

(2005) 03 RAJ CK 0005

Rajasthan High Court (Jaipur Bench)

Case No: Criminal Miscellaneous Petition No. 1061 of 2004

Vijay Kumar Sharma

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision: March 2, 2005

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 311, 362
- Penal Code, 1860 (IPC) - Section 400

Citation: (2005) CriLJ 2893 : (2005) 2 RLW 894 : (2005) 2 WLC 755

Hon'ble Judges: K.C. Sharma, J

Bench: Single Bench

Advocate: Chandra Singh, for the Appellant; R.P. Kuldeep, Public Prosecutor and S.R. Surana, for the Respondent

Final Decision: Allowed

Judgement

K.C. Sharma, J.

Heard counsel for the parties. The accused petitioner is facing trial for offence u/s 400 IPC and Ram Niwas, father of Mst. Guddi is a prosecution witness in the case. He was examined as PW5. His examination-in-chief was complete on 4.3.1999 and cross examination was closed on 10.2.2003. The accused petitioner filed an application u/s 311 Cr.P.C. on 24.5.2004 before the Trial Court with the prayer that he may be allowed to cross examine PW5 Ram Niwas and the learned Trial Court allowed the petitioner's application on the same day. Feeling aggrieved by the order of the Trial Court, the complainant non-petitioner filed a revision petition. The revisional court vide its order dated 21.9.2004 accepted the revision petition and set aside the order passed by the Trial Court. Hence the present petition by the accused petitioner.

2. It appears that the case was fixed on 10.2.2003 for cross examination of PW5 Ram Niwas, but the witness could not be cross examined for the reason that counsel for the accused was busy in some other court and accordingly the Trial Court closed the

cross examination vide order dated 10.2.2003. In doing so, the Trial Court observed that case is pending since 1991 and therefore, no further opportunity can be given to cross examine the witness. In the opinion of Trial Court, the senior advocate was busy in some other court was no ground to adjourn the case. However, the case was fixed for recording the statements of remaining prosecution witnesses. The revisional court while disposing of the revision petition observed that since cross examination was already closed vide order dated 10.2.2003, the court cannot review its earlier order in view of the provisions of Section 362 Cr.P.C.

3. It may also be noted that revision petition was filed by Ram Niwas who was simply a witness in the case. Though the revisional court held that Ram Niwas being a private party has no locus standi to file revision petition, still the revisional court exercised revisional powers.

4. Mr. S.R. Surana appearing for the complainant non-petitioner has supported the impugned order and contended that impugned order is barred u/s 362 Cr.P.C. and has referred to a decision of the Apex Court in Hindustan Construction Co. Ltd. v. G.K. Sengupta 2003 Cri.L.R. (SC) 757.

5. I have gone through the case law cited at the bar. In the aforesaid case, the High Court declined to allow the petition u/s 311 Cr.P.C. in 1997, but in the year 2000 reviewed its earlier order and directed to summon P in evidence. In these circumstances it was held that the impugned order is barred u/s 362 Cr.P.C.

6. In the case at hand, the order to close cross examination was passed on 10.2.2003 for the reasons mentioned in the order. Present is not the case where petitioner earlier also moved an application u/s 311 Cr.P.C. and the same was rejected and later the application u/s 311 Cr.P.C. was allowed. In these circumstances the authority cited by the counsel for the complainant has no application to the facts of the present case.

7. Learned counsel for the complainant has also relied upon [Bindeshwari Prasad Singh Vs. Kali Singh](#), . This case was also considered by the revisional Court. In this case, the Apex Court held that Magistrates do not possess inherent powers and hence cannot review or recall any order passed by them. This case also has no application to the facts of the present case. Here, the Trial Court did not review or recall its earlier order dated 10.2.2003. At the time of passing the order dated 10.2.2003 the consideration for closing the cross examination was different than that which prevailed with the Trial Court while passing the order on the application u/s 311 Cr.P.C.

8. In [Shailendra Kumar Vs. State of Bihar and Others](#), the Sessions Judge closed the prosecution evidence on 3.9.94. Thereafter the case was transferred to 2nd Additional Sessions Judge, Gaya, who by his order dated 20.9.95 recalled the order dated 3.9.94 and directed the appellant to produce the witnesses. This order came to be challenged in revision petition before the High Court. The High Court vide its

order dated 1.2.2000 allowed the revision petition. On 12.5.2000, the State filed an application u/s 311 Cr.P.C. before the Additional Sessions Judge, which was rejected vide order dated 2.6.2000 on the ground that the application has no meaning in view of the order passed by the High Court in revision petition. Thereafter the appellant informant filed criminal Misc. Petition, which too was dismissed by the High Court. The order passed by the High Court in Misc. Petition was challenged in appeal before the Hon"ble Supreme Court.

