

State Vs. Shanthi

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Court : Chennai

Decided On : Apr-03-2006

Reported in : 2006CriLJ3082

Judge : K.N. Basha, J.

Acts : Narcotic Drugs and Psychotropic Substances Act - Sections 8, 20 and 42(2); Code of Criminal Procedure (CrPC) , 1974 - Sections 391

Appeal No. : Crl. M.P. No. 2050 of 2006 in Crl. A. No. 524 of 2005

Appellant : State

Respondent : Shanthi

Advocate for Def. : P. Rathanavel, Adv.

Advocate for Pet/Ap. : M.K. Subramanian, Govt. Adv.

Disposition : Petition allowed

Judgement :

K.N. Basha, J.

1. Crl. M.P. No. 2050 of 2006 in Crl. A. No. 524 of 2005 has filed by the State through the Inspector of Police, Erode Taluk Police Station, Erode, with a prayer to allow the prosecution to take additional evidence under Section 391 of Code of

Criminal Procedure to mark the information which was reduced into writing in Volume III of general diary maintained by the Inspector of Police, Erode Taluk Police Station, Erode, in Crime No. 126 of 2004 and in Crl. A. No. 524 of 2006 pending before this Court.

2. The accused in this case has come forward with an appeal against conviction as he has been convicted under Section 8(c) read with 20(b)(ii)(c) of N.D.P.S. Act (hereinafter referred to as 'the Act') and sentenced to undergo ten years rigorous imprisonment and to pay an amount of Rs. 1,00,000/- fine, in default, to undergo one year rigorous imprisonment. This appeal is posted before this Court for final hearing. At this stage, the State has preferred a petition, as stated above, for the purpose of marking the information which is said to have reduced into writing in respect of this case. One of the main defence raised by the accused in this appeal is that there is a violation of mandatory provisions under Section 42(2) of the Act.

3. Mr. M. K. Subramanian, learned Government Advocate (Crl. side) submits that P.W. 2, the Sub-Inspector of Police, on receiving the information over phone that the accused was in possession of Ganja at Door No. 51, Balaji Garden, Thindal Village, Erode, recorded the same in the general diary and informed to the superior officers through Ex.P. 3. It is further contended by the learned Government Advocate (Crl.side) that the Special Public Prosecutor, who had examined the witnesses, due to inadvertence failed to mark the relevant information in the general diary which was reduced into writing in the General Diary Volume III maintained by him. It is contended by the learned Government Advocate (Crl. Side) that the marking of the General Diary, as stated above, is just and essential for the just decision of the case and such error on the part of the prosecution agency may be rectified by directing the trial Court to take additional evidence. The learned Government Advocate (Crl. side) also placed reliance on the following decisions:

(1) Rajendra Prasad v. Narcotic Cell reported in .

(2) Zahira Habibullah H. Sheik v. State of Gujarat reported in

4. The respondent accused also filed the counter to the petition filed by the State. It is stated by the learned Counsel for the accused that an error has occurred and the prosecution could not fill up the lacuna. It is also submitted by the learned Counsel for the accused that even if the additional evidence is allowed that will not enable this Court to consider and dispose of the appeal on the ground that even the third condition contained under Section 42(2) of the Act has not been complied with by the witness, P.W. 2. It is also further pointed out by the learned Counsel for the accused that even in Ex. P. 3, it is not mentioned about the recorded information.

5. I have given my careful consideration to the rival contentions put forward by either side. Before proceed further to the contentions put forward by Mr. M. K. Subramanian, learned Government Advocate (Crl. side), it is relevant to consider the provisions under Section 391 Cr. P.C.

6. Section 391 Cr. P.C. reads as follows:

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.

The reading of the provisions of Section 391, Cr. P.C. itself makes it crystal clear that the Appellate Court is having power to take further evidence or to direct it to be taken by the trial Court by recording its reasons.

