

Nasir Mohd. Vs. State

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Court : Jammu and Kashmir

Decided On : Apr-08-2005

Reported in : 2006CriLJ635,2006(2)JKJ56

Judge : Nirmal Singh and; Y.P. Nargotra, JJ.

Acts : Ranbir Penal Code (IPC), 1989 Svt. - Section 302; ;Code of Criminal Procedure (CrPC) , 1989 - Sections 157, 161, 311, 342 and 540

Appeal No. : Cr. A. No. 25 of 2000

Appellant : Nasir Mohd.

Respondent : State

Advocate for Def. : A.S. Dogra, Dy. A.G.

Advocate for Pet/Ap. : D.S. Saini, Adv.

Disposition : Appeal dismissed

Judgement :

Y.P. Nargotra, J.

1. The accused-appellant who was the husband of deceased, Amina, who succumbed to the injuries in-flicted upon her in the land/field belonging to father of the accused situate at village Hill Mohra,/Tehsil Mahoore on 11-4-1997, was

charged and tried for commission of her murder in the Court of Addl Sessions Judge Reasi. Learned Addl. Sessions Judge by his judgment dated 15-11-2000 convicted the appellant Under Section 302 RPC and sentenced him to undergo imprisonment for life with a fine of Rs. 1000/- and in default of payment of fine to suffer further simple imprisonment for three months. Aggrieved by the conviction and sentence the accuseds appellant has come in appeal whereas learned Addl. Sessions Judge has made a reference for confirmation thereof. The appeal and the Criminal Reference are being taken up together for disposal.

2. The case of the prosecution before the trial Court was that Talib Hussain, father of the accused, was in possession of State land which he had encroached upon. He sold that land to Gania, Ali and Dilhi but the deceased, wife of the, accused, was opposed to the sale transaction. Two other sisters of the deceased, Mst. Phoolan, PW 2 and Gulzar Begum, PW 3 were also married to other two brothers of the accused namely Abdul Gafoor and Jan Mohd. On the day of occurrence it is alleged that a quarrel between the accused and the deceased over the issue of the land took place. The purchasers of the land were bringing the land under plough. During the quarrel between the two the deceased left the house and ran towards the said land. The accused followed the deceased. When the deceased and the accused had left the house the father of the accused asked PW 2, Mst. Phoolan to go after them for bringing them back to the house. PW 2 when reached on the spot she found the deceased Mst. Amina lying in an injured condition on the ground. The accused with an axe in his hand was found standing nearby. She started wailing and then accused ran away from the spot. PW Siraj Din who is the informant was returning to his house after his Friday prayers through the forest near Dhara of Talib Hussain, the father of the accused, heard some noise, so he went on spot and saw the deceased lying there on the ground in an injured condition and by her side PW 2 was crying. The deceased was having a deep injury on her head and within few moments she breathed her last. Having seen this he went to Police Post Chasana on 12-4-1997 at 10 A. M. and lodged a written report Ex PW 1 and in sup-port thereof also stated that it was a far' flung area and because of darkness after staying for the night in the way he could come to the Police Post in the morning. The report was entered as report No. 5 in the DDR dated 13-4-1907 and copy of the same was sent to Police Station Mahore.