9. Learned counsel for the respondent accused submitted before the Apex Court that in this case there was no question of referring to Section 311 Cr.P.C. in view of earlier order dated 1.2.2000 passed by the High Court setting aside the order dated 20.9.1995 passed by the Additional Sessions Judge recalling the order dated 3.9.1994 by which the prosecution evidence was declared to have been closed. Their Lordships repelled the submission made by the counsel for accused respondent and held as under:

"Bare reading of the aforesaid section reveals that it is of very wide amplitude and if there is any negligence, latches or mistakes by not examining material witnesses, the Courts function to render just decision by examining such witness at any stage is not, in any way, impaired. This Court in [Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi](#), observed: "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".

10. Undisputedly, PW5 Ramniwas Sharma is a star witness as he being a father of the complaint non-petitioner. The object of cross examination is to impeach the credibility and the general value of the evidence given by the witnesses. Likewise, the accused has a right to have the witnesses cross examined so as to elicit the suppressed facts, expose the discrepancies and to bring truth. Therefore, the right to cross examination is one of the valuable rights of the accused in order to elicit the truth.

11. This Court, in [Hazari Ram Vs. State of Rajasthan](#), had an occasion to consider the importance of cross examination. While exercising inherent jurisdiction and dealing with an application u/s 311 Cr.P.C. this court noted the importance of cross examination at considerable length and I feel it appropriate to quote the same :

"The accused has a right to cross examine the witness to elicit the suppressed facts and to expose the discrepancies. The object of cross examination is to impeach the credibility and the general value of the evidence given by the witness. The right to cross-examination is one of the valuable rights of the accused in order to elicit the truth from the witnesses. Though the accused has no right to seek postponement of the cross examination and the cross-examination should follow the Examination-in-chief, but in certain cases, where either the counsel for the accused is not available on account of some unforeseen reason event or the defence counsel

is not prepared with cross-examining the witnesses when the Examination-in-Chief is over, then in such a case, the Trial Court, in discretion, may permit the cross-examination of any such witness to be deferred until any witness is examined or re-called for cross examination. The object of cross examination is to enable the Court to arrive at the truth, irrespective of the fact whether the prosecution or the defence has examined the witnesses or failed to produce some evidence or due to unavoidable circumstances the accused failed to cross-examine the witnesses. The evidence is taken neither to help the prosecution nor for the defence but the same is taken for a just and proper disposal of the case. In these circumstances, in order to impart justice and to arrive at a just and proper disposal of the case, I think it proper to allow the accused-petitioner to cross examine the witnesses, viz., PW 1 to PW6 as P.W. 7 has been given up by the learned counsel for the petitioner for being cross examined. If the accused will not be given an opportunity to cross examine the witnesses then he will not be in a position to impeach the accuracy or credibility of these witnesses. But the re-calling of these witnesses is subject to the condition that the accused-petitioner will deposit the expenses for re-calling these witnesses within 15 days from today since the witness could not be cross-examined on account of non-appearance of Mr. Jaswant Singh Bhadu, Advocate, if the amount is so deposited for recalling for cross examination of the witnesses then the petitioner will be free to recover this amount from his counsel Mr. Jaswant Singh Bhadu, Advocate, on account of whose non-appearance this litigation has been prolonged and the petitioner had to suffer".

12. Now I shall deal with the question as to when the powers u/s 311 Cr.P.C. should be exercised. In *Rajendra Prasad v. Narcotic Cell* (supra), their Lordships of the Supreme Court dealing with the issue observed as under:

"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 inadvertance, 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."

It was then held:

"We cannot therefore accept the contention of the appellant as a legal proposition that the court cannot exercise power of resummoning any witness. If once that power was exercised, nor can the power be whittled down merely on the ground that the prosecution discovered laches only when the defence highlighted them during final argument. 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 resummoning certain witnesses cannot therefore be spurned down or frowned at".

13. Thus, on the basis of what has been stated above, it must be concluded that the learned revisional court has erred in dismissing the application of the accused petitioner filed u/s 311 Cr.P.C. on the ground that the order of the Trial Court recalling PW 5 Ram Niwas for his cross examination is barred by Section 302 Cr.P.C. The order passed by the Trial Court cannot be held to be an order reviewing its earlier order dated 10.2.2003 by which cross examination was closed. The order impugned in the revision was passed on an application u/s 311 Cr.P.C. filed by the accused petitioner. In my considered view the Trial Court having considered the provisions of Section 311 Cr.P.C. and finding that recalling of PW5 would be necessary for just decision of the case, passed the order dated 24.5.2004. PW 5 Ramniwas, being father of the complainant non-petitioner on whose instance the accused petitioner was prosecuted and facing trial, is the main witness in the case and his cross examination for the purposes of defence cannot be denied and the accused petitioner, in my firm view, should not be made to suffer for the fault of his advocate.

14. Resultantly, this misc. petition is allowed. The impugned order passed by the revisional court is set aside and that of the Trial Court allowing application of the accused petitioner filed u/s 311 Cr.P.C. is restored.