7. Mr. M. K. Subramanian, learned Government Advocate (Crl. side) also placed reliance on the following decisions of the Apex Court:

(1) The Hon'ble Supreme Court of India has held in *Rajendra Prasad v. Narcotic Cell* reported in that, (Para 54)

A lacuna in the prosecution is not to be equated with the fall out of a oversight committed by a Public Prosecutor during trial either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during conducting of a case cannot be understood as lacuna which a Court cannot fill up. Lacuna in the prosecution must be understood as inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the Accused in the trial of the case. But an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. (2) The Apex Court also held in *Zahira Habibullah H. Sheik v. State of Gujarat* reported in that, The Appellate Court can direct the taking up of further evidence in support of the prosecution, a fortiori it is open to the Court to direct the Accused persons may also be given a chance of adducing further evidence, who may file an application in this regard, in an appropriate case. Section 391 is in the nature of a exception to the general rule and the powers under it must also be exercised with great care, especially, on behalf of the prosecution lest the admission of additional evidence for the prosecution operates in a manner prejudicial to the defence of the Accused. The legislative intent in enacting Section 391 appears to be the empowerment of the Appellate Court to see that justice is done between the prosecutor and the persons prosecuted by arriving at the truth, that is, the prevention of the guilty man's escape through some careless or ignorant proceedings before a Court or vindication of an innocent person wrongfully accused; and if the Appellate Court finds that certain evidence is necessary in order to enable it to give a correct and proper finding, it would be justified in taking action under Section 391. However

there is no question of filling of any lacuna in the case in hand.

Therefore, in view of the settled principles of law laid down by the Apex Court Section 391, Cr. P.C. gives power to the Appellate Court to direct taking up of further evidence in support of the prosecution. It is also further held by the Apex Court that the accused persons may also be given a chance of adducing further evidence in the event of filing an application in this regard, in an appropriate case and the power under Section 391 Cr. P.C. shall be exercised with great care. It is also further held by the Supreme Court that the object of Section 391 appears to be the empowerment of Appellate Court to see that justice is done between the prosecutor and the persons prosecuted by arriving at the truth. In the instant case, the defence has raised a legal point viz., the violation of Section 42(2) of the Act since P.W. 2 in his evidence has stated that he has sent wireless message to his superior officers by Ex. P.3 and on perusal of Ex. P. 3, it is clear that it does not contain the recorded information and as such it is not the compliance of the provisions under Section 42(2) of the Act as Section 42(2) of the Act contemplates sending a copy of the information recorded to the superior officers. But on the other hand, it is contended by the learned Government Advocate that as a matter of fact P.W. 2, the Sub-Inspector of Police, on receiving the information over phone that the accused was in possession of Ganja at Door No. 51, Balaji Garden, Thindal Village, Erode, recorded the same in the general diary and informed to the superior officers through Ex. P. 3. It is further pointed out by the learned Government Advocate (Crl. side) that the Special Public Prosecutor, who had examined the witnesses due to inadvertence failed to mark the relevant information in the general diary and such error on the part of the prosecution agency may be rectified by directing the trial Court to take additional evidence.

8. I am of the considered view that there is much force in the contentions put forward by the learned Government Advocate (Crl. side). It is categorically claimed by the prosecution that the Sub-Inspector of Police, P.W. 2, actually recorded the information in the general diary but the same was not marked during the trial due to inadvertence. Therefore it is just and necessary that the prosecution should be given an opportunity to rectify the error which, in my view, may not amount to filling up the lacuna in this prosecution case. This Court is of the considered view that

such additional evidence is necessary in order to enable the Court to give correct and proper finding and no prejudice would be caused to the accused by allowing the prosecution to mark the General Diary Volume III containing the information said to have reduced by P.W. 2, the Sub-Inspector of Police, maintained on 30-3-2004.

9. Therefore, the petition filed by the State is allowed and the learned trial Judge viz., The Special Judge, N.D.P.S. Act, Coimbatore, is directed to take additional evidence on the side of the prosecution, as stated above, in S.C. No. 150 of 2004 within a period of two months from the date of receipt of copy of the Order of this Court. It is also made clear that the accused also should be given an opportunity to cross-examine in respect of the additional evidence to be adduced by the prosecution. It is also further directed that after taking such evidence and marking such document, as stated above, the trial Judge should sent back the records to the file of this Court within the stipulated time of two months.

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