
(1997) 04 P&H CK 0117

In the Punjab And Haryana At Chandigarh

Case No : Criminal Miscellaneous No. 13913-M of 1996

Anant Ram

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision : 08-04-1997

Acts Referred:

Citation : (1997) 2 RCR(Criminal) 711

Hon'ble Judges : V.S.Aggarwal, J

Advocate : Gorakh Nath, U.K. Agnihotri, Advocates for appearing Parties

Judgement

V.S. Aggarwal, J.

1. Anant Ram petitioner is facing trial at Sirsa with respect to offences punishable under Sections 302 and 201 IPC. By virtue of the present petition, he seeks quashing of the order passed by the learned Additional Judge, Sirsa. The learned trial Court exercising the powers under Section 311 Cr.P.C. directed summoning and examining of witnesses to produce the documentary evidence by calling an officer from Army Unit of the petitioner with record regarding his leave, duty and return journey from his native place to his place of posting on 14/15.9.1994 and also the concerned officer from the Railway with record regarding Army journey voucher/ticket of the accused of above said journey.

2. The relevant facts are that on basis of the statement of one Naurang Lal, the first information report had been recorded. He had recited that he had been informed by the villagers that there was blood line in the verandah of Railway Station, Surera. One attache one box made of iron, one gandasa type of weapon were lying therein. The dead body of one woman aged about 25 years and of a boy aged 45 years were lying on the right hand side of Nala of the railway station. It was mentioned that dead body of a female child of 4/5 months had been washed away on account of the flow of the water. The injuries had been caused with a sharp edged weapon. The name of the assailant had not been given.

3. Subsequently, on investigation the petitioner had been named as an accused. It is contended that the petitioner alongwith the victims who were travelling from Rewari by train to Sri Ganga Nagar, on the way near Railway Station Khari Surera, the dead bodies of the victims had been found. There was no eyewitness. The prosecution case rested on circumstantial evidence. The trial had proceeded. The entire evidence had been recorded. At the time when arguments were being addressed on 12.7.1996, the learned Additional Sessions Judge had passed the following order :

"Further arguments heard. During the course of arguments and also while perusing the file as referred to by defence counsel, I prima facie feel that evidence from Army and Railway authorities should be summoned regarding leave of the accused at relevant time and regarding his journey if any, from his native village or Rewari to his Army posting place in District Ganga Nagar via Khari Surera. Documentary evidence in this behalf appears to be very essential to the just decision of the case. However, before deciding on this aspect, it is necessary to hear both sides thereon. Defence counsel seeks adjournment for addressing the court on this aspect. Adjourned to 15.7.96 for hearing on the same."

Subsequently, after giving the parties an opportunity of leading evidence, the learned trial Court concluded that the case is based on circumstantial evidence. The petitioner belonged to District Rewari and was posted in the Army in District Sri Ganga Nagar. Village Khari Surera falls on the way as one proceeds from Rewari to Sri Ganga Nagar. The trial Court felt that record of leave, duty and return journey of the petitioner is essential and reliable evidence for just decision of the case. Holding that it was most essential for just decision of the case, the impugned order dated 22.7.1996 was passed. Hence, the present petition for quashing of the same.

4. Learned counsel for the petitioner highlighted the fact that almost arguments had been concluded when the impugned order has been passed. Lacunae could not be permitted to be filled up. The trial court itself was not sure as to what evidence has to be produced. Therefore, direction was given to the Public Prosecutor to give the particulars. He further contended that in such like circumstances, the impugned order cannot be sustained. In addition to that his submission was that such an order prejudicial to the claim of the petitioner should not be passed.

5. Section 311 of the Code of Criminal Procedure gives power to the Court to summon material witnesses and examine certain persons as witnesses. The said provision unfolds itself in the following words :

"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 reexamine any such person if his evidence appears to it to be essential to the just decision of the case."

