

Nitesh Vs. State of Rajasthan and Others

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Court : Rajasthan

Decided On : Feb-03-2012

Judge : Sandeep Mehta

Appeal No. : Criminal Misc. Petition No. 1775 of 2010

Appellant : Nitesh

Respondent : State of Rajasthan and Others

Judgement :

The instant miscellaneous petition has been filed by the petitioner challenging the order dated 29.11.2010 passed by the Additional Sessions Judge (Fast Track) No.1, Jodhpur in Sessions Case No. 52./2008, whereby an application filed by the prosecution under Section 311 Cr.P.C. has been accepted.

The facts giving rise to the instant petition are that the petitioner is facing trial in the Court of the Additional Sessions Judge (Fast Track) No.1, Jodhpur for the offences under Sections 306 and 498-A, IPC. After framing of the charges, the prosecution initiated its evidence and the examination-in-chief of witnesses PW 1 Jagdish Chandra, PW 2 Tara Devi and PW 4 Devi Lal, who are said to be material witnesses of the prosecution, were recorded. The examination-in-chief of PW 1 Jagdish Chandra was recorded on 29.9.2008 and the examination-in-chief of witnesses PW 2 Tara Devi and PW 4 Devi Lal was recorded on 18.10.2008 and their cross-examination was kept reserved. It appears that thereafter the trial

proceeded further and the statements of other witnesses continued to be recorded, but some how or other, three witnesses referred above were not called back for cross-examination either by the counsel for the complainant or the Court, nor did the counsel for the accused make any request for calling three witnesses for cross-examination. Ultimately, the prosecution evidence was closed on 09.8.2010 and thereafter the statement of the accused was recorded under Section 313 Cr.P.C. and the accused, upon being called upon to tender defence evidence, examined six witnesses in his defence. The file was thereafter kept for final arguments on 09.11.2010. On that day, the learned Special Public Prosecutor filed an application for recalling of the witnesses PW 1 Jagdish Chandra, PW 2 Tara Devi and PW 4 Devi Lal so that their cross-examination could be completed by the accused. The said application filed by the learned Special Public Prosecutor has been accepted by the order dated 29.11.2010, which is the subject matter of challenge by the instant miscellaneous petition.

Assailing the impugned order, learned counsel for the petitioner submitted that in this case the witnesses cannot be called for cross-examination under Section 311 Cr.P.C. as this section does not give any permission for the witnesses to be recalled for cross-examination. It has further been submitted that the stage of Section 232 Cr.P.C. had been crossed in the trial and thereafter no witness could be called for cross-examination as the stage of recording the evidence had already been completed. He further submitted that it was the lacuna of the prosecution that the aforesaid three witnesses, viz. PW 1 Jagdish Chandra, PW 2 Tara Devi and PW 4 Devi Lal, despite numerous opportunities being granted, were not kept before the court below for cross-examination and thus, the cross-examination could not be now allowed for filling-up the lacunae of the prosecution. It has further been submitted that there is no finding of the learned trial court that the evidence of the witnesses sought to be recalled for the purpose of being cross-examined was essential for the just decision of the case and, thus, it is submitted that the impugned order, being absolutely an abuse of the process of the court and not being warranted for securing the ends of justice, deserves to be quashed. Learned counsel for the accused-petitioner also argued that the application was filed by the prosecution only after the arguments were advanced on behalf of the accused and thus the defence of the accused would be prejudiced greatly in calling of the

witnesses for cross-examination now. Reliance in support of the arguments has been placed on the following decisions:-

- (i) Rajkaran and Anr. Vs. Jeewan Khan, 1988 Cr.L.R. (Raj.) 516;
- (ii) Vinod Kumar Singh Vs. State of Rajasthan, 2009 (2) Cr.L.R. (Raj.) 978;
- (iii) Abida Vs. State of Rajasthan and ors., 2009 (1) Cr.L.R. (Raj.) 29; and
- (iv) Cheeku Singh Vs. State of Rajasthan, 1997 (3) RLW (Raj.) 1661.

