

State Vs. Naresh Kumar

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Court : Jammu and Kashmir

Decided On : Aug-07-2007

Reported in : 2007(3)JKJ258

Judge : Y.P. Nargotra, J.

Appellant : State

Respondent : Naresh Kumar

Disposition : Petition allowed

Judgement :

Y.P. Nargotra, J.

1. After investigating F.I.R No. 64/2002 registered for the commission of the offences under Sections 302/34 RPC and 4/25 Arms Act, the police filed the charge sheet against three accused, namely, Jatinder Singh, Yash Pal and Naresh Kumar in the Court of learned Chief Judicial Magistrate, Udhampur. Out of three accused, two were produced in custody. Regarding the third accused Naresh Kumar, a statement was made for initiating proceedings under Section 512 Cr. P.C. as he had absconded. The learned Chief Judicial Magistrate leaving that matter for the Sessions Court to decide committed the case.

2. The learned Sessions Judge, Udhampur proceeded against accused Naresh Kumar under Section 512 Cr.P.C. and framed the charges against the two accused in attendance and tried them for commission of the offences under Section 302/34 R.P.C. and with 4/25 Arms Act and, thereafter, acquitted them of the charges on 23.11.2005. While acquitting the accused in attendance directed for issuance of roving warrants against absconding accused Naresh Kumar.

3. On 29.12.2005 accused Naresh Kumar surrendered before the Session Court and he was sent to judicial lock up, from where he was taken in custody by the police for investigation. After completing the investigation, a supplementary challan was filed by the investigating agency before the learned Chief Judicial Magistrate, Udhampur, who committed the same also to the Court of Sessions. The learned Sessions Judge, Udhampur framed the charges against accused Naresh Kumar on 19.4.2006 and directed the prosecution to lead evidence for proving the charges.

4. Accused Naresh Kumar moved an application that he did not want to cross-examine any witness except the one PW Sham Singh. However, the Public Prosecutor made a statement that as the witnesses examined earlier during the trial of acquitted accused persons had turned hostile, so he did not want to re-examine them against the accused facing trial. Therefore, the evidence of the prosecution was closed. The accused facing the trial also withdrew his application filed for seeking cross-examination of PW Sham Singh. Consequently, after recording the statement of accused Naresh Kumar under Section 342 Cr.P.C. and on his not opting for defence, the learned Sessions Judge posted the case for final arguments by Order dated 21.12.2006.

5. However, after hearing learned Counsel for the parties, the learned Sessions Judge instead of disposing of the case on merits has made this reference thereby recommending the setting aside of order of committal made by the learned Chief Judicial Magistrate and consequent retrial of the accused.

6. The learned Sessions Judge has found that the committal of supplementary challan was only a police report on the basis of further investigation in a pending case, therefore, the learned Chief Judicial Magistrate ought not to have committed

the same. It is true that the police should have produced the supplementary challan before the trial Court instead of committal court, but the fact remains that it was produced before the Chief Judicial Magistrate who committed the same to the Court where it should have been actually filed. Since the supplementary challan had been sent to the competent court, may be on being committed, therefore, no prejudice is caused to any of the parties, the committal order was only an irregularity, which stood cured when the Sessions Court took cognizance thereon.

7. The learned Sessions judge is also of the view that trial of the accused has been vitiated because the witnesses, whose evidence stood preserved under Section 512 Cr.P.C., i.e., the witnesses examined during trial of the acquitted accused, had not been re-examined. The question of re-examination of witnesses would have arisen when the public prosecutor being incharge of the prosecution would have desired to examine them. He could have in exercise of that authority chosen for their examination or could have given them up in view of the quality of their evidence. If the Court was of the view that the evidence of such witnesses should not have been given up by the prosecution, it was vested with the power to recall them under Section 540 Cr.P.C. Merely because the public prosecutor has not examined the witnesses again does not render the trial of the accused invalid.

8. Let us examine the question as to whether it is necessary for the prosecution to re-examine the witnesses, whose evidence has been preserved/recorded in terms of Section 512 Cr.P.C. for tendering their evidence in the trial against the accused, who had absconded after his arrest or after his surrender before the Court. Section 512 Cr.P.C. reads as follows:

Record of evidence in absence of accused.-(1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the enquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or his attendance cannot be procured without an

amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) Record of evidence when offender unknown.-If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court may direct that any Judicial Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence. Any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of Jammu and Kashmir State.

9. From the bare reading of section it is manifest that the object behind the section is to preserve the evidence for being used later on in the trial against the absconding accused after his arrest so as to prevent him from taking the benefit of non-availability of the witnesses due to their death or becoming incapable of giving evidence. The idea underlying the Section 512 Cr.P.C. is to prevent such an accused from taking the benefit of the situation when the prosecution witnesses are dead or have become incapable of giving evidence. Section 512 makes a provision for enabling the committal Court or the trial Court for recording and preserving the evidence of important and material witnesses of the prosecution for being tendered against the accused in the trial after his arrest.

The evidence so recorded and preserved can be validly tendered and read against such accused though recorded in his absence because of his evading arrest and not becoming available for his trial, if the witnesses, whose evidence has been preserved, happen to be dead or incapable of giving evidence or if their presence cannot be procured without an amount of delay, expense or inconvenience which under the circumstances of the case would be unreasonable. The provisions made in Section 512 Cr.P.C. is an exception to the general rule enshrined in Section 353 Cr.P.C, which provides that all evidence shall be recorded in presence of the accused or in presence of pleader/advocate when his personal attendance is dispensed with.

10. Is it necessary for the prosecution to re-examine the witnesses, whose evidence has been preserved, during trial of absconded accused in a case where the witnesses are not dead or have not become incapable of giving evidence or their evidence can be procured without an amount of delay, expense or inconvenience or it would suffice if the accused is given the liberty of cross-examining them? In my considered opinion re-examination would not be necessary and the evidence of such witnesses can be tendered against the accused and read against him after giving the accused an opportunity of cross-examination of such witnesses and with a further opportunity of re-examination to the prosecution, if required. It would not be necessary for the prosecution to produce the witnesses before the trial Court in the trial against such accused for the purposes of chief-examination. The only impediment for reading such evidence against such an accused being that the accused has not cross-examined the witnesses, the right of which he possesses under the provisions of Evidence Act can be validly taken care of by providing the opportunity of cross-examination by recalling such witnesses if the accused so requires. The accused cannot insist that the prosecution should conduct the chief-examination of those witnesses again, whose evidence stands already recorded and preserved. The only right which such an accused would have will be to seek recall of the witnesses for the purposes of cross-examination. In case the accused seeks such recall, the Court is bound to recall such witnesses only for the purposes of cross-examination and re-examination by the accused and the prosecution, even if the witnesses are not dead or have not become incapable of giving evidence or their attendance can be procured without an amount of delay, expense or inconvenience, which in the circumstances of the case would not be unreasonable.

11. However, if by that time when the accused is being put on trial the presence of such witnesses cannot be procured, because they are dead or incapable of giving evidence or their attendance cannot be procured without an amount of delay, expense or inconvenience, which in the opinion of the Court would be unreasonable, then the evidence recorded and preserved in terms of Section 512 Cr.P.C. is to be tendered and read against the accused despite the fact that the same has been recorded in the absence of accused.

12. Thus, the learned Sessions Judge appears to have taken hyper technical view of the matter, which in view of the reasons already stated cannot be sustained.

13. The reference is, therefore, rejected and the learned Sessions Judge, Udhampur is directed to dispose of the case in accordance with law after hearing the prosecution and the accused.

Record of trial Court along with a copy of this order be sent back.

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