9.89 and 18.10.89, though bailable warrants were issued. On 18.10.89, the learned Magistrate ordered for the closure of the evidence of Mohan Lal Soni and the case was fixed for recording the statement of the accused under Section 313 Cr.P.C. on 29.11.89. It was, however, observed by the learned Magistrate that if Mohan Lal Soni appears on the next date of hearing then his evidence may be recorded. On 29.11.89, Mohan Lal Soni did not appear, and, therefore, his evidence was finally closed and the case was fixed for recording the statement of

the accused under section 313 Cr.P.C. on 10.1.90. On 10.1.90, the statement of the accused was recorded and the case was fixed for recording the defence evidence on 9.5.90. On 9.5.90, the accused got himself examined as DW 1 and the case was fixed for arguments on 16.5.90. On 16.5.90 and thereafter on 25.7.90, the arguments could not be heard and the case was adjourned to 1.8.90. The matter was finally heard by the learned Magistrate on 1.8.90, 8.8.90 and 22.8.90, and after hearing the arguments, the learned Magistrate fixed the case for pronouncement of the judgment on 29.8.90. On 29.8.90, instead of pronouncing the judgment, the learned Magistrate passed the impugned order recalling and re-examining PW 1 Dinesh Kumar and PW 6 Sushil Chandra Patni. He, also, ordered to call Shri Mohan Lal Soni, Dissatisfied with the order dated 29.8.90, passed by the learned Munsif and Judicial Magistrate, Kherwada, the petitioner preferred a revision petition before the learned Sessions Judge, Udaipur, which was transferred for disposal to the learned Additional Sessions Judge No. 2, Udaipur, who, by his order dated 20.4.91, dismissed the same. Aggrieved with the order dated 20.4.91, the petitioner has preferred this miscellaneous petition.

3. Heard learned Counsel for the parties and perused the record of the case.

4. Several opportunities were given by the learned Magistrate for recording the evidence of Mohan Lal Soni but the prosecution failed to produce Mohan Lal Soni. When once the learned Magistrate himself, after giving ample opportunities to the prosecution to produce Mohan Lal Soni, closed the evidence of Mohan Lal Soni, as he could not put appearance in the Court, then in the facts and circumstances of the case, it was not a case in which the powers under Section 311 Cr.P.C. could have been exercised by the learned Magistrate for summoning this witness again. At earlier occasions, also, an application for recalling and re-examining these two witnesses, namely, PW 1 Dinesh Kumar and PW 6 Sushil Chandra Patni, was moved before the learned Magistrate by the learned Assistant Public Prosecutor under Section 311 Cr.P.C. and the same was rejected by the learned Magistrate by his order dated 10.3.1989. When the earlier application, filed by the prosecution, was dismissed by the learned Magistrate and the evidence of Mohan Lal Soni was closed, then there was no justification with the learned Magistrate to order for recalling and re-examining these witnesses.

5. Section 311 Cr.P.C. no doubt, gives powers to the Court at any stage of enquiry, trial or other proceedings to recall and re-examine any person already examined if his evidence appears to him to be essential to the just decision of the case. The object of this Section is to enable the Court to arrive at a true conclusion irrespective of the fact that the prosecution or the defence has failed to produce some witness, which is necessary for the just and proper disposal of the case. But this discretion, vested in the Court has to be exercised judiciously and with caution and circumspection. Though wide powers have been given to the Courts, but they are to be exercised within the limits and are not meant to be used for the purpose of enabling the prosecution to fill-up the gaps left by the prosecution in its case. If the prosecution neglects 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 lapses of the prosecution and to fill-up the lacuna left by it. As discussed above, it is not a case where the powers vested in the Court under Section 311 Cr.P.C. can be exercised.

6. In the result, I allow this miscellaneous petition, filed by the petitioner, quashed the order recalling and re-examining the witnesses. The Court may hear the arguments and pronounce the judgment on the material already on record.