

Chhetu Vs. State of Jandk

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Court : Jammu and Kashmir

Decided On : Mar-27-2002

Reported in : 2003(2)JKJ530

Judge : S.K. Gupta, J.

Acts : Jammu and Kashmir Code of Criminal Procedure (CrPC) - Sections 435, 439 and 512; ;Jammu and Kashmir Evidence Act, Svt. 1977 - Section 33; ;RPC - Sections 34 and 302

Appeal No. : Criminal Revision No. 7/2002

Appellant : Chhetu

Respondent : State of Jandk

Advocate for Def. : Sanjay Kakkar, Govt. Adv.

Advocate for Pet/Ap. : Sindu Sharma, Adv.

Disposition : Revision dismissed

Judgement :

S.K. Gupta, J.

1. I have heard Mrs. Sindhu Sharma, Advocate for the petitioners as well as Mr. Sanjay Kakkar, Government Advocate, for the State, in extenso.

2. Through the currency of this Revision, petitioners, Chhetu and Mahantoo, seek the reversal of the orders dated 20.11.2001, 12.12.2001 and 19.1.2002, and quashment of the charge framed against them for offence under Sections 302/34, RPC in case FIR No. 122/1993 entitled State v. Chandu and Ors.

3. Facts relevant from the disposal of this Revision in resuming may be noticed. On a report lodged by Bachetru, Sheebu and Lal Chand on 18.9.1989 to the effect that they had seen the dead bodies of Kamloo and Kaki in a pool of blood with injuries allegedly caused by sharp edged weapon, led to the registration of a case under Sections 302/34, RPC, Police swung into action. On conclusion of the investigation, challan came to be presented before Chief Judicial Magistrate, Udampur on 18.12.1993 against Chand Ram and others under Section 302, RPC, A prayer was also made for initiating proceedings under Section 512, Cr.PC. The committal Court, after recording the statement of the process server to the effect that the accused could not be traced despite search, proceeded under Section 512, Cr.PC and directed the Police to apprehend the accused and cause the appearance of the accused in the Court for further proceedings. However, the challan against the rest of the accused was committed to the Court of Sessions vide order dated 18.12.1993 for offence under Section 302/34, Cr.PC for trial. Additional Sessions Judge, Reasi, after hearing the parties and scanning the material on record framed the charge under Section 302, RPC, read with Section 34, RPC against accused, namely Mangtu, Mahantoo, Chand Ram and Raghu Ram, vide his order dated 2.11.1994 and fixed the calendar for recording the prosecution evidence. During the currency of the trial, Mahantoo accused became absent and absconded, on account of which proceedings under Section 512, Cr.PC came to be initiated against Mahantoo accused vide Court order dated 8.12.1995 and the general warrant of arrest issued. The trial, however, against other accused, namely, Chandu Ram and Raghu Ram, continued and the Trial Court after recording the evidence of the witnesses found that both these accused are not at all connected with the commission of the offence on the basis of the evidence appearing on record and that it would be an exercise in futility to proceed further with the trial any more, closed the evidence and acquitted the accused in relying upon the judgment reported in Crime 1996-III page 85 vide its order dated 26.12.1996. No. order was, however, passed with regard to the two other

absconding accused, namely, Chhetu and Mahantoo, against whom proceedings under Section 512, Cr.PC have been taken and general warrants have been issued.

4. On an application dated 19.10.2001 presented by SHO, Police Station, Talwara before Additional Sessions Judge, Reasi that the whereabouts of Chhetu and Mahantoo have become known, who since at large and proceedings under Section 512, Cr.PC have been taken by the Court, duplicate warrants came to be issued by the Court vide its order dated 20.11.2001 and entrusted to Police Station, Talwara for execution. Both the accused petitioners produced before the Trial Court in custody on 12.12.2001 and later on sent to judicial lock up till 18.12.2001. The Trial Court, however, declined to give benefit of the evidence recorded during the trial of co-accused, which resulted in their acquittal, to the absconding accused as well and after perusing the material assembled on record framed a charge against the accused petitioners for offence under Sections 302/34, RPC on 19.1.2002 with a direction to the prosecution to adduce evidence in accordance with the schedule fixed in the case.

5. The Sole grievance of the petitioners raised in this revision is that, neither Additional Sessions Judge was competent to issue warrants under Section 512, Cr.PC in the absence of directions given in the acquittal order dated 26.11.1996 nor could he frame charge against the petitioners and proceeded with the trial. It was further contended that all the orders impugned are in contravention of the established principles of law and violative of Article 20(2) of the Constitution.

6. The basic rule in regard to evidence in criminal trial is that, all evidence shall be taken in presence of the accused or in the presence of his pleader when his personal attendance is dispensed with. This is, however, subject to statutory exceptions contemplated by Section 33 of the Evidence Act. The reason for these exceptions is that, the Court always desired to have best evidence about any matter and there has always been a danger of evidence being lost if there is delay in recording it. The Legislature thought it proper to have empowered the Court to record evidence against a person, who by his own conduct, has chosen to be absent while such evidence is being recorded. The predominant idea behind this

enactment is to obtain and preserve valuable evidence in regard to an offence, so that the interest of justice may not suffer when the accused is found and put on trial after a long delay, because the evidence may have ceased to be available in the interval.