It is apparent from perusal of Section 311 Cr.P.C. that it is in two parts. Once the word used in first part is "may", the second part uses the word "shall". As a consequence the first part gives purely discretionary authority to the criminal court and enables it at any stage of enquiry or trial under the Code of Criminal Procedure to summon anyone as a witness. It can examine any person present in Court and reexamine any person whose evidence has already been recorded. But the second part of Section 311 Cr.P.C. is mandatory. It compels the Court to record any such evidence if the said evidence appears to it to be essential to the just decision of the case. Section 311 calls for no limitations with regard to the stage at which the power of the Court should be exercised or with regard to the manner in which it should be exercised. Before proceeding further it would be appropriate and in the fairness of things that reference may be made to certain precedents relied upon by the petitioner to contend that after the evidence has been completed, additional evidence in exercise of the powers under Section 311 Cr.P.C. should not be allowed.

6. In the case of *Didar Singh v. State of Punjab*, 1977 CLR 60 the Additional Sessions Judge at the final stage of arguments allowed the prayer of the prosecution for additional evidence and directed the Forensic Science Laboratory, Chandigarh to effect the comparison of the documents. A learned Single Judge of this Court accepted the contention that at the final stage under Section 311 of the Code of Criminal Procedure, such a power should not be exercised to the disadvantage of the accused. In coming to this conclusion reliance was placed on the decision of this Court in the case of *Santokh Singh v. State of Haryana*, 1975 CLR 119. The impugned order as such in the facts of that case had been quashed. Armed with this fact the learned counsel thereupon referred to the decision in the case of *Santokh Singh* (supra). In the cited case *Santokh Singh* was convicted by the Judicial Magistrate for the offence punishable under Section 9 of the Opium Act. He had preferred an appeal. The learned Sessions Judge had set aside the conviction and remitted the case for a fresh trial. The Magistrate was directed to afford another opportunity to the prosecution to file affidavits of formal witnesses. Keeping in view that no such application had been filed during the course of trial, this Court had set aside the order of the learned Sessions Judge and held :

"The short point that arises for determination in this case is whether the learned Sessions Judge could remit the case for a fresh decision to afford another opportunity to the prosecution for filing duly sworn and verified affidavits of the formal witnesses. Mr. M.M.S. Liberhan, learned counsel for the petitioner, stated that the order of the learned Sessions Judge is without jurisdiction and he could not pass the impugned order remitting the case for retrial. He submitted that the case was first registered on 18th July, 1971 and the trial Court decided the case

on 27th February, 1973 and the appeal by the learned Sessions Judge was disposed of on 1st September, 1973. No application was ever made by the prosecution either before the trial Court or the appellate Court for giving an opportunity to file duly sworn and verified affidavits of the formal witnesses. More than three years have passed and it is not most unreasonable and unjustified to again order the trial of the accused. To my mind, the submission of the petitioner's counsel seems to be sound."

7. Same view prevailed with this Court in the case of *Bachan Singh v. State of Punjab*, 1981 C.L.R. 369. In the cited case also during the trial against the accused with respect to the offence punishable under Section 9 of the Opium Act, the prosecution had closed its evidence. It was listed for defence evidence. An application was filed for permission to examine certain more witnesses whose affidavits were already tendered in evidence. This Court held that such order allowing additional evidence was to the disadvantage of the accused and set aside the same holding :

"The principal argument raised on behalf of the petitioner is that prosecution cannot be allowed to fill up the lacunae in its case specially after the prosecution evidence has been closed. It is stated that the order is prejudicial to the accused and the discretion was improperly exercised. In support of this contention, reliance is placed on a decision in *Bhag Singh v. State of Haryana* (Crl. Revision No. 356/1971 decided on 13.7.1971) in similar circumstances. It was held that the power u/s 540 of the Criminal Procedure Code though wide should not be exercised to the disadvantage of the accused. The same view was taken in *re. K.V.R.S. Mani*, AIR 1951 Madras 707 and in *Shree Lal Kajaria v. The State*, I.L.R. 1963 Bom. 698. Applying this principle I find that the learned trial Magistrate was in error in allowing an opportunity to the State to produce *Virinder Singh M.H.C.* to fill up the lacunae and that discretion has not been properly exercised. Taking this view of the matter I accept this revision petition and set aside the order of the trial Magistrate dated June 13, 1980. The parties through counsel are directed to appear in the trial Court on 5.1.1981."

