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Court : Rajasthan

Decided On : Apr-11-2002

Reported in : 2002(1)WLC586; 2002(3)WLN616

Judge : Harbans Lal, J.

Appeal No. : S.B. Cr. Misc. Petition No. 224 of 2002

Appellant : Bhanwar Lal

Respondent : State of Rajasthan

Disposition : Petition allowed

Judgement :

Harbans Lal, J.

1. This petition Under Section 482 Cr.P.C. has been filed by complainant Bhanwar Lal against the order dated 6.2.2002 passed by Learned Addl. Sessions Judge (Fast Track), Nagaur in Sessions Case No. 187/2001, whereby, the evidence of the prosecution has been closed.

2. Briefly stated the relevant facts of the case are that in F.I.R. No. 224/97 Police Station, Ladnu lodged on the complaint of petitioner complainant, after investigation, a challan was filed against the non-petitioners No.2 to 4 for the offences Under Sections 341, 447, 323, 379, 325 and 302/34 I.P.C., wherein

presently trial is pending. Learned Addl. Sessions Judge tried to summon Dr. D.K. Sharma, who conducted autopsy on the dead body of deceased Pukh Raj, but despite issuing of the summons, bailable warrants and warrant of arrest, the witness could not be produced by the prosecution and ultimately the evidence of the prosecution was closed on 6.2.2002 by the learned trial court as it was reported on his warrant of arrest that his present address was not available. Thereafter, the trial Court has recorded statements of the accused Under Section 313 Cr.P.C. and their defence evidence. Now the case is fixed for final arguments. The petitioner complainant has furnished the present address of the witness namely Dr. D.K. Sharma and has prayed that direction may be given to the, learned trial Court to summon and examine this essential witness in exercise of its powers Under Section 311 Cr.P.C. because without his examination the post mortem report prepared by him will not be read in evidence and the case which is otherwise very strong case will fail against the accused non-petitioners No.2 to 4 resulting in miscarriage of justice. In this regard he has relied upon 2002 (1) Crimes 197 (S.C.) Shailendra Kumar v. State of Bihar and Others).

3. I have heard learned Counsel for the petitioner, learned Public Prosecutor for the State and learned Counsel for the non- petitioners.

4. Learned Counsel for the non-petitioners has raised a preliminary objection that the impugned order is revisable and a revision petition ought to have been filed against the said order and this petition Under Section 482 Cr.P.C. is not maintainable.

5. Faced with this objection, learned Counsel for the petitioner has prayed that this petition, which has been filed within the period prescribed for filing revision, may be treated as a revision Under Section 397/401 Cr.P.C. and a prayer to this effect has also been made in the petition itself.

6. The impugned order has been passed by the learned Addl. District and Sessions Judge (Fast Track), Nagaur and revision against the order lies to this Court. It has been filed within the period prescribed for filing revision. This petition is, therefore, treated as revision Under Section 397/401 Cr.P.C.

7. Learned Counsel for the petitioner has contended that this is a trial which pertains to murder case and the post mortem report was prepared by Dr. D.K. Sharma and he is the most material and essential witness in this case to prove the post mortem report. The witness was present in the court on 11.12.2001 and he submitted his personal bond for his appearance on the next date of hearing i.e. 18.12.2001 but he remained absent from the court and jumped his personal bonds. Learned trial Court has not forfeited his personal bond and has not initiated any proceeding against him, as is evident from the order sheet dated 18.12.2001 and thus has failed to discharge its lawful duty. He has also submitted that no serious effort seems to have been made for finding out his correct address and for enforcing his presence in the court for evidence. According to him, the bounden duty of the prosecution as also of the trial court was to find out the correct address of this witness by writing to Home Department/Director General of Police/Superintendent of Police or Director, Medical and Health Services, Govt. of Rajasthan but no such efforts seem to have been made in this case. He was transferred to S.M.S. Hospital, Jaipur but no summons were sent to him at his changed address and no correspondence was made with the Superintendent, S.M.S. Hospital, Jaipur for providing his correct address. It is argued that if serious and sincere efforts were made, the correct address of the witness could have been known and the process could have been sent to his correct address. The petitioner has now found his correct address which is as under:

Dr. D.K. Sharma, Medical Jurist, B/54, Krishna Nagar, Basni, Jodhpur. Telephone No.: 742441.

8. He has further submitted that non-bailable warrant of the witness may now be got executed at his above address in the interest of justice. He has urged that this can be done in exercise of the powers vested in the court Under Section 311 Cr.P.C. at any stage of the trial and even at the stage of hearing of final arguments, if the conditions mentioned in the Section are satisfied. He has, thus, prayed that the learned lower court may be directed to summon this witness and record his statement in the interest of justice.

9. Learned Public Prosecutor has supported the stand of learned Counsel for the petitioner.

10. Learned Counsel for the non-petitioners No.2 to 4 has, however, opposed the prayer and has submitted that sufficient efforts were made by the court below but whereabouts of the witness could not be traced and the trial against the non-petitioners No.2 to 4 could not be prolonged indefinitely.

