

State Vs. Mohd. Sultan Sheikh.

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Court : Jammu and Kashmir

Decided On : Jul-22-1976

Reported in : 1977CriLJ1109

Judge : Adarsh Sein Anand, J.

Appellant : State

Respondent : Mohd. Sultan Sheikh.

Judgement :

ORDER

Adarsh Sein Anand, J.

1. The following question of law and of general public importance arises for determination in this reference made by the learned Chief Judicial Magistrate, Srinagar:

Whether a person not examined during the investigation by the police under Section 161 Cr.P.C. can be allowed to be produced by the prosecution subsequently at the trial under the provision of Section 251-A (7) Cr.P.C.

For the proper determination of this question, it will be relevant to note some of the salient facts of this case which have given rise to the reference under consideration.

2. In a case State v. Mohd. Sultan Sheikh for an offence under Section 304-A.R.P.C. the prosecution cited five witnesses including two eye witnesses in its calendar of witnesses. During the examination of one of the eye witnesses, by name Haji Ghulam Ahmad Najar, it transpired that person by name of Mushtaq Ahmad was also present at the time of the occurrence and had witnessed the occurrence. The prosecution on the very first day of hearing, made an application before the trial court praying that it may be allowed to adduce additional evidence in the case. That application was not disposed of on that day but was posted for orders on the closing of the prosecution case. The learned trial court, by its order dated 5-8-1975, rejected the said application made by the prosecution. Aggrieved against the order of the learned trial Judge rejecting the prayer of the prosecution to adduce additional evidence in the case, the State went up in revision to the learned Chief Judicial Magistrate, Srinagar, who vide his order dated 21-2-1976, has recommended to this Court that the prosecution be allowed to adduce additional evidence and the order of the Magistrate rejecting the prayer be quashed.

3. I have heard Mr. Malik, the learned Addl. Advocate General, for the State and Mr. Bashir, the learned Counsel for the accused-respondent.

4. The learned Counsel for the accused-respondent has vehemently argued that the witnesses who are sought to be produced now by the prosecution were never examined during the investigation by the police and, therefore, they may not be allowed to be examined at the trial because the accused would be seriously prejudiced for he would not be able to confront the witnesses with their earlier statements recorded since, there were no earlier statements. It has been submitted that the provisions of Section 162 Cr.P.C. which grant the right to the accused to confront the witnesses with their earlier statements made under Section 161 Cr.P.C. is a valuable right and that right should not be allowed to be taken away. The learned Counsel has placed reliance, in support of this submission, on Noor Khan v. State of Rajasthan : 1964 CriLJ167 wherein it has been laid down by their Lordships that the provisions relating to the record of the statements of the witnesses and the supply of copies of the same to the accused so that they may be utilized at the trial for effectively defending himself cannot

normally be permitted to be whittled down. It was also held, that the object of the provision is manifestly to give the accused the fullest information in the possession of the prosecution, on which the case of the State is based, and the statements made against him. However, in the said Supreme Court authority it was also found that since no prejudice, on the facts of the case, had been caused to the accused by the failure of the prosecution to supply copies of the statements of the witnesses recorded under Section 161 Cr.P.C. the conviction recorded by the High Court was proper.

5. The learned Counsel has then placed reliance on a judgment of this Court in *Dharampal v. State*, 1974 JK LR 314 wherein it was held by my learned brother Mufti Bahauddin Farooqi J that:

So read it must, therefore be held that the prosecution is not debarred from producing any witness or document at the inquiry or trial even if such document or witness is not mentioned in the list of witnesses and documents filed with the report under Section 173 Cr.P.C. provided that the additional document or witness is relevant and provided, further that a copy of the document or of the statement of the witness, if recorded by the police, is made available to the accused.

6. On the basis of these authorities, it is submitted that the prosecution cannot examine a witness who has not been examined during the investigation by the police. Reference was also invited to the provisions of Sections 251-A (7) and 173(4) Cr.P.C. These shall be discussed in the subsequent part of this order.

