

Baiju Vs. State of U.P. and Another

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Court : Allahabad

Decided On : Dec-23-2010

Judge : S.C. Agarwal, J.

Appeal No. : Criminal Revision No.2251 of 2010

Appellant : Baiju

Respondent : State of U.P. and Another

Judgement :

1. his revision under section 397/401 of the Code of Criminal Procedure is directed against the order dated 22.5.2010 passed by Additional Sessions Judge / Fast Track Court No.2, Aligarh in Sessions Trial No.499 of 2001 (State v. Baiju & others) arising out of case crime no.23 of 2001 under sections 147, 148, 149, 302 IPC, Police Station Civil Lines, District Aligarh, whereby application 152 kha under section 311 Cr.P.C. filed by learned counsel for accused - revisionist Baiju for summoning S.I. Birendra Singh Tomar was rejected.

2. Revisionist is one of the accused in the aforesaid Sessions Trial. During the course of final arguments, application under section 311 Cr.P.C. was moved by learned defence counsel on the ground that as per the prosecution case, accused Baiju was arrested on the date of incident itself i.e. on 21.01.2001, but the prosecution had not produced any documentary or oral evidence in respect of the arrest. The F.I.R. was lodged on 21.01.2001 at 10:45 a.m. on the basis of a written

report submitted by Mohd. Ashif and the investigation was handed over to S.I. A.B. Saifi, who immediately proceeded towards the place of occurrence, but in the G.D. No.19 of 10:45 a.m., it is disclosed that the information regarding the incident was received at the police station at 9:30 a.m. This fact was also concealed by the prosecution that injured Babloo @ Aakil was admitted in the hospital on 21.01.2001 at 10:10 a.m. by accused Baiju. Under what circumstances S.I. Birendra Singh Tomar arrested Baiju from the place of occurrence without being the investigating officer of the case, has not been disclosed. It has also not been disclosed under whose direction S.I. Birendra Singh Tomar was acting. This anomaly not only makes the prosecution case doubtful, but also proves the F.I.R. to be ante timed and, therefore, to clear the doubt and for just decision of the case, S.I. Birendra Singh Tomar be summoned as a witness under section 311 Cr.P.C.

3. The application was opposed by prosecution. Learned Additional Sessions Judge rejected the application on the ground that the prosecution did not wish to examine S.I. Birendra Singh Tomar as its witness. The case was at the stage of final argument. The powers under section 311 Cr.P.C. are not to be exercised in favour of a particular party. If there is any ambiguity in the evidence on record, the Court will certainly summon such person, but from the evidence on record, there is no such ambiguity in the instant case. It was further observed that as per the contentions raised by the defence that the prosecution story is doubtful and F.I.R. is proved to be ante timed, then the defence may take advantage of the same, but there is no contradiction in the prosecution evidence and there was no need to summon S.I. Birendra Singh Tomar as a witness. Consequently, application was rejected. Hence, this revision.

4. Heard Sri Anoop Trivedi, learned counsel for the revisionist, learned A.G.A. for the State and Sri Ashutosh Dwivedi, learned counsel for the complainant.

5. It is submitted by learned counsel for the revisionist that after registration of the case under section 302 IPC at 10:45 a.m., according to prosecution case, the revisionist Baiju was arrested by S.I. Birendra Singh Tomar under section 25 Arms Act in respect of which crime no.24 of 2001 under section 25 Arms Act was registered on 21.01.2001 at 13:15 hours wherein the time of arrest of Baiju was

shown as 11:30 a.m. and the arresting officer was S.I. Birendra Singh Tomar. The place of occurrence in the murder case and the place of arrest in the case under section 25 Arms Act are in the same vicinity. It was further submitted by learned counsel for the revisionist that as per the records of the Aligarh Muslim University Hospital, injured Babloo @ Aakil was admitted in the Hospital on 21.01.2001 at about 10:00 a.m. by revisionist Baiju and there was no occasion for S.I. Birendra Singh Tomar to arrest the revisionist at 11:30 a.m. from near the place of incident, as he was neither the investigating officer of the murder case nor did he arrest the revisionist under instructions from any person. The contention is that S.I. Birendra Singh Tomar is the most important witness, who may throw light on some vital aspects of the case.

6. Reliance has been placed on the decisions of the Apex Court in *Iddar & Ors. Versus Aabida & Anr.*, AIR (2007) SCC 3029, *Godrej Pacific Tech. Limited Versus Computer Joint India Limited*, (2008) 11 Supreme Court Cases 108 and *Himanshu Singh Sabharwal Versus State of Madhya Pradesh & others*, (2008) 3 Supreme Court Cases 602, wherein it was held that the object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. It is the duty of the Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

7. Per contra, learned A.G.A. as well as learned counsel for the complainant submitted that the revisionist was not arrested by S.I. Birendra Singh Tomar under section 302 IPC, he was arrested by S.I. Birendra Singh Tomar as he was found near the place of incident in a suspicious manner. He was apprehended and on search, a 315 bore country made pistol with a spent cartridge case in its barrel was recovered from his possession and the said arrest and recovery was not

under section 302 IPC and, therefore, has no bearing on the merit of the instant case.

8. There is nothing on record to show that the recovery of a country made pistol from the possession of the revisionist had any bearing with the instant murder case. There is also nothing on record to show that the case under section 25 Arms Act is being jointly tried with the case under section 302 IPC. Had it been so, it would have been proper for the trial court to record evidence of the witnesses in respect of the arrest of the accused and recovery of firearm from his possession. In these circumstances, it appears that arrest of accused - revisionist at 11:30 a.m. on 21.01.2001 was not in connection with the murder case, but it was a simple arrest under section 25 Arms Act. The incident took place on 21.01.2001 at about 9:30 a.m. The F.I.R. was lodged on the same day at 10:45 a.m. The revisionist might have admitted injured Babloo @ Aakil in the hospital at about 10:00 or 10:10 a.m. His arrest at 11:30 a.m. under section 25 Arms Act unconnected with the case under section 302 IPC does not appear to have any bearing with the case under section 302 IPC. As per the prosecution case, the deceased Mohd. Aarif was assaulted by accused persons including the revisionist by knives and chhurees. One person from the side of defence namely Babloo @ Aakil received firearm injuries from the licensed gun of the complainant Ram Gopal. The recovery of a country made pistol from the possession of the revisionist does not have any bearing with the murder of Mohd. Aarif. In these circumstances, the evidence of S.I. Birendra Singh Tomar is not at all relevant in the instant murder case.

9. In the facts and circumstances of the case, I do not find any error or illegality in the order passed by learned Additional Sessions Judge.

10. The Revision is devoid of merit and is accordingly dismissed.

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