(2008) 05 GAU CK 0021

Gauhati High Court

Case No: None

Subrata Bhattacharjee		APPELLANT
	Vs	
Central Bureau of Investigation		RESPONDENT

Date of Decision: May 8, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 2, 311, 313

Citation: (2009) 3 GLR 117 : (2008) 3 GLT 658

Hon'ble Judges: H.N. Sharma, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

H.N. Sarma, J.
Challenging the legality and the validity of the order dated 15.12.2007 passed by the learned Special Judge, CBI, Kamrup at Guwahati, in Special Case No. 6/2007 in exercise of power u/s 311, Cr PC, allowing the prosecution to recall and re-examine the witnesses, is the subject matter in this revision petition.

2. I have heard Mr. J.M. Choudhury, learned senior counsel assisted by Mr. B.M. Choudhury and Mr. A.C. Buragohain learned standing counsel for the CBI.

3. The relevant facts to put in short are that the petitioner along with another co-accused had to face criminal prosecution investigated and conducted by CBI (SPE) resulting to registration of the aforesaid Special Case No 6/2007, on submission of the charge sheet on completion of investigation. At the end of the trial, the learned Special Judge vide judgment and order dated 20.4.1999 passed in Special Case No. 18-C/1995 (as it was then registered), both the accused persons were acquitted of the charges levelled against them. Being aggrieved, the CBI preferred Criminal Appeal No. 179/1999, which was heard and finally disposed of by this Court on 22.12.2006. The aforesaid Criminal Appeal was allowed by this Court and after setting aside order of acquittal, the case was remanded back to the

learned trial Judge for further examination of two accused persons u/s 313(1)(d), Cr PC, and then to dispose of the case. It was also further directed that the learned Trial Judge shall proceeded from the stage of recording of the additional statement of the two persons, and to consider any such other material which may appear on records. Thereafter the learned trial Judge further examined two accused persons u/s 313, Cr PC, by bringing to their notice the circumstances those appeared against them during the course of trial. During such examination the accused persons repudiated most of the incriminating circumstances brought to their notice and the co-accused, namely Milan Kumar Chakravorty also adduced two defence witnesses who were cross-examined by the prosecution and discharged. The petitioner has also denied to have given any specimen signature to the Investigating Officer. There after the prosecution filed an application u/s 311, Cr PC, for recalling the prosecution witnesses, namely Shri S.H. Shah, Shri Jagadish Chand Rajbongshi and PW 11 (the Investigating Officer), contending that their examination was necessary for just decision of the case. The said application was resisted by the petitioner, but the learned trial Judge vide the impugned order over-ruled the objection raised by the petitioner and allowed the prayer to recall and re-examine the aforesaid witnesses, which is the subject matter in this, revision petition.

4. Mr. Choudhury, learned senior counsel appearing on behalf of the petitioner raises two fold argument.

(1) That after the remand of the case, the scope of the learned trial Court is limited to the extent as indicated in the remand order, i.e., only for examining the petitioner u/s 313, Cr PC and is not entitled to exercise power u/s 311, Cr PC.

(2) That by allowing the prayer of the prosecution to recall the witnesses, the learned trial Court has allowed the prosecution to fill up the lacuna, which is not permissible under the law and beyond the scope of Section 311, Cr PC.

Mr. Choudhury has also pressed into service the ratio of decision rendered by the Apex Court in the case of Sajeendran Vs. Thalakulathoor Grama Panchayath,

5. Mr. Buragohain, learned senior standing counsel for CBI, however, supporting the impugned order submits that the impugned order is a well written speaking order passed by the learned trial Judge and the points raised in this petition have already been answered by the learned trial Court, which cannot be said to be unsustainable in law, apart from reiterating the decision in the case of Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi, and in the case of The State (Delhi Administration) Vs. Pali Ram,

6. I have considered the rival submissions made by the learned Counsel for the parties. In order to appreciate the contentions raised by the learned Counsel for the parties, let us look into the provisions of Section 311, Cr PC. For ready reference, Section 311, Cr PC, is quoted herein below:

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.

7. Analysis of Section 311, Cr PC, disclose that it has got two parts. The first part appears to be directory and the second part is mandatory. Under the first part 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. Under the second part, which is mandatory one, 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.

8. Thus, the Court may not know at what stage that the evidence of any person would be necessary or essential for the just decision of the case. Such a person maybe summoned as witness or the Court may examine any person whose attendance though not summoned as witness for the just decision of the case, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined in the proceeding.

9. The word "inquiry" has been defined in Section 2(g) of the Criminal Procedure Code, to mean every inquiry, other than a trial, conducted under the Code by a Magistrate or Court.

