(2013) 07 AHC CK 0246

Allahabad High Court (Lucknow Bench)

Case No: Criminal Appeal No. 2999 of 2007

Kamlesh	APPELLANT
Vs	
State of U.P.	RESPONDENT

Date of Decision: July 9, 2013

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 138, 273, 294, 296, 299
- Evidence Act, 1872 - Section 138
- Penal Code, 1860 (IPC) - Section 302, 323, 34

Citation: (2013) 7 ADJ 217 : (2013) 83 ALLCC 79

Hon'ble Judges: Vinay Kumar Mathur, J; Imtiyaz Murtaza, J

Bench: Division Bench

Advocate: Shishir Pradhan and S.H. Ibrahim, for the Appellant;

Final Decision: Partly Allowed

Judgement

Imtiyaz Murtaza, J.

In the present appeal judgment and order dated 20.9.2007 passed by Additional Sessions Judge, Court No. 2, Barabanki in Sessions Trial No. 103-A of 1998 has been challenged by means of which appellant Kamlesh has been convicted u/s 302/34 IPC and sentenced to undergo imprisonment for life with a fine of Rs. 5000/- and in default of payment of fine, further imprisonment for six months and u/s 323/34 IPC to undergo six months'' R.I. Briefly stated, according to the prosecution case, on 6.4.1997 at about 5-20 p.m. in village Chilauki, P.S. Safdarganj, the informant''s brother Shiv Kumar was grazing cattle at the outskirts of the village in Kasahi grove. Kamlesh and Durbal, who were also present there, accused Shiv Kumar that he had scared away the bees on account of which they were got stung by them. Over this matter, some altercation took place which was seen by Arvind Kumar alias Devari and Suresh. Kamlesh and Durbal went towards their house threatening Shiv Kumar. Shiv Kumar being frightened was returning home. Having heard about the said

altercation from Suresh, the informant, his mother Sundara, Ajay Kumar and Santram were going towards the grove. When they reached near the house of Mahadeo, they saw that Kamlesh carrying a country-made pistol and Durbal carrying a knife were threatening Shiv Kumar. The informant and others challenged them, whereupon Kamlesh, on the exhortation of Durbal, fired from his pistol at Shiv Kumar which hit his stomach. The informant''s mother tried to apprehend Kamlesh, but Durbal assaulted her with knife and caused injuries. Thereafter Kamlesh and Durbal ran away towards northern side of the village. They took the injured to Barabanki hospital, where during medical treatment he died due to fire-arm injury.

2. The report of the incident was registered at P.S at 8 p.m on 6.4.1997. The investigating Officer recorded the statements of the witnesses, prepared the site-plan and completed all formalities.

3. Post-mortem examination on the body of Shiv Kumar was conducted by Dr. Brijendra Pal Azad, who noted the following ante-mortem injury:

Gunshot wound 4 cm x 4 cm x cavity deep over left side abdomen, 8 cm above and outer to umbilicus. Margins inverted. (Intestines were protruding out of the wound.) Wound of entry. Direction downwards and medially.

In the opinion of doctor, death was cause due to shock and haemorrhage as a result of ante-mortem injury described above.

Smt. Sundara was medically examined on 6.4.1997 at 10 p.m. by Dr. D.R. Singh, who found the following injuries on her person:

1. One lacerated wound on chin 3 cm x.1 cm, fresh blood present.

2. One lacerated wound on upper lip inner side middle region.

3. One lacerated wound 1 cm x.5 cm at tip of left middle finger. Fresh blood present.

In the opinion of doctor, all the injuries were simple, caused by blunt objection and their duration was fresh.

After conclusion of the investigation, charge-sheet was submitted against the accused u/s 302/323 IPC.

4. The case was committed to the Court of Sessions. The Sessions Judge framed charges under Sections 302/34 and 323/34 IPC against the accused. The accused denied the charges and claimed to be tried.

Accused Kamlesh thereafter absconded and his trial was separated.

5. We have heard Sri S.H. Ibrahim, Advocate for the appellant and Sri Jyotinjay Verma, AGA for the State and perused the entire evidence on record.

6. The prosecution, in order prove its case examined P.W.1 Ram Naresh, P.W.2 Dr. D.R. Singh and P.W.3 Smt. Sundara. Before the evidence of P.W.3 could be completed appellant had absconded and his trial was separated. The trial of co accused Durbal was completed. After the appearance of the appellant the evidence of P.W.3 was completed and thereafter remaining evidence of the prosecution witnesses was not recorded. The Sessions Judge has accepted the certified copies of the testimonies of remaining witnesses recorded in the trial of co-accused Durbal. For not examining the remaining prosecution witnesses, the Sessions Judge observed as under:

Anya gawahon ke sambandh mein bachav paksh ke vidwaan adhivakta ne yeh kathan kiya ki mujhe kisi gawah se koyi jirah nahin karni hai tatha jo sakshya satra parikshan sankhya-103/1998 Rajva Prati Durbal mein prastut ki gayi hai usey maana jaaye tatha abhiyojan paksh ne bhi yeh kathan kiya ki koyi gawah prastut nahin karna hai. Atah abhiyojan paksh ki sakshya samapt ki gayi.