Yet another decision of this Court relied upon was in the case of *Jagdish Chander v. State of Haryana*, 1984(1) RCR 95. Herein the prosecution had closed its evidence. The case was listed for arguments. An application was filed to recall a witness. This Court concluded that the said discretion has to be exercised if the evidence is essential for just decision of the case. It should not demolish the case of the prosecution. The revision petition was accepted and the order passed by the trial Court was set aside. The following reasons had been recorded in coming to this conclusion :

"From the above it is clear that Section 311 consists of two parts. The first part is regarding discretion of the Courts to summon any person as a witness or recall or reexamine any person already examined. The second part casts an obligation upon the Court to summon and examine or recall and re examine any person if his evidence appears to it to be essential for the just decision of the case. In the

above cited Supreme Court case the Magistrate had exercised the powers under the second part and had held that the evidence of the witness summoned and examined by him was necessary for the just decision of the case. In the present case the Additional Chief Judicial Magistrate had not formed any conclusion that the evidence of Parshotam Lal Singla was essential for just decision of the case. He has exercised his jurisdiction under first part of that Section. As discussed above, that discretion can be exercised on justifiable grounds. In the present case no such ground exists."

It is apparent from the decision in the case of Jagdish Chander (supra) that the learned trial Court had not recorded any finding that the evidence of the witness was essential for just decision of the case. It was in this background that the order allowing the additional evidence/recalling of the witnesses was set aside.

8. Another decision in this regard that was much relied upon by the petitioner's counsel was in the case of Bhagwan Singh v. State of Punjab, 1988(2) RCR 46. In the cited case the report of the Chemical Examiner had not been signed. At the arguments stage the prosecution applied permission to produce the Chemical Examiner to prove the report. The application was allowed. This Court had set aside the said order and held :

"The phrase "for ends of justice" does not only mean that the prosecution should not suffer from such infirmities. Actually, the Court has to keep up a balance. The case was registered some time much before 18.6.1986 and the investigation continued for a period of about a year. The report under Section 173 of the Code was presented on 27.3.1987. Arguments were heard on 19.10.1987. It was only on 19.10.1987, as stated above, that the present application was filed. The only ground mentioned for summoning additional evidence is that the report of the Chemical Examiner is not signed by the Assistant Chemical Examiner and the same was tendered in evidence as Ex.PE inadvertently. This ground does not appeal to reason, because earlier as already remarked, the prosecution had so many opportunities of checking up all the documents to be produced with the challan so as to see whether a case is made out against the accused or not. If no body has looked into the report at any stage till the day of arguments, it is the fault of no body else except that of the prosecution itself for which it must suffer."

The obvious flows from aforesaid, this Court did not accept the order of the trial court because many opportunities had been given to the prosecution. They had checked the documents. It was concluded that lacunae could not be allowed to be filled up. A Division Bench of this Court in the case of Sukhdev Singh v. State of Punjab, 1982 C.C. Cases 464 was also concerned with the same situation. The trial was under Section 9 of the Opium Act. The entire prosecution evidence had been recorded. Even the defence has closed its evidence. At that stage, the prosecution moved an application for examining the clerk of Chemical Examiner to prove the sample having been received intact. The application was allowed. The matter when it came to this Court had been considered. It was held that power under Section 311 Cr.P.C. is not to be utilized to demolish the case of the

accused. The sole criteria in such a case should be, whether exercise of power under Section 311 Cr.P.C. is necessary in the interest of justice. After scanning through various decisions, this Court held :