On receipt of copy of the report FIR No. 47/97 was registered at the police station on 1374-1997 at 750 hours for commission of offence Under Section 302 RPC. Copy of the FIR was forwarded to the Court of Judicial Magistrate Mahore where it was received on 17-4-1997 at 12 A.M. As no senior officer was available in the police station investigation into the case was commenced by Abdul Hussain HGC PW 14. During the course of investigation body of the deceased was seized and postmortem got conducted. From the scene of occurrence plain and bloodstained earth was seized, the wearing apparel of the deceased were also seized and the accused was arrested. After postmortem the dead body was handed over to PW 4, father of the deceased, for conducting her last rites. On 21-4-1997 the accused while being in custody made disclosure statement Ex PW HN in presence of PW 1 Siraj Din and one Ghulam Nabi and disclosed therein that he had concealed the axe; with its handle in the forest of Mohrahill under the stones in a Kassi. Pursuant to the disclosure statement at the instance of the accused axe, the weapon of offence, was recovered by the police and seized vide seizure memo Ex PW HN/Z in presence of PW Siraj Din and one Ghulam Nabi. After the seizure the weapon of offence and other articles were sent for forensic examination. Statement of the witnesses Under Section 161, Cr.P.C. were also recorded PWs 9 & 10 namely Lateef and Sardar Mohd stated about the extra-judicial confession of the accused. After completion of investigation a charge sheet Under Section 302, RPC was instituted in the Court of Judicial Magistrate Mahoore on 31-5-1997 who committed the case for trial to the Court of learned Addl. Sessions Judge Reasi in view of nature of the offence involved, being exclusively triable by the Court of session. Learned Addl. Sessions Judge by his order dated 13-8-1997 charged the accused Under Section 302, RPC for having committed the murder of deceased Amina with the axe blow inflicted by him. The accused pleaded not guilty, hence the prosecution was directed to lead evidence. Prosecution examined PWs. 1 to 6 namely Siraj Din, Mst. Phoolan, Mst. Gulzar Begum, Ali Mohd., Dil Mohd. and Chandia as witnesses of the occurrence. It also examined PW 9 & 10 Mohd. Lateef and Sardar Mohd. for proving the extrajudicial confession of the accused. Other witnesses PWs Surjeet Singh, Krishan Chand Patwari, Mohanlal Sharma Tehsildar and the Investigating Officers, Abdul Hamid and Ch. Haqnaswaz, besides Dr. Bachitter Singh, who had conducted autopsy on the dead body of the

deceased were also examined.

3. After closure of the prosecution evidence, statement of the accused was recorded Under Section 342 Cr. P.C. in which he put forth simple denial and entered the defence and examined three defence witnesses for propounding the story that the deceased had climbed upon a tree for cutting the branches wherefrom she fell down on stones and sustained injuries, resulting into her death. Learned Trial Court rejected the story of the defence and accepted, the evidence of the prosecution and convicted and sentenced the accused as aforesaid by mainly relying upon the evidence of PW 2 Mst. Phoolan.

4. We have heard the learned Counsel for the parties and perused the record of the case thoroughly.

5. Undisputedly the deceased has died unnatural death. PW 12, Dr. Bachitter Singh, who conducted the postmortem on the dead body of the deceased found the following injuries on the body of the deceased :--

1. An incised wound on right middle 3rd and anterior 3rd of neck 5' x 1' and bone underneath the wound had comminuted fracture running towards right eye and towards left side crossing anterior 3rd of vertex. Brain substance extruding out of the wound and the shawl on the body was stained with brain substance. Extra dural haematoma on injured bone wound and on opposite side, also;

2. Communitated fracture of scalp just anterior to right ear, right side eye was full of blood;

3. Fracture of anterior cranier fossa.

6. In the opinion of the doctor the cause of death of the deceased was stoppage of vital function secondary to extra dural haematoma and protrusion of brain substance out of the incised wounds. The defence of the accused was that though death of the deceased was unnatural it was not homicidal but accidental. We have been led through the evidence of the parties tendered during the trial by learned Counsel for the appellant meticulously.

7. The FIR in the case was lodged by one Siraj Din. He has proved Ex PW1 in which he has stated that when he arrived on spot, he saw Mst. Amina deceased in an injured condition. PW 2 Phoolan was crying on her side. The deceased was having deep injury on her head and within few moments she succumbed to the same. Some body had committed her murder with the blow of axe. He however stated in his testimony before the Court that PWs 2 & 3 Mst. Phoolan and Gulzar Begum were seen by him near the dead body of the deceased. He was also a witness to the disclosure statement of the accused and consequent discovery of the weapon of offence but in his testimony he has denied to have witnessed the disclosure and recovery. He was declared hostile and subject to cross-examination by the prosecution but nothing material Could be elicited out from him.