7. It, therefore, follows that the Section is not meant to give any benefit to an accused and reward him for his absconding, but to see that he does not get any undue benefit or advantage or defeat the law or escape from its provisions permanently by his absconding. Sub-section (1) of Section 512, Cr.PC envisages merely recording of evidence and nothing more in proceeding, which is neither in enquiry nor in trial. The mere fact that the Court recorded a finding that the accused has been absconding and there is no immediate prospect of arresting him would not, in the absence of legal evidence to support the finding, invest him with the power to record the depositions under this Section against the absent accused.

8. Where an accused is absconding when the trial against his co-accused opens, the Court should record evidence against him under this section. The proceedings cannot be dropped against such accused because of the fact that he is absconding. However, the evidence recorded in the trial of a co-accused of the absconder or other persons cannot by ex-post-facto operation be treated as evidence recorded under Section 512 for the purpose of utilizing it at the trial of the absconder when he is apprehended and tried subsequently. The prosecution should move the Court and prove by evidence before the recording of evidence against the co-accused that certain persons are absconding and that it is not possible to apprehend them. It is for the Court, thereafter, to give directions that the evidence about to be taken is being taken for the purpose of being used if necessary against the absconder under Section 512 as well as against the persons present and on trial. Where the accused with other persons was charged with murder, he, however, had absconded at the time of the preliminary inquiry before the committal court, and his associates were committed to the Sessions and convicted, the evidence given in the Sessions trial of the co-accused, cannot be taken as evidence against the absconder and, therefore, cannot be used against him at this trial, as Section 33 of the Evidence Act would not be attracted

and as the accused was not party to the proceedings and had no opportunity to cross-examine.

9. A matter relating to consideration of the evidence of witnesses recorded in the absence of the accused came up for consideration before the Apex Court in *Nirmal Singh v. State of Haryana*, (2000) 4 SCC 11 and it was held that.

'Section 299(1), Cr.P.C. consists of two parts: The first part speaks of the circumstances under which witnesses produced by the prosecution could be examined in the absence of the accused and the second part speaks of the circumstances when such deposition can be given in evidence against the accused in any inquiry or trial for the offence with which he is charged. This procedure contemplated under Section 299, Cr.P.C. is thus an exception to the principle embodied in Section 33 of the Evidence Act inasmuch as under Section 33, the evidence of a witness, which a party has no right or opportunity to cross-examine is not legally admissible. Being an exception, it is necessary, therefore, that all the conditions prescribed, must be strictly complied with. For taking the benefits of Section 299, the conditions precedent therein must be duly established and the prosecution, which proposes to utilise the said statement as evidence in trial, must, therefore, prove about the existence of the preconditions before tendering the evidence. It is only then, the statements of witnesses recorded under Section 299, Cr.P.C. before the arrest of the accused can be utilized in evidence in trial after the arrest of such accused. In other words, before recording the statement of the witnesses produced by the prosecution, the court must be satisfied that the accused has absconded or that there is no immediate prospect of arresting him, as provided under the first part of Section 299(1). When the accused is arrested and put up for trial, if any such deposition of any witness is intended to be used as evidence against the accused in any trial, then the court must be satisfied that either the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience, which would be unreasonable.'

10. Relying upon the ratio of the aforesaid judgment and on perusal of the record of the Trial Court, the inevitable conclusion reached is that, the evidence given at

the trial for another purpose cannot be, by any ex-post-facto operation, converted into an equivalent of what is called a deposition taken under this section (corresponding) to Section 299(1) of the Central Act), at the time of taking the evidence, the question of recording a deposition under Section 512 was never intended. So, when a statute permits something to be done, which a fundamental rule prohibits, that thing can only, be done by strict compliance of the statute, which creates the exception. The Trial Court, while acquitting the co-accused, who faced their trial, stated least about the accused Mahantoo, who absconded and also the utilization of the evidence against the accused Cheetu, in whose absence the evidence was recorded against the co-accused put up on trial, in his judgment and order dated 26.12.1996. This order has not been challenged in this Revision.

11. When the proceedings under Section 512, Cr.P.C. have been initiated against the absconding accused, issuance of general warrants of arrest is a consequence of such order. On getting an information about the presence of the absconding accused at a particular place, the Police getting a duplicate warrant of arrest on a motion presented in this behalf, through judicial apparatus, does not suffer from any illegality on completion of other formalities contemplated under law, a charge framed against the accused petitioners by the Trial Court in view of a prima facie case on the basis of material on record, notwithstanding that the co-accused have been acquitted earlier on consideration of evidence, which pertained to their part in the alleged occurrence, in my opinion, is neither legally laconic nor factually frail, so as to invite interference of this Court in the Revision.

12. Having considered the facts and circumstances discussed above, this Revision, in my considered view, does not possess any merit and is hereby dismissed.

Record shall be remitted back to the Court below, where parties through their counsel are directed to cause appearance on 22nd April, 2002. The case is of the year 1993; the Trial Court is directed to expedite the trial and shall decide the case not later than two months from the date of the receipt of the file.