The word "trial" has not been defined in the Code. In the old Criminal Procedure Code, 1872, the term "trial" was defined but the same has been omitted in the subsequent Code. The term "other proceeding" has also not been defined. The general meaning attached to this words is be understood in the context in which it appear. The purpose of omission of the words in the subsequent Codes after 1872, perhaps for the reason that the legislature in its wisdom did not intend to assign constant and specific word "trial" as it appears in various provisions of the Code and the manner is understood in the contention of particular section in terms found to be used (ref: AIR 1944 1 (Federal Court) .

10. For the purpose of Section 311, Cr PC, the word "trial" as it appears from the scheme of section as well as the Code to mean the stage upto the pronouncement of the judgment. In the Case of Ram Jeet and Others Vs. The State, a Division Bench of the Allahabad High Court has held that for the purpose of Section 540 corresponding to Section 311 of the present Criminal Procedure Code, a trial terminates on the pronouncement of the judgment or the charge of the Jury or so long as the judgment is not pronounced or Jury charges, the trial is not terminated. Section 311, Cr PC, further provides such power can be exercised at any stage of any

inquiry, trial or other proceeding under the Code. Interpreting the meaning of "any" as it appears in Section 540 of the old Code, Section 311 of the new Code came before the Apex Court in the case of Jamatraj Kewalji Govani Vs. The State of Maharashtra, Justice Hidayatullah, J, speaking for the Court has interpreted the aforesaid provisions as follows:

Section 540 intended to be wide as the repeated use of the word "any" throughout its length clearly indicates. The section is in two parts. First part gives a discretionary power but the latter part is mandatory. The word ''may'' in the first part and of the word ''shall'' in the second firmly establishes this differences. As the section stands there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bona fide of the opinion that for the just decision of the case, the step must be taken. It is clear that the requirement of just decision of the case does not limit the action to something in the interest of the accused only. The action may equally benefit the prosecution. There are, however, two aspects of the matter which must be distinctly kept apart. The first is that the prosecution cannot be allowed to rebut the defence evidence unless the prisoners brings forward something suddenly and unexpectedly.

11. In the instant case, before the learned trial Judge, the prosecution made a prayer for recalling and re-examining three witnesses to prove the fact that, in fact, during the course of investigation, the specimen signature of the accused persons were taken, but the same was inadvertently and due to mismanagement of the prosecution the same was not elicited. The learned trial Judge also found that after the remand of the case, the petitioner stated to have given the specimen signature and hand writing to the Investigating Officer during the course of investigation. The Court felt that the said fact should be clarified by recalling and re-examining the prosecution witnesses. In such a situation, the relevant ratio of decision of the Apex Court in the case of Rajendra Prasad (supra) cannot be said to unwarranted. In the case of Rajendra Prasad (supra), the Apex Court had the occasion to deal with the true meaning and scope of the word "lacuna" and it was held as follows:

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 mistake 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.

12. Although Mr. Choudhury has strenuously urged that in the instant case on delivery of the judgment by the learned trial Court acquittal of the accused persons

the trial of the case terminated. In such a situation it is impermissible to recall and re-examine the prosecution witnesses with the aid of the provisions of Section 311, Cr PC.

13. I am not impressed, inasmuch as, on the count that the aforesaid judgment of acquittal has been set aside by this Court. After setting aside the judgment of acquittal and in view of the judgment rendered by the appellate Court, the case is relegated to the position of examination of accused and the witnesses u/s 313, Cr PC. The earlier judgment having been set aside and restored back to the position of examination of accused u/s 313, Cr PC, it cannot be said that the learned trial Court was not right in exercising power u/s 311, Cr PC. The decision rendered by the Apex Court in the case of K. Sajeendran (supra) referred by Mr. Choudhury has no application in the instant case. In fact, the ratio of decision of the Apex Court in the case of Rajendra Prasad (supra) was referred in the said case. In K. Sajeendran (supra) the stage of the case was that judgment was delivered after closer of the trial, which is not in the instant case.

14. The learned trial Court in exercise of its discretion and in view of answer given by the petitioner in his examination u/s 313, Cr PC, has for the just decision of the case found that the prayer made by the prosecution for recalling and re-examination of the witnesses should be allowed. The aforesaid decision of the learned trial Court on the facts of the case cannot be said to be unjust, improper, illegal or unwarranted exercise of discretion conferred u/s 311, Cr PC. In fact, the aforesaid finding of the learned trial Court about the necessity to elicit relevant facts by recalling and re-examining the prosecution witnesses, falls within second part of Section 311 of the Code, which is mandatory in nature.

15. In view of what has been stated and discussed above, I do not find that there has been any illegality, impropriety in passing the impugned order by the learned trial Court. Consequently, this revision petition fails and is dismissed, leaving the parties to bear their own costs. The interim order dated 8.2.2008 stands vacated,