8. PW 2 Mst. Phoolan is the star witness of the prosecution. She has stated that her father-in-law namely Talib Hussain and the accused had sold land to Ganaia and others but the deceased was opposed to the transaction which led to a quarrel between the accused and the deceased. The deceased left the house and rushed towards the land throwing a challenge to the accused and the accused followed her. Her father-in-law told her to search them out and bring them back. When she reached the spot she found the deceased lying on the ground in an injured condition. She had sustained an axe blow on left side of her head and her face was covered with blood. The accused was standing nearby. She started crying and the accused escaped with the axe. Thereafter Alia, Dilhi, Ganai, Lateef and Sardar Gujjar arrived on spot. The deceased succumbed to her injuries on spot. She and the above witnesses sat near the body of the deceased. The parents of the accused also arrived. Siraj Din and father of the accused went to Police Post for lodging the report. She further stated that she had seen the axe in the hand of the accused.

9. PW 3 Mst. Gulzar Begum who is the sister of the deceased and PW-2 Mst. Phoolan is a hostile witness/She has Stated that the deceased Amina had fallen from a tree 1-1/2 year before and died. She was accompanied by Mst. Phoolan.

10. PW 4 Chandiya, the father of the deceased deposed that on 1st of Baisakh of previous year there was a quarrel between the accused and his father regarding sale of land. He went on sport after hearing the noise. He found his daughters, Gulzar and Phoolan besides Sardar Mohd. and Bhagu cm spot. His daughter was lying on the ground with axe blow on her head. The accused was not present on spot. Siraj Din and Sardar1 Mohd. left for police station to lodge the report. Police came on spot on the following day and seized the dead body and gave it to him for burial.

11. PW5 Ali Mohd. @ Alia, is another hostile witness and has deposed that while he was returning after offering Friday prayers he found Phoolan and Gulzar offering water to a girl who was lying on the ground under a tree. Gulzar asked him to inform her mother Mst. Hasina. Amina died on the same day. The accused was not there.

12. PW 6 Dil Mohd. also a hostile witness deposed that he found Phoolan and Gulzar wailing and crying. They were saying that their sister died due to fall from a tree. He found the deceased lying on the ground with her head facing the soil. The girl had sustained head injury and had fallen from a very high tree.

13. The version of the occurrence given by PW Phoolan in her evidence has remained unchallenged in the cross-examination. No suggestion has been put to her by the defence about the possibility of the death of the deceased by fall from a tree. The accused also has not taken up such specific plea of defence in his statement Under Section 342 Cr. P. C. It is only the defence witnesses and PW 3 Gulzar Begum who have put up a parallel story about the occurrence. Learned Counsel for the appellant has argued that statement of PW 2 Mst. Phoolan cannot be believed being in contradiction to the version of Mst. Gulzar Begum PW 3 and PW 6 Dil Mohd. He argued that PW 2 Phoolan has made a false statement in order to falsely implicate the accused in the murder of her sister. According to Mr. Saini the deceased died due to fall from a tree. The evidence of PWs Gulzar Begum and Dil Mohd. is truthful and merits to be relied upon over the evidence of PW Phoolan for the reason that evidence of PW. 2 has not been corroborated by the other prosecution witnesses. He further submitted that there is no eye witness

to the occurrence i.e. to say that no witness has claimed to have seen the accused actually inflicting axe blow on the head of the deceased. According to Mr. Saini the parallel version of the occurrence given by PW 3 Gulzar Begum. Which finds corroboration from the evidence of PW 6 Dil Mohd. is sufficient to make the version of PW 2 Phoolan doubtful.

14. Per contra Mr. Dogra, learned Dy. A.G. submits that the evidence of PW 2 Phoolan is the truthful count of the occurrence. It finds due corroboration from the evidence of PW 12 Dr. Bachitter Singh and merits full reliance. The version given by PW 3 being that of a hostile witness is not required to be believed.

