
(1995) 09 PAT CK 0004

In the Patna High Court

Case No : Criminal Miscellaneous No. 8961 of 1988

Anand Kumar Singh, Arun Kumar and Brijnandan Prasad
Singh

APPELLANT

Vs

The State of Bihar and Dwarika Choudhury

RESPONDENT

Date of Decision : 07-09-1995

Acts Referred:

Citation : (1995) 09 PAT CK 0004

Final Decision : Allowed

Judgement

1. This petition, u/s 482 of the Code of Criminal Procedure, 1973 ("the Code" for short), is directed against an order dated 9.8.1988 passed by the learned Sessions Judge, Munger, in Cr. Revision No. 79 of 1988, whereby the learned Sessions Judge has set aside the order dated 11.2.1988 passed by Sri R.K. Srivastava, Judicial Magistrate, 1st Class Lakhisarai, in G.R. No. 284 of 1986 rejecting a petition filed u/s 311 of the Code praying for allowing the prosecution to examine three prosecution witnesses at a stage when the evidence of the prosecution side had already been closed, accused examined u/s 313 of the Code and the case was pending for judgment.

2. The Petitioners were accused in a case bearing G.R. No. 284 of 1986 and had been charged of the offences punishable under Sections 323 and 325 of the Indian Penal Code. The charges had been framed on 19.11.1986 and thereafter several adjournments, as many as 13, had been allowed till 24.8.1987 for producing the witnesses of the prosecution side but no witness of the prosecution was produced. Later one witness was produced on 8.9.1987 and thereafter five further adjournments were allowed but no further witness was produced. Then the prosecution evidence was closed, the Petitioners-accused were examined u/s 313 of the Code and the case was fixed for judgment on 19.12.1987. On that date the prosecution side filed a petition praying for allowing the prosecution to examine three witnesses and after hearing the parties on that petition, the learned Judicial Magistrate by order dated 11.2.1988 rejected the petition

observing that the prosecution could not be allowed to fill up lacuna when it had failed to produce the rest witnesses. Against the order dated 11.2.1988 of the learned Judicial Magistrate, the informant filed a revision petition before the learned Sessions Judge bearing Cr. Revision No. 79 of 1988 and the learned Sessions Judge by the impugned order dated 9.8.1988 had disposed of the revision petition with the following concluding observations and directions:

... I think the learned Magistrate should have permitted the prosecution to examine the prosecution witnesses when they were present in Court. Thus, witnesses may be examined u/s 311 Code of Criminal Procedure in the interest of justice. It is cardinal principle of administration of justice that justice should not only be done but should manifestly seem to be done. Learned Magistrate may examine the witnesses who were produced by the informant on the day fixed by the Court. No further adjournment should be granted. The Petitioner should produce witnesses on the date fixed by the Magistrate. This petition is thus disposed of.

3. Learned Counsel for the Petitioners has strongly contended that the learned Sessions Judge has not considered the true import and purport of Section 311 of the New Code and that section cannot be used for the purpose of filling up lacuna, if any, that has been left out in the evidence of the prosecution, and the view taken by the learned Sessions Judge is against the decision of this Court in the case of *Rajendra Prasad Singh alias Khiru Singh and Ors. v. Ramuchit Singh alias Chhotan Singh* (1984 BBCJ 657). According to his submission, the prosecution had been allowed by the Judicial Magistrate several opportunities to produce the witnesses, but the opportunities were not availed of, and ultimately when the case was fixed for judgment, the prosecution filed a petition to examine three witnesses, and the learned Judicial Magistrate in the background of the case was absolutely justified in rejecting the petition filed by the prosecution but the learned Sessions Judge has illegally and improperly set aside the order of the learned Judicial Magistrate and has allowed the prosecution at a very belated stage, to fill up lacuna, that had been left by the prosecution.

4. On the other hand, learned Addl. P.P. has submitted that the provisions of Section 311 of the Code, which corresponds to the provision of Section 540 of the Code of Criminal Procedure, 1898 ("the Old Code" for short) gives wide power to the Court to do justice and while the first part of Section 311 is discretionary, the second part is mandatory and if the Court including the Revision Court would feel that for just decision of the case, some witnesses should be examined, the Court is bound to examine those witnesses in view of the mandatory requirement of the second part of Section 311 of the New Code, and if the Revisional Court's order is considered in this aspect, it will appear proper and justified, for without examination of the three witnesses, there could be no just decision of the case.