7. Thus, it is not in dispute that when the accused appeared, counsel for the appellant Kamlesh did examine PW-3 but thereafter the evidence of remaining witnesses was not recorded in the presence of the accused. The Sessions Judge did not examine the remaining witnesses because the counsel of the accused stated that he does not want to cross-examine the remaining witnesses any further.

In the above conspectus, we are of the opinion that the procedure which has been adopted by the trial Court is against the provision of law.

8. It will be pertinent at this stage to refer to Section 138 of the Evidence Act which provides as under:

138. Order of examinations.--Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts but the cross-examination need not to be confined to the facts which the witness testified on his examination-in-chief.

Direction of re-examination.--The re-examination shall be directed to the explanation of matters referred to in cross-examination, and if new matter by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

9. The aforesaid view we are taking receives reinforcement from the decision of Sukhwant Singh Vs. State of Punjab, , in which the Apex Court ruled as under:

Section 138 envisages that a witness would first be examined-in-chief and then subjected to cross-examination and for seeking any clarification, the witness may be re-examined by the prosecution. There is, in our opinion, no meaning in tendering a

witness for cross-examination. Tendering of a witness for cross-examination, as a matter of fact, amounts to giving up of the witness by the prosecution as it does not choose to examine him in-chief.

10. Section 273 Cr.P.C. being also relevant to the point under discussion is excerpted below:

273. Evidence to be taken in presence of accused.--Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.

Explanation.--In this Section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.

11. On the point under discussion, we may usefully refer to a vintage decision which still holds good and it is Bigan Singh Vs. Emperor, , the quintessence of what has been held is that "The provisions of Section 353 (Section 273 in New Code) require that with certain exceptions the evidence should be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader. A contravention of this express provision does not come within the description of error, omission or irregularity and the waiver of any objection by the accused''s pleader on this score does not improve the case of the prosecution.

(emphasis supplied)

12. The next decision which also is of pivotal importance is Sukanraj Vs. State of Rajasthan, . It was held therein to the effect. "In my opinion, the provisions of Section 537 of the Code of Criminal Procedure cannot be attracted to cure a defect of procedure which infringes the mandatory requirement of the Code. This violation is clearly an illegality and not an irregularity."

13. Likewise, in the case of Ram Asheesh Vs. State of U.P., , it was observed as under:

The Cr.P.C. does not contemplate any ex parte proceeding against an accused except for recording statements against an absconder. When the Court was approached on 24.7.1998 for recall of the witness examined on 10.7.1998 for his examination and cross-examination afresh, the prayer was refused. What happened between the counsel and the Court, could not affect the right of the accused and, as such, the evidence of the witness taken on 10.7.1998 cannot be called an evidence in the true sense of the term and the same must not be treated as part of the record.

14. In the case of Tarun Gautam and Another Vs. State of U.P., , it was observed by this Court at Allahabad as under:

It is well-settled that the evidence of the witnesses cannot be recorded in the absence of the accused unless attendance of the accused is exempted through counsel and the counsel agrees to cross-examine on behalf of such accused. In the

instant case, Umesh accused was not appearing on the dates fixed as is evident from Annexure-1 copy of the order sheet filed by the revisionists. At least on the instant date that is on 1.8.1997 the trial Court did not exempt personal attendance of accused Umesh and directed issuance of non-bailable warrant of arrest and process under Sections 82/83 Cr.P.C. In these circumstances the evidence of witnesses could not have been recorded.

15. In the case of Beni Madho and another v. Emperor through Basant Rai, AIR 1941 Oudh 19, it was observed as under:

All this shows that the learned Magistrate was influenced in the case to a great extent by the evidence which was no part of the case before him. It was argued that no prejudice is shown to have been caused to the accused by the procedure adopted by the learned Magistrate and that procedure only showed an irregularity that can be covered by Section 537, Criminal P.C. I cannot however accept this argument. In the first place, the very use of evidence which is not part of the record is by itself proof of prejudice to the accused and the second place, it has been held by various High Courts that the use in a case of evidence produced in another case is not a mere irregularity but an illegality vide, e.g., the cases in Cr LJ 247Mrs. W. Waugh v. Emperor and Mrs. W. Waugh Vs. Emperor, . I am therefore definitely of opinion that the judgement of the learned Special Magistrate in both the cases must be set aside. The question however is whether or not the cases should be re-tried.