15. Prosecution has not led any direct evidence against the accused in the case as there is no witness available who has claimed that he saw the accused inflicting axe blow on the head of the deceased. The prosecution is seeking to prove its case by circumstantial evidence. It is no longer res-integra that a conviction can be recorded on the basis of circumstantial evidence. The Apex Court has consistently laid down that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person (See *Hukam Singh v. State of Rajasthan* : 1977 CriLJ639 , *Eradu v. State of Hyderabad* : 1956 CriLJ559 , *Erabhadrapa v. State of Karnataka* , *State of U.P. v. Sukhbhasi* : 1985 CriLJ1479 , *Balwinder Singh v. State of Punjab* : 1987 CriLJ330 and *Ashok Kumar Chatterjee v. State of MP* : 1989 CriLJ2124 . The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram v. State of Punjab* : AIR 1954 SC621 it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt. In *Padala Veera Reddy v. State of AP* : AIR 1990 SC79 it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests :--

- (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (3) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused¹ and none else; and
- (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

16. PW 2 Phoolan's presence on spot is admitted even by the hostile witnesses, so same cannot be doubted. She has claimed that she reached the spot on the asking of her father-in-law to go after the deceased and the accused who had left the house one after the other and bring them back. Her presence in the house of her father-in-law in which she was living along with her husband and in which the deceased and the accused were also living on the date of occurrence is natural. Therefore, if something happened in the house she is expected to have knowledge of the same in the natural course of things. She has deposed that in the house a quarrel took place between the accused and the deceased over the sale of land by her father-in-law to Gania and others. Her evidence on this account has not been challenged by the accused in her cross examination or by any other evidence led by the prosecution or the defence. Therefore her evidence to this effect merits acceptance. From her unchallenged version it stands conclusively established that the deceased and the accused had a quarrel in the house during which the deceased ran towards the land which was the cause of the dispute and was followed by the accused. PW 2 Phoolan's evidence that she was asked by her father-in-law to go after the deceased and the accused for getting them back in the house also stands conclusively established. There being no challenge to her version in the cross-examination, moreso, when her presence on spot is admitted by all the witnesses of the occurrence namely PWs Siraj Din, Gulzar Begum, Dil

Mohd, Ali Mohd. and Sardar Mohd. The prosecution, therefore, has cogently proved the fact that after going after the deceased and the accused she reached the scene of occurrence. PW 2 Mst. Phoolan has claimed that when she reached the spot she saw the deceased lying in an injured condition with head injury and the accused was standing near her with an axe in his hand.

17. PW 12 Dr. Bachitter Singh in his evidence has testified that the injuries found on the body of the deceased could be caused by the axe blow, Ex PM1. Thus also it cannot be disputed that the fatal injury was possible by the axe blow. This circumstance also stands cogently established.

18. PW3 Gulzar Begum, a hostile witness, and as already said, has set up a parallel story that the deceased died due to fall from a tree. She in her examination-in-chief has only made a stray statement giving shaky account of the occurrence. It is only on being cross-examined by the defence that she has stated that the deceased fell from a tree and her head hit a stone, which resulted in her death. PW1 Siraj Din who is also a hostile witness has stated that when he was returning after Friday prayers he found Mst. Phoolan and Gulzar Begum on spot offering water to the girl lying on the ground under a tree. PWs Dil Mohd and Sardar Mohd also hostile witnesses have claimed that on spot they found two girls by the side of the deceased who were saying that their sister had died due to fall from a tree. The evidence of the defence witnesses is in tune with the version of the aforesaid hostile witnesses. What is evidentiary value of evidence of a hostile witness? In a criminal prosecution when a witness is cross examined and contradicted with the leave of the Court by the party calling him, his evidence cannot as a matter of law be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process the credit of the witness has not been completely shaken he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case the whole of the testimony of the witness is impugned, and in the process the witness

stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence. (See Satpaul v. Delhi Administration : 1976 CriLJ295 and AIR 1933 J&K; 41. In : 1977 CriLJ173 R. K. Dey v. State of Orissa, the Apex Court has observed :

It is also clearly well settled that the mere fact that a witness is declared hostile by the party calling him and allowed to be cross examined does not make him an unreliable witness so as to exclude his evidence from consideration altogether. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence.

