

Surinder Kumar Vs. State

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Court : Himachal Pradesh

Decided On : Sep-23-1981

Reported in : 1982CriLJ548

Judge : Vyas Dev Misra, C. J.

Appellant : Surinder Kumar

Respondent : State

Judgement :

ORDER

Vyas Dev Misra, C.J.

1. This revision is directed against the order of the Additional Chief Judicial Magistrate, Simla, calling upon the accused-petitioner to deposit expenses of the witnesses summoned by him,
2. The petitioner along with others is being tried for offences Under Sections 465, 468, 471, and 120-B of the Penal Code. After the prosecution had closed its case the petitioner was duly examined under the provisions of Section 313 of the Code of Criminal Procedure, The petitioner made an application summoning various persons as defence witnesses. One of the witnesses summoned by the petitioner is Shri Des Raj Sood. This witness is stated to be presently living at New Delhi. The Magistrate issued a summons to this witness and directed the petitioner to deposit Rs. 155/- as expenses for the witness. This amount was duly deposited by the

petitioner. However, on the date fixed for hearing neither the witness was present nor the summons was received back after service. The Magistrate, therefore, directed the petitioner to take summons dasti and serve it on the witness for the next date of hearing. The petitioner duly took summons for service to New Delhi but he failed to serve the witness who was stated to have gone out of Delhi. The report was accordingly given to the Court. Now the Magistrate found that the summons returned by the petitioner without service did not have the signatures of any witness in whose presence the petitioner visited the house of the witness for serving the summons. In these circumstances the Magistrate ordered that this witness will be produced by the petitioner on his own responsibility though he could have the summons from the Court on payment of process fee.

3. Another witness who was sought to be summoned by the petitioner was the Record Keeper of the State Bank of India, Simla Branch. He was to produce some documents asked for by the petitioner. One Chet Ram Sharma, Record Keeper, appeared in the Court on 2nd July, 1981 in obedience to the summons issued to him. He stated that he could not bring the requisitioned record since it was not available with the Simla Branch of the Bank. On 9th July, 1981 the petitioner made an application to the Court stating that the record in question has since been sent by the State Bank of India, Simla Branch to its Head Office at Bombay and, therefore, the record should be summoned from Bombay. It was also prayed that the Manager, State Bank of India, Simla, may be directed to obtain the requisitioned record from their Head Office at Bombay and produce the same. The Magistrate directed that the relevant record be summoned from Bombay 'through special messenger on payment of diet money and necessary expenditure to be paid by the accused within three days.' On this date of hearing Chet Ram, Record Keeper was also present and he was discharged. However, the petitioner was directed to pay Rs. 25/- as diet money to Chet Ram for each day he came to the court.

4. The petitioner now contends that the Magistrate was not justified in asking the petitioner to pay the diet money of the defence witnesses as also to foist the responsibility on the petitioner to serve Des Raj Sood.

5. Chapter XIX of the Code of Criminal Procedure deals with the trials by the Magistrates. Section 243 deals with the evidence for defence. It reads thus:

243. (1) The accused shall then be called upon to enter upon his defence and produce his evidence; and if the accused puts in any written statement, the Magistrate shall file it with the record.

(2) If the accused, after he has entered upon his defence applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing :

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice.(3) The Magistrate may, before summoning any witness on an application under Sub-section (2), require that the reasonable expenses incurred by the witness in attending for the purposes of the trial be deposited in court.

6. Section 312, which is in Chapter XXIV relating to 'General provisions as to inquiries and trials', makes a provision for payment of expenses of any complainant or witnesses. This reads thus :

312. Subject to any rules made by the State Government, any Criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court under this Code.

7. At this stage it may be noticed that the present Section 312 is a reproduction of S, 544 of the repealed Code of Criminal Procedure, 1898. Rules Under Section 544 were framed by the then Punjab Government which find a place in Chapter IX-

A of Vol. III of the Rules and Orders of the Punjab High Court. These Rules and Orders are by operation of law in force in Himachal Pradesh as Rules and Orders of this Court. It is not disputed before me that the rules framed by the Punjab Government were duly adopted by the then Judicial Commissioner of Himachal Pradesh and are, therefore, still in force.

8. Rule 1 of this Chapter reads thus:

1. The Criminal Courts are authorised to pay at the rates, specified below, the expenses of complainants or witnesses- (1) in cases in which the prosecution is instituted or carried on by or under the orders or with the sanction of the Government, or of any Judge, Magistrate, or any other public officer, or in which it shall appear to the presiding officer to be directly in furtherance of the interests of the public service: (2) in all cases entered in column 5 of Schedule II appended to the Code of Criminal Procedure, as not bailable; (3) in all cases which are cognizable by the police; and (4) of witnesses in all cases in which they are compelled by the Magistrate, of his own motion, to attend the court under Section 540 of the Code of Criminal Procedure.

9. It is true that under Sub-section (3) of Section 243 the Magistrate has been given a discretion to ask an accused to pay the reasonable expenses likely to be incurred by the witnesses in attending the court. But then this discretion has to be exercised reasonably. There has to be some reasons why an accused has been asked to deposit the amount. The order asking the accused to deposit the amount cannot be made as a matter of routine as has been done in the present case. No reason has been given by the Magistrate for asking the accused to deposit the expenses to be incurred for summoning the witnesses for the accused-petitioner.

10. While exercising the discretion the Magistrate should have taken into consideration Section 312 of the Code of Criminal Procedure as well as the rules which have been framed under this provision by the State. The rules which have been reproduced above leave no doubt that indeed as a matter of routine the courts are required to pay the expenses of the witnesses who are falling, in the categories mentioned in the rules. The discretion thus, which vests in the Magistrate to ask the accused to pay the expenses, can only be in exceptional

circumstances where the facts disclosed a situation when the accused may be calling a witness in order to cause vexation or delay or for defeating the ends of justice.

11. At this stage another provision of the High Court Rules and Orders Volume III which relates to instructions to criminal courts may be noticed. Rule 14 of Chapter 1-D of this Volume is in the following terms :

14. The Magistrate is bound to cause the production of and hear all witnesses whom the accused desired to call, and to consider any documentary evidence relied on by him. The only exception to this rule is where the Magistrate considers that in naming any witnesses the object of the accused is to cause vexation or delay or to defeat the ends of justice. In case the Magistrate refused to receive any evidence required by the accused, he should record his reasons for such refusal in writing....The Magistrate may, before summoning any witness applied for by the accused, require the accused to deposit reasonable expenses for his attendance. In ordinary warrant-cases, however, the cost of causing the attendance of accused's necessary witnesses is usually borne by Government.

12. These instructions this leave no doubt that it is the duty of the Magistrate to summon the witnesses of the accused at the Government expense.

13. My attention has been drawn by Mr. P, A, Sharma, learned Counsel for the petitioner, to a decision of the Punjab High Court in it Singh Rattan Singh v. The State , where the expenses were directed to be paid by the accused on the simple ground that the accused was in a position to pay such expenses. This order was struck down on the ground that it was no reason to ask an accused to pay the expenses which have normally to be borne by the Government.

14. I would, therefore, quash and set aside the impugned order passed by the learned Magistrate calling upon the petitioner to deposit the expenses of the witnesses summoned by him.