7. Mr. A. K, Malik, the learned Addl. Advocate General, has on the other hand submitted that the very question which is before the court, came up for consideration in Calcutta High Court in *State v. Jagadish Pandey* : AIR1958 Cal311 and therein it was held as follows:

Under Section 173(4) the prosecution is not prevented from calling any witness at the trial who has not been examined by the police or whose statement has not been recorded by them under Section 161 of the Code, It was not the intention of the legislature to shut out relevant evidence by enacting Sub-section (4) of Section 173 of the Code. The purpose might have been to benefit the accused by giving

him in advance, copies of the documents and statements referred to in the sub-section; but that could not possibly have the effect of preventing the prosecution from calling other competent evidence at the trial....

The language of Sub-section (7) of Section 251-A is purposely wide so as to enable the prosecutor to produce all such evidence as may be produced in support of the prosecution. If the words 'all such evidence' in the sub-section were to be read as meaning only such evidence as relates to those of persons who have been examined by the police, it will be reading into the sub-section something which is not there. Sub-section (4) of Section 173 does not control Sub-section (7) of Section 251-A of the Code. Moreover, a Magistrate in the discharge of his judicial functions must always be left free to exercise his discretion in the matter of allowing parties to produce evidence.

8. Reliance is also placed on State v. Baikunthanath Mohanta AIR 1960 Cri 150 : 1960 Cri LJ 1231 wherein it was held that the provisions of Section 173(4) Cr.P.C. are only directory and even after the commencement of the trial, the prosecution may prove additional documents in the usual way, provided the accused gets a full opportunity to cross examine the prosecution witnesses in the light of those documents. On the basis of these authorities, the argument of Mr. Malik is that the prosecution has the right to examine the witnesses who were not examined during the investigation. The learned Addl. Advocate General has submitted that the said right of the prosecution cannot be curtailed in the absence of any express provision in the Code to that effect. It is further contended that the only right which an accused has is to be afforded proper opportunity to cross examine those witnesses and that opportunity would not be denied to the accused petitioner at the trial.

9. I have given my anxious consideration to the respective contentions raised by the learned Counsel for the parties, and have also perused the well considered order of the learned Chief Judicial Magistrate, Srinagar.

10. In the Supreme Court authority AIR 1964 SC 286 : 1964 (1) Cri LJ 167 (supra) their Lordships have only laid down that an accused is entitled to receive copies of the statements recorded by the police under Section 161 Cr.P.C. Their Lordships

were not considering the question whether a witness who was not examined during the investigation can be allowed to be examined or not at the trial. There cannot be any quarrel with the proposition laid down by their Lordships, that if, during the investigation, the statement of a witness has been recorded under Section 161 Cr.P.C. the prosecution is under an obligation to supply its copy to the accused before the commencement of the trial and such a copy may be withheld only in 'exceptional circumstances.' But it has not been held that the prosecution is debarred from examining witnesses who were not examined during the investigation. The Supreme Court authority would not, therefore, in my opinion, be applicable to the question under consideration of this case. Coming now to the authority of our own High Court in *Dharam Pal v. State*, 1974 J&K; LR 314 (supra) relied upon by the learned Counsel for the accused, it would be relevant to point out that the said authority does not lend any support to the case of the petitioner either in that authority, it has been held in unequivocal terms that the prosecution is not debarred from producing any witness at the inquiry or trial even if such a witness is not mentioned in the list of witnesses filed under Section 173 Cr.P.C. The only proviso added is that the evidence of such a witness should be relevant and provided further that a copy of the document or of the statement of the witness, if recorded by the police, is made available to the accused. This Judgment, therefore, recognises the right of the prosecution to examine a witness not examined during the 'investigation' at the trial and goes on to state that if the statement of the witness has been recorded by the police earlier, the copies of the same must be supplied to the accused person before the commencement of inquiry or trial, It has not been laid down, as is contended by the learned Counsel for the accused respondent, that if the witness has not been examined by the police he cannot be produced at the trial. This authority does not, therefore, support the contention of the accused respondent.