5. The point that arises for decision in this case is whether in the facts and circumstances of the case, the learned Sessions Judge was right in giving

direction to the learned Judicial Magistrate to examine the prosecution witnesses which would be produced on the date to be fixed by the learned trial Court?

6. We may notice here that when this petition had been listed before a Single Judge, it was referred to a Division Bench with the following observations:

Learned Counsel appearing on behalf of the Petitioner relies upon the judgment of this Court reported in 1984 BBCJ 657 : Ramchander Nonia and Others Vs. State of Bihar, He is right in submitting that this Court has held that it is well settled that the jurisdiction conferred u/s 311 of the Code of Criminal Procedure cannot be used for filling up the lacunae in the prosecution case, in view of the decision of the Supreme Court reported in 1980 Cri. LR 80 which I am told, is the same judgment as has been reported in State of Rajasthan Vs. Daulat Ram, From the aforesaid judgment, it appears that the Supreme Court observed that the prosecution could not be allowed to fill up the gaps or lacunae left at the trial at appellate or revisional stage. According to me, there is nothing in the judgment of the Supreme Court which bars the prosecution from examining any evidence before the trial Court before the judgment is delivered, even though such evidence is examined at a belated stage. The language employed in Section 311 of the Code of Criminal Procedure, to me, appears to be wide enough to include a situation where the prosecution may have justification to move the trial Court to grant permission to examine the witnesses left out which it considers necessary to examine with a view to do justice.

In this view of the matter, left this application be placed before a Division Bench for disposal....

7. On perusal of the decision reported in State of Rajasthan Vs. Daulat Ram, it is clear from the observation made therein by the Hon'ble Supreme Court that "the prosecution, which was taking a vacillating stand in the matter, could not be allowed to fill up the gaps or lacunae left at the trial, at the appellate or revisional stage". In the instant case obviously the observation will not apply because the concerned case is still pending before the trial Court and the matter as to whether any further witness should be allowed to be examined by the prosecution or not before the trial Court is an issue. In the case reported in 1984 BBCJ 657 the following observations have been made, vide paragraph, 3 which read as follows:

3. It is submitted on behalf of the Petitioners that oral arguments have (sic) ready been made, written arguments filed and the date for judgment was also fixed, but on the date fixed for delivering the judgment, the impugned order has been passed. This clearly shows that in order to outdo the arguments of the defence, the Court seeks to examine a material witness. This is impermissible.

8. In our view it is not correct to say that at the time of delivering judgment the power given to a Court under the provision of Section 311 of the Code cannot be exercised and this position seems to be settled long back by a decision of the Hon'ble Supreme Court as reported as early in the year 1968 vide Jamatraj

Kewalji Govani Vs. The State of Maharashtra, but at the same time it was also observed that the power u/s 311 of the Code can be only exercised when it would appear to be essential for just decision of the case.

9. Considering the scope and purport of the provisions of Section 540 of the Code of Criminal Procedure, 1898 ("the Old Code" for short) which corresponds to Section 311 of the New Code, the Apex Court observed as follows:

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 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....

10. The stage of trial for the purpose of Section 311 in our opinion would continue till judgment is delivered in the concerned case and before delivery of the judgment if the Court feels it essential for just decision of the case to examine, recall or re-examine any witnesses, the Court can take steps for examination or re-examination or re-call any witness. When such a question arises for consideration, the question, in our opinion, should not be considered as to whether the examination, recall or re-examination of any witness will amount to filling up lacunae in the prosecution evidence or it will help defence. If the Court in the facts and circumstances of the case before it, does not consider the examination, re-call or re-examination of any witness to be essential for the just decision, it will not exercise its power or discretion given to it u/s 311 of the Code. Equally, if the Court considers that for just decision of the case before it, it is essential to examine, recall or re-examine any witness, it must exercise its power u/s 311 of the Code. The focus of attention in such a matter cannot be the interest of prosecution or the interest of the defence or question of filling up lacunae or putting any side in advantageous or disadvantageous position. Of course if the Court on considering it essential for just decision of the case examines any witness afresh or recalls or re-examines any witness already examined by the prosecution or the defence, the result and evidence may eventually have the effect of being advantageous or disadvantageous to either the prosecution or the defence, and if it goes to the advantage of the prosecution, it may even be said that some lacunae in the prosecution evidence have been filled up. But the power in that case has not been exercised for filling up the lacunae but for just decision of the case. The position in this regard is clear from a recent decision of the Supreme Court.