In : 1981 CriLJ1034 , State of U.P. v. Shahai their lordships of the Supreme Court has observed :--

Where a particular witness was disbelieved by the trial Court as he was declared hostile, it was not open to the High Court to have distrusted the testimony of some stray statements made by that particular witness whose evidence also, if properly appreciated, did not disprove the presence of one of the witnesses at the spot where the occurrence took place.

19. In the present case presence of PW 2 Phoolan has been admitted even by the hostile witnesses. Her testimony has been relied upon by the trial Court. PW3 Gulzar Begum has made only a stray statement giving sketchy account of the occurrence. We have gone through her evidence and the evidence of the other witnesses supporting the parallel story. We do not feel inclined to believe the parallel sketchy story especially when the account of occurrence put forth by these witnesses in categorical terms is that the deceased sustained the fatal Injury after falling from a tree. The testimony of PW 2 appears to us to be fully trustworthy and reliable the corroboration to which is duly provided by the medical evidence. The possibility of the, deceased having sustained injury by a fall on a stone is completely ruled out from the nature of the injuries sustained by the deceased. The parallel story has not been put by the defence to the doctor for obtaining expert opinion about the possibility of sustaining injuries by the deceased by falling on stones from a tree. There is no medical evidence available to support the version of hostile witnesses. Therefore the story put forth by PW 3 Gulzar Begum

and supported by other witnesses, including the defence witnesses is not acceptable to us and is thus rejected.

20. Now the prosecution during the trial also sought to prove the fact of the accused making a disclosure statement and recovery of weapon of offence in pursuance of the disclosure statement. Two witnesses who witnessed the disclosure and recovery were PWs Siraj Din and Ghulam Nabi. Ghulam Nabi has not been examined. Only Siraj Din has been questioned about the disclosure and discovery. He has not supported the prosecution. The only evidence which has supported the disclosure and recovery of weapon of offence at the instance of the accused is that of the I.O. which in absence of corroboration from attesting witnesses we are not inclined to accept. Learned Trial Court also has not accepted the same. Prosecution thus has failed to prove the disclosure statement of the accused and recovery of weapon of offence at his instance.

21. From the aforesaid discussion we find that the prosecution has succeeded cogently, conclusively, consistently and completely proving the circumstance that there was a quarrel between the accused and the deceased in the house of the accused over sale of land by father of the accused. The prosecution has also proved that during the quarrel the deceased left the house and ran towards the land which was the cause of the quarrel followed by the accused on which the father-in-law of the deceased asked PW 2 Phoolan to go after them and get them back. When PW 2 reached the spot she saw the deceased lying in an injured condition on the ground and besides her was standing the accused with an axe in his hand. By the medical of PW 12 Dr. Bachitter Singh the prosecution has proved that the deceased died because of the injury caused by an axe blow on her head. Once the presence of the accused on spot with axe in his hand is proved it was for the accused to explain what he was doing there with an axe in his hand. The accused has not rendered any explanation; therefore, the only inference which is possible from the aforesaid circumstances, is that it was the accused alone and none else who was responsible for the injury caused with the axe blow on the head of the deceased.