11. The view expressed by the Calcutta High Court in AIR 1958 Cal 311 : 1958 Cri LJ 863 (supra) appears to be the correct view. It has been clearly laid down in the said authority in the passage quoted in the earlier part of this judgment, that the prosecution is not debarred from examining a witness whose evidence is relevant even if he was not examined by the police during the investigation.

Section 251-A (7) Cr.P.C. reads as under:

On the date so fixed the Magistrate shall proceed to take all such evidence as may be produced in support of the prosecution.

Provided that the Magistrate may permit the cross-examination of any witness to be deferred till any other witness, or witnesses have been examined, or recall any witness for further cross-examination.

12. A bare reading of the sub-section shows that the court is required to take all such evidence "as may be produced in support by the prosecution." The words 'all such evidence cannot be confined to mean only such evidence as has already been examined by the police. To hold otherwise, would in my opinion, be doing violence to the section and reading something into the section which the legislature never intended. The legislature could never have intended to shut out material and relevant evidence to be examined at the trial only because the investigating officer, due to his negligence, carelessness or otherwise, failed to examine that evidence during the investigation. Whereas it is the right of an accused to have proper and full opportunity to defend himself, it is also the right of the prosecution to have a fair opportunity to establish its case and that right cannot be made subservient to the whims and caprices of an investigating officer.

13. The argument that unless the copy of a statement of a witness recorded under Section 161 Cr.P.C. is made available, such a witness cannot be examined and, therefore, a witness who was not examined under Section 161 Cr.P.C. cannot be allowed to be produced, in view of the language of Section 173(4) Cr.P.C. to my mind, is not sound. The right of an accused person to receive copies of the earlier statements of the witnesses can only be confined to the cases where such earlier statement had been recorded by the police and cannot be stretched to imply that, if the police has not recorded the statement of a witness during the investigation, the prosecution cannot produce such a witness at the trial. Neither Section 251-A (7) Cr.P.C. noticed above, nor Section 173(4) Cr.P.C. permit of any such limitation. Section 173(4) provides.

After forwarding a report under this section the officer-in-charge of the police station shall, before the commencement of the inquiry or trial, furnish or cause to be furnished to the accused, free of cost, a copy of the report forwarded under Sub-section (1) and of the first information report recorded under Section 154 and of all other documents or relevant extracts thereof, on which the prosecution proposes to rely, including the statements and confessions, if any, recorded under Section 164 and the statements recorded under Sub-section (3) of Section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

The object behind this sub-section is to give benefit to the accused by giving him an advance copy of the statement of the witness examined during investigation and nothing more than that. It cannot possibly be read to have the effect of preventing the prosecution from calling other competent evidence at the trial, which comes to its notice subsequent to the completion of investigation by the police.

14. As a result of the above discussion I would hold that a witness though not examined during investigation by the police under Section 161 Cr.P.C. can still be allowed to be produced by the prosecution at the trial under Section 251-A (7) Cr.P.C. provided the evidence of such a witness is relevant.

15. In this view of the matter, for the reasons stated above and also for the valid reasons assigned by the learned Chief Judicial Magistrate, Srinagar, I would accept this reference and quash the order of the learned trial court dated 5-8-1975, and grant the application of the prosecution to adduce additional evidence as that evidence has been opined to be relevant. I must, however, make it clear that the value to be attached to the evidence of the witness so produced, shall have to be judged independently by the court and by agreeing with the learned Chief Judicial Magistrate that the said evidence is relevant and should be allowed to be adduced at the trial, I should not be taken to have expressed any opinion on the veracity, value or truthfulness of that evidence.

16. The parties through their learned Counsel are directed to appear before the learned trial court on 20th August, 1976, when the learned magistrate shall proceed further in accordance with law.

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