
(2019) 06 GAU CK 0016
In the Gauhati High Court
Case No : Criminal Petition No. 641 Of 2019

Bhaigyoram Khaklary And 3 Ors

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision : 11-06-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 154, 164, 311

Indian Penal Code, 1860 — Section 109,143, 144, 147, 148, 149, 186, 302, 332, 341

Evidence Act, 1872 — Section 138, 154

Citation : (2019) 06 GAU CK 0016

Hon'ble Judges : Suman Shyam, J

Bench : Single Bench

Advocate : M Sarania

Final Decision : Disposed Off

Judgement

1. Heard Mr. M. Sarania, learned counsel appearing for the petitioners. I have also heard Mr. P. P. Baruah, learned Public Prosecutor, Assam, appearing for the respondent/State.

2. This Criminal Petition has been preferred against the order dated 07.06.2019 passed by the learned Sessions Judge, Nagaon in Sessions (T-1) Case No.53(N)/2018 by means of which the learned trial court had allowed the petition filed by the prosecution side under Section 311 Cr.P.C. with a prayer to recall a witness.

3. The entire controversy in this case revolves around the prayer to re-examine the witness Numal Basumatary i.e. the PW-17. As per the statements recorded under Section 164 Cr.P.C. the PW-17 is an eye-witness to the incident. The prosecution side had examined the witness on 30.04.2019 whereafter, he witness was cross-examined and thereafter, discharged by the court. PW -17 was the last witness examined on that day. However, immediately after the conclusion of the days' proceeding, the prosecution side had filed petition bearing No.1155/2019 under Section 311 Cr.P.C. with a prayer to re-call PW-17 and to permit his cross-

examination by the prosecution side. The application was premised on the ground that the PW-17 did not support the prosecution case and on the contrary, during his examination-in-chief and cross-examination, the witness had resiled from his statement recorded under section 164 Cr.P.C. The petitioners, who are the accused in Sessions (T-1) Case No.53(N)/2018 registered under sections 302/341/427/143/144/147/148/149/109/332/186 of the IPC had objected to the prayer for recall of PW-17. However, by the impugned order dated 07.06.2019, the learned Sessions Judge has allowed the prayer made on behalf of the State.

4. Mr. Sarania, learned counsel for the petitioners, has assailed the impugned order primarily on two counts. Firstly, that no proper reason has been recorded by the learned trial court before allowing the prayer for recall of the witness in exercise of powers under section 311 Cr.P.C. Secondly, the prosecution side having failed to make a prayer under Section 154 Cr.P.C. before the witnesses (PW-17) was discharged after his cross-examination, such a prayer cannot be granted at this point of time since allowing the prayer would amount to permitting the prosecution side to cure the lacuna in their evidence.

5. By placing reliance on a decision of the Hon'ble Supreme Court rendered in the case of State of Haryana vs. Ram Mehar & others reported in (2016) 8 SCC 762 Mr. Sarania submits that under section 311 Cr.P.C., the court cannot permit re-examination of a witness so as to allow a party to fill up a lacuna. Mr. Sarania has also relied upon a decision of the Hon'ble Supreme Court rendered in the case of Rajaram Prasad Yadav vs. State of Bihar & another reported in (2013) 14 SCC 461 to contend that the guidelines laid down by the Apex Court for exercising powers under section 311 Cr.P.C. have not been followed in the instant case. It is also the submission of Mr. Sarania that the learned trial court had committed an error in granting leave to the prosecution side to cross-examine PW -17 without a prayer being made on that behalf. On such ground, a prayer has been made to set aside the impugned order.

6. Mr. P. P. Baruah, learned Public Prosecutor, Assam, has, on the other hand, argued that there is no error in exercise of jurisdiction by the learned Sessions Court in issuing the impugned order dated 07.06.2019 and therefore, no interference is called for in the matter.

7. I have considered the submissions advanced by learned counsel for both the parties and have meticulously gone through the materials available on record.

8. At the very outset, it needs to be pointed out herein that the application filed by the prosecution side was under Section 311 Cr.P.C. with a prayer to recall the witness (PW-17). In the said application, a prayer had also been made to declare the witness as hostile witness. However, the impugned order dated 07.06.2019, the learned trial court has only allowed the prayer for re-calling the witness PW -17.

9. At the outset, it is to be noted herein that recording of evidence of the prosecution side is still under progress in this case. The application under section

311 Cr.P.C. had admittedly been filed the prosecution side on the same day on which the witness PW-17 was discharged after the cross-examination. There is nothing on record to indicate that the prosecution side had declined re-examination of the witness (PW -17).

10. As per section 138 of the Evidence Act, a witness is to be examined-in-chief, then cross-examined and then re-examined. Therefore, re-examination of a witness by the party calling the witness is a right conferred under the statute and unless such a right is declined, the party cannot be denied of such an opportunity to re-examine the witness if the circumstances of the case so justifies.

11. The petitioners' counsel has argued that no proper justification for recalling of PW-17 has been recorded by the learned court below. However, a bare reading of the impugned order dated 07.06.2019 goes to show that PW-17, who had claimed to be an eye-witness to the incident, had later on resiled from his earlier statement during his examination by the prosecution side. Therefore, it is clear that PW -17 is a material witness and his testimony would have a relevant bearing in a just decision of the case.

12. Law is firmly settled that jurisdiction under section 311 Cr.P.C. is discretionary and unless there is an error in exercise of such jurisdiction, the revisional court would not ordinarily interfere with the order of the trial court passed in exercise of such discretionary jurisdiction. In the impugned order dated 07.06.2019, the learned trial court has made it clear that the defence side would have the liberty to cross-examine the PW-17 afresh. Therefore, no prejudice can be said to have been caused to the petitioners in the matter. Having regard to the facts and circumstances of the case it cannot be said that prayer to re-call the witness PW-17 was for the sole purpose of curing a lacunae. I am, therefore, of the considered opinion that the impugned order dated 07.06.2019 does not suffer from any infirmity warranting interference by this Court. The revision petition is, therefore, held to be devoid of any merit and is accordingly dismissed.

13. Before parting with the record it would be apposite to mention herein that as per section 154 of the Evidence Act, a party can cross examine his own witness if the same is permitted by the Court. The power conferred under Section 154 is discretionary in nature and would depend on the facts and circumstances of each case. In the present case, although the respondent/State had made a prayer in the application filed under Section 311 of Cr.P.C. to declare the witness (PW-17) as a hostile witness, no such declaration has been made in the order dated 07/06/2019. Therefore, it is made clear that the question of cross examining the PW-17 by the prosecution side would be subject to the leave granted by the Court at an appropriated stage and also subject to the condition that the defendant side is permitted to further cross examine the said witness.

With the above observation, the revision petition stands disposed of.