Rajendra Prasad Vs The Narcotic Cell Through its Officer in Charge, Delhi

Court: Supreme Court of India

Date of Decision: July 12, 1999

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 21, 25, 29, 311, 397(2)

Citation: (1999) 2 ACR 1575 : AIR 1999 SC 2292 : (1999) AIRSCW 2356 : (1999) 2 ALD(Cri) 345 : (1999) CriLJ 3529 : (1999) 3 Crimes 106 : (1999) 66 ECC 318 : (1999) 4 JT 496 : (1999) 2 KLT 779 : (1999) 2 OLR 558 : (1999) 9 PLJR 81 : (1999) 2 RLW 321 : (1999) 4 SCALE

Hon'ble Judges: M.B. Shah, J; K. T. Thomas, J

Bench: Division Bench

Advocate: Manoj Swarup, Lalita Kohli and Maulina Swarup, for Manoj Swarup and Co, for the Appellant;

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

K.T. Thomas, J.
Leave granted.

2. Can a trial court permit lacuna in prosecution evidence filled 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 questions one way or the other.

3. The present case provides an occasion to decide the said question. Appellant is now facing trial along with certain other persons before a court

of sessions for offences under Sections 21, 25 and 29 of the Narcotics Drugs and Psychotropic Substances Act, 1985. Appellant is now on bail

pursuant to an order granted by the High Court of Delhi. As the trial proceeded almost to the end when the prosecution and the defence closed

their evidence on 19,9.1997, the case was posted for further steps. Nevertheless, subsequently, the case stood posted to some other days also.

On 7.3.1998, at the instance of the prosecution two of the witnesses, who were already examined, were re-summoned for the purpose of proving

certain documents for prosecution. They were further examined and the evidence was once again closed and the case was posted for hearing

arguments. It appears that arguments were heard in piece-meal on different days. On 7.6.1998, the Public Prosecutor moved an application

seeking permission to examine PW-21 (Dalip Singh-Si) and two other persons. Though the application was stoutly opposed by the accused''s

counsel the trial court allowed it in exercise of its power u/s 311 of the CrPC (for short "the Code") and summons were issued to the witnesses as

per its order dated 8.1.1999.

4. The relevant portion of that order of the trial court is the following:

In order to find out whether the CESL Form accompanied the sample packet or not, it has been repeatedly held by the Hon"ble High Court that

the Read Certificate should be produced to make things clear in this respect. It cannot be denied that it is an old case and directions have been

issued several times to expedite the trial but at the same time when the witnesses are available the prosecution cannot be debarred by examining

him. In the present case, cross examination of P.W. 4 was deferred by learned Additional Public Prosecutor. Cross examination of P.W. 21 by the

Defence Counsel was deferred but thereafter he was never summoned for cross examination. There was negligence on the part of Public

Prosecutor as he closed evidence twice without verifying whether cross examination of all the witnesses has been concluded or not. However, in

the interest of justice, I allow the application to the extent that P.W. 21 Dalip Singh be recalled for cross examination. The interest of justice

demands that things should be clear before the Court to assist it to meet the ends of justice.

5. Appellant challenged the said order in revision before the High Court of Delhi. As it was an interlocutory order the question whether a revision

was not maintainable as per Section 397(2) of the Code was not considered by the High Court. Nevertheless, the High Court entertained the

revision and dismissed it as per the impugned order. According to the learned single judge who dismissed the revision ""there are certain

circumstances which have been mentioned in the order of the sessions Judge which forced him to pass the order.

6. Learned Counsel for the appellants contended that the trial court failed to appreciate that in the garb of exercise of powers u/s 311 of the Code

a court cannot allow the prosecution to re-examine prosecution witnesses in order to fill up lacuna in the case. Lacunae, as pointed out by the

learned Counsel, were the following:

(a) PW 21 Dalip Singh was never tendered by the prosecution for cross examination.

(b) PW4 Suresh Chand Sharma was also not cross examined by the State.

(c) There was no link evidence to correct the testimony of PW28 H/ C Jai Prakash. That aspect was highlighted during arguments in the trial court,

before the court resorted to the impugned steps.

7. The above contention was based on the observation made by this Court in 290220 that the court while exercising its power u/s 311 of the Code

shall not use such power "for filling up the lacuna left by the prosecution."

8. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers u/s 311 of the Code

or u/s 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 proved. A

corollary of any such latches or mistakes during the conducting of a case cannot be understood as the lacuna which a court cannot fill up.

9. 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 trail of the case, but an over sight in the management of the prosecution cannot be treated as

irreparable lacuna. No party in a trial can before-closed 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.

10. The very same decision Mohanlal Shamji Soni v. Union of India (supra) which cautioned against filling up lacuna has also laid down the ratio

thus:

It is therefore clear that the Criminal Court has ample power to summon any person as a witness or recall and re-examined any such person even if

the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and

good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would

depend on the facts and circumstances of each case.

11. Dealing with Corresponding Section in the old Code Section 540. Hidyatullah Jias the learned Chief Justice then was) speaking for a three-

judge bench of this Court had said in 283278 as follows:

It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage or the trail to summon

a witness or examine one present in Court or to recall a witness already examined, and makes this the duty and obligation of the Court provided

the just decision of the case demands it. In other words, where the court exercise the power under the second part, the inquiry cannot be whether

the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just

decision of the case.

12. Chinnappa Reddy, J. has also observed in the same tone in 287323

13. 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 that power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered latches 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.

14. The appeal is accordingly dismissed.