22. Learned Counsel for the appellant submits that the accused had no motive to kill the deceased because he too was opposing the sale of land by his father to Ganai and others as the deceased was opposing the same. According to Mr. Saini in absence of motive the circumstantial evidence cannot be made basis for his conviction. In the first place we are not in agreement with learned Counsel. Men do not act wholly without motive. Failure to discover motive of offence does not signify non-existence of the crime. Failure to discover motive by clinching evidence may be a weakness for the proof of the case but not necessarily fatal as a matter of law. Proof of motive is never an indispensable factor for conviction. Where there is clear evidence that a person has committed the offence it is immaterial that no motive for commission of the crime has been shown. Therefore even in the case of circumstantial evidence absence of motive which may be one of the strongest links to connect the chain would not necessarily become fatal provided other circumstances would complete the chain and connect the accused with the commission of offence leaving no room for reasonable doubt from the proof of circumstances. In the present case the prosecution has established that a quarrel took place between the accused and the deceased over sale of land by the father of the accused. There is no evidence available so as to show as to what actually was stated by the accused or the deceased during the quarrel. The fact of existence of quarrel however by itself provides motive to the accused for killing the deceased. Therefore, we do not find any merit in this contention and reject the same.

23. Learned Counsel for the appellant has further contended that case of the prosecution is doubtful as there is unexplained delay in lodging the FIR. The occurrence took place on 11-4-1997 and report was lodged at Police Post Chasana by PW1 Siraj Din on 12-4-1997. While lodging the report PW 1 explained the cause of delay by saying that he could not reach Police Post in the evening of 11-4-1997 due to the distance involved. This witness has not been questioned on this aspect of the matter. Therefore the explanation given by the informant at the time of lodging the FIR has been accepted by the defence. The defence thus cannot raise the plea of delay in lodging the FIR.

24. Mr. Saini further argued that the FIR being registered in Police Station Mahore on 13-4-1997, copy of the same was forwarded to Judicial Magistrate Mahore and the same was received there on 17-4-1997 i.e. after four days. He submits that delay in forwarding the copy to the magistrate is fatal to the case and makes the story of prosecution doubtful. We are not in agreement with learned Counsel for the appellant. Section 157, Cr. P. C. makes it obligatory upon the I. O. to send a report of the commission of offence to the Magistrate empowered to take cognizance of such offence upon police report forthwith which means that the report must be forwarded without any inordinate delay. The delay is inordinate which has not been explained. Question of explaining delay comes only when the defence seeks explanation during the trial. In case where the I.O. is not questioned to explain the delay in sending the report to the magistrate it cannot be said that the delay caused was inordinate and unexplained. The failure of the defence to cross-examine him on the point of delay bars it from taking such plea for challenging the version of the prosecution case. In the present case admittedly no question has been asked to the I. O. for explaining the delay. Had he been asked, possibly he may have explained the cause of delay. In the absence of such cross-examination the defence cannot be permitted to raise the plea of delay for attacking the story of the prosecution. The delay per se is not fatal to the case of the prosecution. It may assume importance in the circumstances of the case if same remains unexplained. Therefore, there is no force in this contention of the learned Counsel for the appellant also.

25. Learned Counsel for the appellant has also contended that version of PW 2 Phoolan could not be relied upon for the reason that she was not recalled for re-examination despite her making application in this behalf by submitting before the Court that she had made her earlier statement under police pressure and had not disclosed the truth. Learned trial Court has rejected this prayer of the witness. The power to recall a witness for Cross-examination or re-examination is vested in a criminal Court Under Section 540, Cr. P. C. The section reads as follows :--

Any Court may, at any stage of any inquiry, trial or other proceedings under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already

examined; and the Court shall summon and examine or recall and re-examine any such persons if his evidence appears to it essential to the just decision of the case.

26. From a bare perusal of the section it is manifest that Section is in two parts first part vests discretion in the Court for summoning any person as a witness or examine any person in attendance though not summoned as witness or recall or re-examine any person already examined, whereas the second part makes it mandatory upon the Court to summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case. In case titled *Jamatraj v. State of Maharashtra* : 1968 CriLJ231 it has been held as follows :--

The Section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word 'may' in the first part and of the word 'shall' in the second firmly establishes this difference. As the section stands there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bona fide of the opinion that for the just decision of the case the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution. There are however two aspects of the matter which must be distinctly kept apart. The first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoner brings forward something suddenly and unexpectedly. There is however, the other aspect namely of the power of the Court which is to be exercised to reach a just decision.