(emphasis supplied)

16. In another case, namely, Ram Shankar Rai Vs. The State of Bihar, , it has been observed by Patna High Court in Para 5 of the report, as under:

In support of the application Mr. Fanish Singh has contended that the trial itself is vitiated on account of noncompliance with the mandatory provisions of Section 353 of the Cr. P.C., inasmuch as P.Ws. 8 and 9 were not examined by the trial Court in presence of the petitioner. According to him the personal attendance of the petitioner had been dispensed with u/s 540-A of the Code of Criminal Procedure. A perusal of the order sheet dated 10th March, 1966 shows that P.W. 8 Posan Balha was examined, cross-examined and discharged and P.W. 9 Shiva Sahu who was tendered was also cross-examined and discharged. My attention has, however, been drawn to the deposition of these two witnesses (P.Ws. 8 and 9). It appears therefrom that P.W. 8 was examined-in-chief, but nobody turned up-to cross-examine him. A certificate has, however, been giver that the evidence was read over to the witness in presence of the accused. This obviously is incorrect. As it appears from the order sheet, the petitioner was on representation u/s 540-A, Cr. P.C. and was not present in Court. Even the pleader engaged toy the petitioner does not appear to have been present when P.Ws. 8 and 9 were examined-in-chief. Section 353 of the Cr. P.C. is as follows:

Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.

A perusal of this section will show that the evidence of witnesses has to be recorded in presence of the accused or when personal attendance has been dispensed with in presence of his pleader. I have indicated above that personal attendance of the petitioner had been dispensed with. R was, therefore, necessary that evidence of these two witnesses should have been taken in presence of his pleader. In case the pleader was not present, the trial Court should have adjourned the case on that day and should have directed the petitioner to attend the Court on the next date fixed, so that the evidence of the prosecution witnesses could be recorded in his presence. It is really surprising that instead of adopting this procedure he recorded in the order sheet that P.Ws. 8 and 9 were cross-examined.

(emphasis supplied)

17. Apart from Sections 138 and 273 Cr.P.C., the other provisions in the Cr.P.C. are Sections 294 and 296 which are relevant in a case where the examination of witnesses is not necessary. Sections 294 Cr.P.C. and 296 Cr.P.C. are quoted below:

294. No formal proof of certain documents.--(1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:

Provided that the Court may, in its discretion, require such signature to be proved.

296. Evidence of formal character on affidavit.--(1) The evidence of any person whose evidence is of a formal character may be given by affidavit and. may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit.

In the instant case the evidence of witnesses is not given by affidavit.

At this stage, it is relevant to mention that in this case evidence was not recorded u/s 299 Cr. P.C.

18. In view of aforesaid discussions, we are of the opinion that the witnesses who have not been examined in the presence of the accused, need be re-examined, in view of Section 273 Cr.P.C. which has already been quoted in the earlier part of the judgement.

19. Thus, considering the entire gamut of the case in hand, we are of the opinion that the impugned judgement of the trial Court is vitiated. This Court in exercise of its power under appellate jurisdiction, can issue a direction for remand of the matter for recording of evidence in accordance with law.

20. This Court u/s 386(b), in an appeal from a conviction-, it brooks no dispute, is empowered to reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial.

21. In the case of Subhash and Another Vs. State of U.P., , para 6 of the said judgement being relevant is quoted below.

Before referring to the evidence in the case, it has to be mentioned that the High Court had before it not only the appeal filed by the accused but also a reference made by the Sessions Court for confirmation of the capital sentence u/s 374 of the Code of Criminal Procedure. Time and again, this Court has pointed out that on a reference for confirmation of the sentence of death, the High Court is under an obligation to proceed in accordance with the provisions of Sections 375 and 376 of the Criminal Procedure Code. Under these sections, the High Court must not only see whether the order passed by the Sessions Court is correct but it is under an obligation to examine the entire evidence for itself, apart from and independently of the Sessions Court''s appraisal and assessment of that evidence. From the long line of decisions which have taken this view, it would be enough to refer to the decisions in Jumman v. State of Punjab, Rama Shanker Singh v. State of West Bengal and Bhupendra Singh v. State of Punjab.

22. In the case of Pandit Ukha Kolhe Vs. The State of Maharashtra, , the para 11 of the said decision being relevant on the point is excerpted below.

11. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was for reasons over which he had no control, prevented from leading or tendering evidence material to the charge and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the

case, that the accused should be put on his trial again.

23. In the case of Ramanlal Rathi Vs. The State, , Harries, C.J., observed as under:

If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example if evidence had been wrongly rejected which should have been admitted or admitted when it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case.

24. Therefore, in the facts and circumstances of the case and in the ends of justice, we direct the Sessions Judge to record the testimonies of PW-4, PW-5, PW-6 and PW-7 and proceed with the trial in accordance of Section 273 Cr. P.C. or if necessary, evidence may be taken on record u/s 294 Cr.P.C.

25. The appellant is in jail, therefore, we deem it appropriate to direct the trial Court to record the remaining evidence and conclude the trial, if possible, within a period of two months from the date of receipt of a certified copy of this order and the lower Court record. We direct accordingly. The appeal is partly allowed.

Office is directed to communicate the judgement and order alongwith lower Court record, to the trial Court for conclusion of the trial, as directed above.