"We do not think that the mere fact that evidence is permitted to be taken after the entire prosecution case is over is in itself in excess of the powers of the Court. No hard and fast rules can be prescribed as to when and at what stage this discretion should be exercised. The anxiety for justice is paramount and should be kept in view. The Court should be unmindful of the fact of the use of the discretion in favour or against any party. The principle that such evidence should not demolish the case set up by the accused in his defence, if he has done so, should be present to the mind of the Judge at the time when he takes a decision. The powers of the Court under Section 311, which are very wide, cannot be limited, as the judgments in Bhag Singh and Santokh Singh's cases, and other cases following those cases, tend to do. The Court under this section is to help neither the prosecution nor the accused. The discretion has to be exercised during the trial, which only terminates with the pronouncement of the judgment. Bhag Singh's case, Santokh Singh's case and other Single Bench judgments of this Court, expressing similar view, so far as they lay down that this discretion is limited and cannot be exercised at a later stage of the case after the defence is closed or the arguments are heard, do not lay down a correct law and, being contrary to the principles in Jamatraj Kewalji Govani's case (supra) and two Division Bench judgments of this Court, are overruled. The discretion can be exercised by the Court at any stage of the case, but on justifiable grounds."

9. At this stage, one can conveniently also refer to the decision of the Supreme Court in the case of Jamatraj Kewalji Govani v. State of Maharashtra, AIR 1968 SC 178. This was a case under Section 540 of the earlier Code of Criminal Procedure. It basically corresponded with Section 311 of the new Code. The Supreme Court also concluded that such a power has not to be utilized unless it was absolutely necessary for just decision of the case.

10. After scanning through various decisions, it becomes necessary to draw a logical conclusion. It goes without saying that duty of the Court is to decide the rights of the parties in a fair manner. It will not allow the lacunae to be filled up. Where large number of particulars have been given, the prosecution should not be allowed to lead additional evidence which could easily have been produced on an earlier occasion. But under Section 311 of the Code of Criminal Procedure, the Court has unrestricted power of summoning a witness. The Court is duty bound to record evidence which it considers necessary for doing justice between the parties. A duty is casted upon the Court to arrive at the truth by all lawful means. One such means is examination of witnesses of its own accord when for certain reasons the prosecution or defence is not calling those witnesses. If their statements are necessary and essential for just decision of the case, then the said Court cannot avoid its statutory responsibility by not summoning the

witnesses. The Court can act of its own initiative and summon those witnesses. This is the basic purpose of the second part of the Section 311 Cr.P.C. If the Court fails in duty, then there would be failure of justice. The decisions quoted by the petitioner's learned counsel were confined to the peculiar facts. There is no controversy with the principles but the facts of each case necessarily have to be looked into.

11. In the present case in hand the learned trial Court had specifically recorded that the said evidence was essential for just decision of the case. When the trial Court so feels in normal circumstances, this Court will not interfere. Not only that, brief resume of the facts has already been given above. The petitioner was posted at Sri Ganga Nagar. There was no eye witness to the incident. The petitioner is a resident of Rewari. The dead bodies were found at a station which falls on the way on route from Rewari to Sri Ganga Nagar. In these circumstances, the documentary evidence regarding the leave, duty and return journey pertaining to the petitioner for the relevant dates, was essential for just decision of the case. It was also essential that the corresponding evidence from the railways about travelling of the petitioner should also be produced. The learned trial court indeed was doing its duty to arrive at a just decision. There is no ground thus to interfere.

12. Learned counsel for the petitioner urged that the said enquiry and the evidence summoned is fishy in nature because according to him a direction has been given to the Public Prosecutor to furnish the particulars. In this regard the said direction must be taken to be inconsequential. Keeping in view the facts of the case, certain evidence had been directed to be summoned. As a consequence thereto, if Public Prosecutor gives the particulars, it would only help the Court in arriving at a just decision. It cannot be described that as yet no certain or specific evidence is known. The plea of the petitioner, therefore, patently is without merit.

13. For these reasons, the petition being without merit must fail and is dismissed.