11. In the case of Mohanlal Shamji Soni v. Union of India and Anr. [reported in Mohanlal Shamji Soni Vs. Union of India and another, our Apex Court after noticing several decisions relating to the provision of Section 540 of the Old Code observed (vide paragraph-27) as follows:

27. The principle of law that emerges from the views expressed by this Court in

the above decisions is that the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if 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 requirement of justice command the examination of any person which would depend on the facts and circumstances of each case.

In this judgment the Hon^{ble} Supreme Court also considered as to whether the wide power given by the provision of Section 540 of the Old Code was un-guided, uncontrolled or uncannalised and on this aspect it observed as follows:

... 18 Though Section 540 (Section 311 of the new Code) is, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the Court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the Section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the Court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties.

12. In the context of principles laid down by our Apex Court, we have to see whether the impugned order of the learned Sessions Judge can be said to be proper and legal. Obviously, there is no finding of the learned Sessions Judge that examination of the three witnesses of the prosecution was essential for just decision of the case, rather it appears from the observations of the learned Sessions Judge that he directed the examination of the witnesses by the trial Court not for doing justice but for showing that justice should be shown to be done. This reason indicated in the order of the learned Sessions Judge, in our opinion, is not a good reason for exercise of power given to the Court by the provision of Section 311 of the Code. From the fact that numerous adjournments had already been allowed to the prosecution to produce the witnesses in a case in which charges were not of very serious offence but only for the offences punishable under Sections 323 and 325 of the Indian Penal Code, it will appear that giving further opportunities the prosecution, which had failed to avail the numerous opportunities given to it earlier would amount to giving undue premium to the apathetic attitude shown and default made by the prosecution in

producing the witnesses before the trial Court. It also appears doubtful to us that by allowing the prosecution to examine three witnesses at the stage when the case was already fixed for judgment, the purpose that "justice should manifestly seem to be done" (as observed by the learned Sessions Judge) could be served. The system of trial that is prevailing in our country is primarily what is called adversary system of trial in which primarily the parties are expected to place before the Court their respective cases in accordance with the procedure prescribed by the law, and the Courts are expected to play comparatively less active role in collecting evidence in comparison to the Court where what is called "inquisitorial" system of trial (as is prevailing in some continental countries of Europe) where the Courts are expected to play more active role in collection of evidence. To be sure, the Courts in our country have also been given ample powers by certain provisions of law (Sections 311 or 482 of the Code, Section 165 of the Evidence Act, for instance) to enable them to do justice and at times in the facts and circumstances of a particular case, they should play considerably active role in the interest of justice. But seekers of justice by the Court, in the background of the system of adversary trial prevailing, expect that the Court should not pass any order which will give an impression that any side is being given undue advantage despite lapses made by that side. In the instant case we feel that the order passed by the revisional Court instead of having the effect of showing that justice was manifestly being done could have shown that prosecution was being allowed to harass the accused side. So in this view of the matter also, the order of the learned Sessions Judge is un-sustainable.

13. We may also notice here that right to speedy trial has now been recognised as part of the fundamental right as guaranteed by Article 21 of the Constitution of India, and any undue prolongation of any trial in non-serious cases will amount to violation of that fundamental right and undue harassment to the Petitioners accused in the case. So from this point of view also the impugned order of revisional Court seems to be unsustainable for it had the effect of prolonging the trial in a case of such nature.

14. So in the light of discussions made and reasons indicated above, we decide the point for decision by holding that in the facts and circumstances of the case the revisional Court u/s 311 of the New Code has wrongly held that the prosecution witnesses should be examined by the trial Court in order to ensure that the justice should not be only done but manifestly seem to be done. Accordingly, we allow this petition, set aside the impugned order dated 9.8.1988 passed by the learned Sessions Judge in Criminal Revision No. 79 of 1988 and direct the learned trial Court to dispose of the case accordingly to law without examining the witnesses as indicated above.