The learned Public Prosecutor and the counsel for the complainant, on the other hand, submitted that the cross-examination of the witnesses was kept reserved on the prayer of the counsel for the accused and thereafter the witnesses were never summoned by the court for cross-examination, nor did the counsel for the accused make any prayer for calling of these witnesses. Thus, it was not the fault of the prosecution that the witnesses could not be called for cross-examination. Learned counsel for the complainant submitted that the trial Judge has held that the three witnesses, who were called for cross-examination, are important witnesses in relation to the allegation of the prosecution that the deceased was led to commit suicide because of the abetment given by the accused-petitioner and thus the cross examination of these witnesses was absolutely essential for unfurling the true story of the prosecution and if the witnesses are not subjected to cross-examination by the accused then their evidence would be taken out of consideration as their evidence could not be read in the trial. Thus, it is submitted that the order of the learned trial Judge calls for no interference by this Court.

I have given my thoughtful consideration to the rival arguments advanced at the bar and carefully considered the judgments cited by the learned counsel for the petitioner in support of his arguments.

The first argument advanced by the learned counsel for the petitioner is that the witnesses could not be recalled for the purpose of cross-examination under Section 311 Cr.P.C. For a proper consideration of the said argument, the provisions of Section 311 Cr.P.C. have to be taken into account. Section 311 Cr.P.C. reads as under:-

“311. Power to summon material witness, or examine person present.- Any Court may, at any stage of any inquiry, trial or other proceeding 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 person if his evidence appears to it to be essential to the just decision of the case.”

In the opinion of this Court, the argument which has been advanced on behalf of the accused-petitioner regarding the permission to cross-examine the witnesses not being accorded by Section 311 Cr.P.C. is a fallacious argument. The language of Section 311 Cr.P.C. is very wide and the Court, at any stage of inquiry, trial or other proceeding, can recall and re-examine any person already examined. The power which has been given to the Court is, thus, to recall as well as re-examine any person already examined. The witnesses who have been directed to be recalled had, admittedly, been examined though their examination had not been completed as per Section 137 of the Evidence Act. The witnesses, after being in attendance before the court, were examined in chief and then their cross-examination were deferred and for some reason or other, the court below never summoned them for them to be subjected to cross-examination by the counsel for the accused. Though an argument has been raised that if at all the witnesses were important witnesses for the prosecution, the duty to keep them in the Court for being cross-examined was upon the complainant, who was being represented by his counsel and it was not at all necessary for the court to have issued summons to these witnesses. In the opinion of this Court, the argument is far from convincing. In a sessions trial, summoning of witnesses is exclusively the duty of the court and the court has to issue process to the witnesses who are cited as prosecution witnesses in a sessions case when the Public Prosecutor makes a request for summoning the witness.

Further more, Section 231 Cr.P.C. permits the trial court to allow cross-examination of any witness to be deferred and thereafter to recall any witness for further cross-examination. Thus, by a conjoint reading of Sections 311 and 231 Cr.P.C., it become apparent that the trial court has the power to recall a witness

for cross-examination. In the opinion of this Court, the object underlying the provisions of Section 311 Cr.P.C. is that there may not be failure of justice on account of mistake of either party in bringing the best available evidence on record or leaving ambiguity in the statement of a witness examined from either side. The section is not limited only for the benefit of the accused and it will not be an improper exercise of power of the court to summon a witness under this section merely because the evidence supports the case of the prosecution and not that of the accused. The Hon'ble Apex Court has gone to the extent of holding that it is the duty of the Court to see that all the witnesses essential for unfurling the case should not be left unexamined or unrecorded. In the case of Raghunandan Vs. State of Uttar Pradesh, AIR 1974 SC 463, wherein an important question emerged from the post-mortem report was not considered by the trial court, the Hon'ble Apex Court directed the High Court to record the expert medical evidence under Sections 540 and 428 Cr.P.C.

Again, in the case of Hanuman Ram Vs. State of Rajasthan and ors., AIR 2009 SC 69, while considering the scope of Section 311 Cr.P.C., the Hon'ble Apex Court held as below:-

“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. The section is not limited only for the benefit of the accused and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is “at any stage of inquiry or trial or other proceeding under this Code.” It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.’

