

Sisir Ghosh Vs. State

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Court : Kolkata

Decided On : Nov-12-2003

Reported in : 2004(1)CHN80

Judge : P.N. Sinha, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Section 299

Appeal No. : C.R.R. No. 1916 of 2003

Appellant : Sisir Ghosh

Respondent : State

Advocate for Def. : Kazi Safiullah and ;S.K. Mallick, Advs.

Advocate for Pet/Ap. : Biplab Mitra, ;Subir Banerjee and ;J. Banerjee, Advs.

Judgement :

P.N. Sinha, J.

1. This revisional application is directed against the order dated 6.8.2003 passed by the learned Additional Sessions Judge, 6th Court, Alipore in Sessions Trial No. 5(4) of 2001. By the impugned order learned Additional Sessions Judge directed that witnesses are to be examined afresh, and being aggrieved, the accused petitioner has preferred this revision.

2. Mr. Biplab Mitra, learned senior advocate appearing for the petitioner contended that observation of the learned Additional Sessions Judge that examination of 12 witnesses earlier in absence of this petitioner was not recorded under Section 299 of the Code of Criminal Procedure (hereinafter called Code) is bad in law. There were two accused persons in the sessions case namely Debasish Mondal alias Dibakar Mondal and this petitioner and the learned Sub-Divisional Judicial Magistrate (hereinafter referred as S.D.J.M.), Alipore committed the case to the Court of Sessions along with accused Dibakar after filing the case against the petitioner for the present. From the Court of the learned Sessions Judge, Alipore, the case was transferred to the learned Additional Sessions Judge, 6th Court and after framing charge against Dibakar Mondal 12 witnesses were examined. It was clear to the learned Additional Sessions Judge that this petitioner did not appear and as such the evidence of 12 witnesses recorded by him in the trial of Dibakar Mondal should be treated as recording of evidence under Section 299 of the Code against this accused petitioner. After recording the 12 witnesses the accused Debasish @ Dibakar Mondal absconded and warrant is pending against him and case against him was filed for the present on 31.3.2003. In the meantime this petitioner was produced before the learned Additional Sessions Judge and after framing of charges some of the witness(sic) were further examined in chief and cross-examined on behalf of this petitioner. Thereafter the learned Judge by the impugned order has again directed examination of witnesses afresh on the basis of petition filed by the learned Public Prosecutor in-charge of the prosecution in this sessions case.

3. Mr. Mitra contended that recording of evidence in sessions trial under Section 231 of the Code covers both the provisions of Sections 273 and 299 of the Code. After examination of 12 witnesses in the trial against Debasish and after examination of some witnesses including cross-examination against this petitioner the order of the learned Sessions Judge for a fresh trial and recording of evidence afresh is illegal and improper. The procedure adopted by the learned Judge is not only bad in law but unknown in law. Accordingly the said order should be set aside and the learned Additional Sessions Judge may proceed with the examination of further witnesses who have not yet been examined and there cannot be recording of evidence afresh of all witnesses.

4. Mr. Kazi Safiullah, learned Public Prosecutor appearing for the State contended that the learned Additional Sessions Judge was right by observing that in the sessions case provisions of Section 299 of the Code were not followed. He contended that in order to avail of provisions of Section 299 of the Code certain conditions are to be fulfilled and report of execution of warrant and other processes are to be submitted before the learned Judge to establish that this petitioner was absconding and there was no immediate prospect of arresting him. There was no such report before the learned Judge as this petitioner was never produced before the Sessions Court and the learned Trial Judge. Reports of execution of warrant or non-execution and other processes, if any, were lying in the Court of learned Magistrate. Report of Investigating Officer or Officer-in-Charge of Police Station regarding non-execution of warrant against this petitioner with the report that there is no immediate prospect of arresting him was not placed before the learned Trial Judge and no order of the learned Trial Judge was obtained for proceeding against this petitioner in view of provisions of Section 299 of the Code. Therefore, the order passed by the learned Trial Judge was not bad in law.

5. I have duly considered the arguments canvassed before me by the learned advocates of the parties and I have also carefully perused the certified copy of impugned order dated 6.8.2003 passed by the learned Trial Judge and the annexures made with this application. It is clear that after investigation police submitted charge-sheet under Section 302/34 of I.P.C. along with other sections against this petitioner and one Debasish Mondal alias Dibakar in connection with Nodakhali P.S. Case No. 119 dated 28.11.1999. Learned S.D.J.M. after receiving the charge-sheet took cognizance of offence and supplied copy of relevant papers to accused Debasish Mondal. As this petitioner was absconding warrant and proclamation were issued against him and finally as he was not arrested case against this petitioner was filed for the present and the learned S.D.J.M. committed the case to the Court of Sessions on 19.1.2001. Thereafter the case was transferred to the Court of learned Additional Sessions Judge, 6th Court, Alipore and after framing charges against Dibakar @ Debasish Mondal learned Additional Sessions Judge examined as many as 12 witnesses upto 26.6.2001. Thereafter, Debasish Mondal absconded and warrant was issued against him and in the

meantime this petitioner was brought under arrest and was produced before the learned S.D.J.M. who directed production of this accused petitioner before the learned Additional Sessions Judge. On 31.3.2003 learned Additional Sessions Judge framed charge against this petitioner and on the same day he filed the case against Debasish Mondal for the present. It appears that thereafter P.W. 1, P.W. 3, P.W. 4 and P.W. 5 were further examined in chief by the prosecution and the said witnesses were cross-examined on behalf of this petitioner.

