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Bibhuti Kumar Vs. the State

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Court : Kolkata

Decided On : Feb-15-1993

Reported in : (1993)2CALLT153(HC),98CWN115

Judge : Gitesh Ranjan Bhattacharjee, J.

Acts : Indian Penal Code (IPC), 1860 - Section 302; ;Code of Criminal Procedure (CrPC) , 1973 - Sections 173, 311 and 313

Appeal No. : Crl Rev No. 1741 of 1992

Appellant : Bibhuti Kumar

Respondent : The State

Advocate for Def. : A. Bhose, Adv.

Advocate for Pet/Ap. : H.K. De and ;A. Jana, Advs.

Disposition : Application dismissed

Judgement :

G.R. Bhattacharjee, J.

1. In a sessions trial in respect of a charge Under Section 302 of the Indian Penal Code the learned Public Prosecutor after getting almost all the prosecution witnesses examined barring certain charge-sheet witnesses who were not

examined on the ground that they were gained over, prayed in the court below for examination of two more witnesses who were not named in the charge-sheet nor were examined by the investigating officer Under Section 161 of the Code of Criminal Procedure during investigation of the case. It may be mentioned here that the prosecution evidence was not yet closed when the learned Public Prosecutor made that prayer for examination of the said two witnesses. It also appears that the names of those two witnesses transpired from the evidence of P.W. 2 who is the father of the deceased. The learned trial Judge on consideration of that prayer permitted the prosecution to examine those two witnesses.

2. The learned Advocate for the petitioner assails that order on the ground that those two witnesses were neither named in the charge-sheet nor examined by the investigating officer during investigation. It is further contended that many of the charge-sheet witnesses were not examined by the prosecution and instead some two new witnesses were sought to be examined for filling up the lacuna of the prosecution case. It is also submitted by the learned Advocate for the petitioner that the power Under Section 311 of the Code of Criminal Procedure cannot be exercised by the court for filling up lacuna in the prosecution case or to the prejudice of the defence. In this connection he attracts my attention to a decision of the Supreme Court in Mohanlal v. Union of India, 1991 SCC (Cri) 595. In that case after examining the prosecution witnesses the prosecution evidence was closed, thereafter the accused was examined Under Section 313 of the Code and even the accused also entered on the defence and thereafter, the argument of one side was concluded and then the prosecution came forward with a prayer for recalling a witness who had been earlier examined and for examining two more new witnesses The court below, however, did not allow the prayer but the High Court allowed the prayer and then the matter came up before the Supreme Court. The learned Advocate for the petitioner draws my attention to paragraph 18 of the said Supreme Court decision wherein it has been observed inter alia, that it should be borne in mind that the aid of Section 311 Cr. P.C. should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undersirable results and that it is incumbent that due care should be taken by the

court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to cause an unfair advantage to the rival side and further additional evidence should not be used as a disguise for a retrial or to change the nature of the case against either of the parties. In the facts of the particular case the Supreme Court, however, upheld the decision of the High Court to summon witnesses even at the stage when the argument was going on. In our present case, however, even the prosecution was not yet closed when the prayer was made for examination of two new witnesses. It also appears that the learned Public Prosecutor got the clue for examination of those witnesses from the evidence of P.W. 2 who in his evidence disclosed their names as persons acquainted with the facts on this point. The question whether such statement of P.W. 2 should at all be believed even assuming that he did not make any such statement before the investigating officer, is a matter which may be taken for consideration in judging the credibility of the witnesses named by him or his own credibility in naming them at the stage of trial, but at this stage such statement may be accepted at face value. In view of the fact that in evidence he has named those two persons as witnesses and the prosecution was also not concluded yet, I think the learned Judge did not commit any perversity or error in exercising the jurisdiction to allow the prosecution to examine those witnesses. It is needless to mention that the defence will get proper opportunity for cross-examining those witnesses after they are examined by the prosecution and it is also needless to mention that all grounds which may legitimately be available to the defence concerning the credibility of the witnesses, will remain open to the defence for being canvassed at the time of argument.

3. I, therefore, do not find any reason to interfere with the impugned order of the learned trial Judge whereby he has granted the prosecution an opportunity to examine the two witnesses for which the learned Public Prosecutor made a prayer. I am again making it clear that nothing in this order will be construed as any opinion about the merits of the evidence of the witnesses which remains open to be assessed by the learned trial Judge in accordance with law at the time of rendering judgment.

4. The revisional application stands dismissed accordingly. The stay order stands vacated.

5. Let xerox copy of this order be given to the learned Advocates for the parties on the usual terms.

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