'8. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short 'Evidence Act') are based on this rule. 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 side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes." That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.'

'9. The object of Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the provisions of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the court could not be termed a witness of any particular party, the Court should give the right of cross-examination to the complainant. These aspects were highlighted in Jagat Ravi Vs. State of Maharashtra (AIR 1968 SC 178), Rama Paswan and ors. Vs. State of Jharkhand (2007 (11) SCC 191) and Iddar and Ors. Vs. Aabida and Anr., (2007 (11) SCC 211)."

The scope of Section 319 Cr.P.C. was also considered by the Hon'ble Apex Court in Rajendra Prasad Vs. Narcotic Cell through its Officer-in-charge, Delhi, AIR 1999

SC 2292, wherein the Hon'ble Apex Court held as below:-

“(2) Can a trial Court permit lacuna in prosecution evidence fill up The conventional concept is that the Court should not do so. But then, what is meant by lacuna in a prosecution case, has to be understood before deciding the said question one way or the other.’

(6) It is a common experience in criminal Courts that defence counsel would raise objections whenever Courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act by saying that the Court could not ‘fill the lacuna in the prosecution case.’ A lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage ‘to err is human’ is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such lapses or mistakes during the conducting of a case cannot be understood as the lacuna which a Court cannot fill up.’

‘(7) Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.’

‘(11) We cannot therefore accept the contention of the appellant as a legal proposition that the Court cannot exercise power of re-summoning any witness if once the power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered lapses only when the defence highlighted them during final arguments. The power of the Court is plenary to summon or even recall any witness at any stage of the case if the Court considers it necessary for a

just decision. The steps which the trial Court permitted in this case for re-summoning certain witnesses cannot therefore be spurned down nor frowned at.”

The situation in the case of Rajendra Prasad Vs. Narcotic Cell through its Officer-in-charge, Delhi (supra) was also identical, whereby the Public Prosecution negligently closed the evidence without verifying whether the cross-examination of the witness had been concluded or not. The trial Court thereafter permitted the recalling of the said witness for cross-examination and the order was affirmed by the High Court of Delhi and thereafter by the Hon'ble Apex Court in Rajendra Prasad's case (supra). The same is the situation in the instant case.

The Hon'ble Apex Court, in the case of Shailendra Kumar Vs. State of Bihar and ors., reported in (2002) 1 SCC 655, has held as under:-

“In our view, in a murder trial it is sordid and repulsive matter that without informing the police station officer-in-charge, the matters are proceeded with by the court and by the APP and tried to be disposed of as if the prosecution has not led any evidence. From the facts stated above, it appears that the accused wants to frustrate the prosecution by unjustified means and it appears that by one way or the other the Additional Sessions Judge as well as the APP have not taken any interest in discharge of their duties. It was the duty of the Sessions Judge to issue summons to the investigating officer if he failed to remain present at the time of trial of the case. The presence of investigating officer at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on the part of any witness to remain present, it is the duty of the court to take appropriate action including issuance of bailable/non-bailable warrants, as the case may be. It should be well understood that the prosecution cannot be frustrated by such methods and victims of the crime cannot be left in a lurch.

Tested on the touch-stone of the the aforesaid authoritative pronouncements of the Hon'ble Apex Court, it becomes apparent that the judgments cited by the learned counsel for the petitioner, in support of his arguments, do not help the accused-petitioner in any manner. In this case the trial Judge has observed in the impugned order that the cross-examination of these three witnesses is essential for the just decision of the case and in the opinion of this Court, rightly so.

Even if it is held that the cross-examination of the witnesses could not be conducted because of negligence either of the Public Prosecutor or that of the counsel for the complainant then too the prosecution could not be made to suffer for the error so committed. It is the duty of the Court, as observed by the Hon'ble Apex Court, to see that such lacunae did not end up in destroying the prosecution case. If the witnesses are not subjected to cross-examination then the trial court will be precluded from considering their testimony in its entirety. Thus, in the opinion of this Court, no other order but to recall these witnesses for cross-examination was permissible in this case.

Resultantly, the miscellaneous petition, being bereft of any force, is hereby dismissed. The stay petition also stands dismissed.

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