6. The learned Public Prosecutor who was conducting the case filed a petition praying for examination of witnesses afresh and the learned Trial Judge by the impugned order allowed the said prayer and rejected the objection of this petitioner that the witnesses examined earlier in the trial of Debasish Mondal should be treated as examination of witnesses against him also under the provisions of Section 299 of the Code. As the learned Judge directed recording of fresh evidence and alteration of charge the accused petitioner has preferred this revision.

7. I am of opinion that in order to avail of provisions of Section 299 of the Code certain conditions are to be fulfilled. There must not only be report before the learned Judge that an accused has absconded and there is no immediate prospect of arresting him and in his absence the trial may be started but proper evidence to establish that an accused has absconded is needed. In the instant case there was no report before the learned Trial Judge that this petitioner has absconded and that there was no immediate prospect of arresting him and there was no proper evidence in that respect. It appears that case against this petitioner was filed in the Court of the learned S.D.J.M. and reports of police officers regarding execution and non-execution of warrant and proclamation, if any, against this petitioner were lying in the Court of the learned S.D.J.M. No prayer was also made on behalf of prosecution before the learned Judge to record evidence of prosecution witnesses against this petitioner under the provisions of Section 299 of the Code. This petitioner was first produced before the learned Trial Judge on 20.9.2003.

8. It now requires consideration under which circumstances provisions of Section 299 of the Code can be invoked. In this connection I rely upon two decisions namely *State of Mysore v. Sanjeeva*, reported in A.I.R. 1956 Mysore 1: 1956 Cri. L. J. 77 and *Tahsildar Singh v. State*, reported in : AIR1958 All214 . Section 299 is corresponding to Section 512 of the old Code of 1898.

9. In the case of *State of Mysore v. Sanjeeva*, reported in A.I.R. 1956 Mysore 1: 1956 Cri. L. J. 77, it was held that:

'As regards the basis on which the recording Court is to be satisfied of the fulfilment of the conditions i.e. that the accused was absconding and that there was no immediate prospect of his arrest, it is seen from the wording of Section 512 Cr. P. C. that these conditions have to be 'proved'. It has accordingly been held that the facts must be proved by legal evidence and not merely by the report of the Police or by information otherwise tendered:, vide 1890 All W. N. 100 (D) and -- '*Janu v. Emperor*', AIR 1947 Sind 122 (K).'

'It appears to us that the latter view viz. that the recording Court should make a record of its finding that the accused person has absconded and that there is no immediate prospect of arresting him is essential to invest the depositions with legal validity is correct. It is beyond doubt that Section 512 Cr.P.C. requires proof of these facts. Obviously, the proof must be to the satisfaction of the Court that proceeds to record the depositions.

The only way in which such satisfaction can be indicated by a Court is by recording its finding. That is the only way in which it can be safely presumed that the mind of the Court and of the Counsel for the prosecution is directed towards the object of the recording of such depositions.'

10. Almost same view was taken in *Tahsildar Singh's* case (supra) and it was further observed in *Tahsildar Singh's* case:

'Cross-examination is undoubtedly a very potent weapon in the hands of an accused person for his defence, yet it cannot be said that if an accused person has by his own conduct not made use of that weapon, then the evidence which

has not been cross-examined cannot be used against him. The value of the evidence recorded under Section 512 has, therefore, to be judged like any other evidence given by witnesses at the trial.'

11. Therefore, it is clear that there must be legal evidence to prove that accused was absconding and that there was no immediate prospect of his arrest and in order to prove it, report of police officer only is not sufficient. In the instant case, there was no legal evidence either before the learned Magistrate or before the learned Trial Judge that this accused petitioner has absconded and that there was no immediate chance of his arrest. There was no prayer from prosecution seeking order of learned Trial Court to record evidence under Section 299 of the Code in absence of this petitioner. Learned Trial Judge was thus right by observing that in the instant matter provisions of Section 299 of the Code were not followed while recording evidence of witnesses. The contention of the petitioner in this respect is, therefore, not acceptable and is rejected.

12. But, I find that there was no ground before the learned Trial Judge to pass order for recording evidence of witnesses afresh. Already 12 witnesses were examined when accused Debasish alias Dibakar was facing trial and this petitioner was absconding. Thereafter this petitioner was brought under arrest and 4 or 5 witnesses (the figure of witnesses examined not very clear) were examined and cross-examined at the time of trial of this accused. Learned Trial Judge has indicated that charge requires to be altered as there was some irregularity in framing of charge. Section 217 of the Code lays down the procedure to be followed after alteration of charge and the learned Trial Judge should follow the provisions of Section 217 of the Code if charges are altered due to irregularities. There should not be recording of fresh evidence afresh when some witnesses were already examined at the time of trial of this petitioner. If anything left out at the time of trial of accused Debasish when this petitioner was absconding the learned Public Prosecutor-in-Charge of this case would submit a prayer before the learned Trial Judge for re-examination of witnesses on the points which were not taken earlier in respect of this petitioner. When already some of the witnesses were re-examined and cross-examined there should not be recording of evidence afresh or starting de novo trial. If charges are altered learned Trial Judge shall

follow the provisions of Section 217 of the Code.

13. In view of the discussions made above, the revisional application succeeds in part and the order of the learned Trial Judge directing that the evidence of the witnesses be taken afresh is set aside as that portion of the order is not correct and proper. Learned Additional Sessions Judge, 6th Court, Alipore is directed to proceed in accordance with law and to expedite the trial.

14. Send a copy of this order to the learned Additional Sessions Judge, 6th Court, Alipore for information and necessary action.

15. Urgent xerox certified copy be given to the parties, if applied for, expeditiously.

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