11. I have given my anxious and thoughtful consideration to the submissions made at the bar and also to the facts of the case.

12. It is apparent from the perusal of the order sheets of the case, particularly the order sheets dated 11.12.2001 and 18.12.2001 that Dr. D.K. Sharma was present on 11.12.2001 and his statement could not be recorded because the presiding officer was on leave on that day and the case was adjourned to 18.12.2001 and the witness furnished a personal bond in the sum of Rs. 1000/- for his appearance on the next date as required by the court but he failed to appear on the next dated 18.12.2001. But his personal bond was not forfeited and requisite proceeding for recovery of the said amount was also not initiated and he was ordered to be summoned through bailable warrant of Rs. 1000/- and the same was given to the learned A.P.P. for service. On the next date i.e. 5.1.2002, his bailable warrant was not received and the same was issued again and was given 'Dasti' to the learned A.P.P. and on the next date i.e. 16.1.2002 neither the witness nor his bailable warrant was received served or unserved in the court, still the learned trial court did not pass any effective order against those who failed to produce the bailable warrant of the witness and the witness himself. The trial court simply refused to give assistance for summoning the witness and directed the learned A.P.P. to produce the witness himself. But on the next date, the learned trial Court observed in the order sheet dated 25.1.2002 that the witness Dr. D.K. Sharma was the main witness of post mortem report and without his examination there will be adverse effect on the case and issued non-bailable warrant against the witness and the application of the learned A.P.P. in this regard was allowed and again the warrant was given 'Dasti' to the learned A.P.P. but on the next date i.e. 6.2.2002 the evidence of the prosecution was closed in view of the report on the warrant.

13. It is well settled principle of law that the Court has power Under Section 311 Cr.P.C. to summon any material witness whose presence for the just decision of the case is essential. Section 311 provides as under:

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.

A bare reading of the aforesaid section reveals that it is of very wide amplitude and if there is any negligence, latches or mistakes by not examining material witnesses, it is the duty of the court to render just decision by examining such witnesses at any stage and this power is not in any way impaired or curtailed even by a judgment rendered in *Raj Deo Sharma v. State of Bihar* reported in 1999 Cr. L.R. (S.C.) 613), wherein, it has been observed by the Hon'ble Apex Court as under:

We may observe that the power of the Court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the Seven Judge in *A.R. Antuley's* case nor in *Kartar Singh's* case such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the Court under Section 311 of the Code. We make it clear that if evidence of any witness appears to the Court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person.

In *Shailendra Kamar's* case (*supra*) it has been observed that:

In our view, in a murder trial it is sordid and repulsive matter that without informing the police station officer-in-charge the matters are proceeded by the Court and by the APP and tried to be disposed of as if the prosecution has not led any evidence.

From the facts stated above, it appears that accused wants to frustrate the prosecution by unjustified means and it appears that by one way or the other the Addl. Sessions Judge as well as the APP have not taken any interest in discharge of their duties. It was the duty of the Sessions Judge to issue summons to the investigating officer if he failed to remain present at the time of trial of the case. The presence of Investigating Officer at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on part of any witness to remain present, it is the duty of the Court to take appropriate action including issuance of bailable/non-bailable warrants as the case may be. It should be well understood that prosecution cannot be frustrated by such methods and victims of the crime cannot be left in lurch.

Quoting from *Rajendra Prasad v. Narcotic Cell* reported in 1999 (6) S.C.C. 110, the Hon'ble Apex Court has observed as under:

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.

14. In view of the foregoing observations and principles of law laid down by the Hon'ble Apex Court, it is apparent that in the present case though some effort was made by the learned trial court to enforce the attendance of the witness, but the same cannot be said to be adequate and it appears that no effort was made to summon the Investigating Officer or to send the process of the witness to the concerned police station. The possibility of the warrants issued against the witness remaining unserved due to not being received by the police station concerned cannot be ruled out and it is not disputed that the witness Dr. D.K. Sharma is the main witness of post mortem report and is, thus, a material and essential witness in this murder trial and now that the latest and correct address of the witness has been traced out and furnished by the petitioner, the learned lower court requires to be directed for securing the ends of justice that this witness be summoned and examined in the case.

15. Accordingly, this petition is allowed and it is directed that the learned Addl. Sessions Judge (Fast Track) Nagaur shall summon Dr. D.K. Sharma through non-

bailable warrant giving his present address and sending it to the Superintendent of Police, Jodhpur for service with a D.O. letter requesting him to get the witness served and produced before the court on the next date of hearing and, thereafter, proceed to complete the trial of the case as per law.

16. It is also made clear that in case the warrant still remains unserved or the witness does not appear the fact may be brought to the notice of concerned higher authorities and they be requested to take suitable steps for ensuring the presence of this witness before the court on the fixed date.

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