27. In : 1970 CriLJ9 , titled *Husain Umer v. Dalipsingh*, question of recalling a witness who had already been examined arose for consideration. PW All in that case was examined as a witness and his cross-examination was completed on 4-9-1961. On 6-3-1962 and again on 21-6-1962 the defence applied for recalling him for cross-examination: The request was declined; The defence had submitted before the Court for seeking recall that witness was repentant and wanted to say that his version given in his testimony recorded in the Court was false and he wanted to give true version. Their lordships held :--

According to the defence Ali was repentant and wanted to say that he had given false evidence. In our opinion no ground was made out for recalling Ali. There was no affidavit from Ali nor was there any other material showing that his testimony was incorrect in any material particular. The Court has inherent power to recall a witness if it is satisfied that he is prepared to give evidence which is materially different from what he had given at the trial. In this case there was no material upon which the Court could be so satisfied. The learned magistrate rightly disallowed the prayer for recalling Ali.

28. In : 1991 CriLJ1521 . Mohanlal Shamji Soni v. Union of India the Apex Court observed as follows :--

It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish his respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. It is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness' or recall or re-examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated. The very usage of the words such as 'any Court', 'at any stage' or 'of any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that this section is expressed in widest possible terms and do not limit the discretion of the Court in any way. However, the very width requires a corresponding caution that the discretionary power should be Invoked, as the exigencies of justice require and exercised judicially with circumspection and

consistently with the provisions of the Code. The second part of the section does not allow for any discretion but it binds and compels the Court to take any of the aforementioned two steps if the fresh evidence to be obtained is essential to the just decision of the case.

29. It thus stands fairly settled that powers of the Court for recalling a witness who has already been examined are very wide and vast. The wider the power more the caution' should be the rule In exercising power vested Under Section 540, Cr. P. C. in the criminal Court. While being called upon to recall a witness whose examination has already been completed, before exercise of such power the Court must be satisfied that the request is bona fide and the purpose for which the request has been made is for advancing the cause of justice. Such satisfaction must be drawn from the material, which may be placed before the Court for justifying the recall of the witness. For entertain-ing the request of the defence or of the prosecution witness already examined, for his recall the Court must act with great care and caution. The Court must satisfy itself about the genuineness of the request. Possibility of such witness being won over or being under the threat of the accused must also be kept in view. Merely on the asking of the defence or prosecution witness whose statement stands recorded such witness should not be recalled. The genuineness of the request would depend on the material produced in support of the application to indicate that some material evidence necessary for the just decision of the case has been left out and for bringing that evidence on record further examination of the witness who stands already examined is necessary. Where an examination of a witness stands concluded and after some time either such witness or the accused applies to the Court for his recall on the ground that in the statement of the witness he has not given the truthful account the Court must not recall the witness unless it is satisfied that the cause for not speaking the truth by the witness at the time of his examination is sufficient and reasonable. Some material on the sufficiency of the cause must be produced before the Court. In the present case the application was filed by PW2 after about three years of conclusion of her examination. In the affidavit filed she has stated that she was under the pressure of the police. The reason given is ex-facie unacceptable. If she has the courage of disclosing truth now she could have done the same when she was examined before the Court. It has come in the evidence

that after the occurrence she was thrown out of her in-laws house. The reason for the same is obvious. After all the accused is the real brother of her husband and it could be under his influence she may have filed the application. In the affidavit she has not given any other account of the occurrence to show that she had made untruthful statement in her examination. The trial Court in our considered view was right in declining her recall, in the circumstances of the case.

30. For what has been stated above we find no merit in the appeal. The appeal, is, therefore, dismissed. We uphold the judgment of the trial Court and confirm the conviction and sentence of the accused and accept the Criminal Reference of the learned trial Court. The accused shall serve the sentence imposed.

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