
(2010) 03 MP CK 0063
In the Madhya Pradesh High Court
Case No : M. Cr. C. No. 163 of 2010

Boby alias Sanjeev Singh

APPELLANT

Vs

State of Madhya Pradesh and Another

RESPONDENT

Date of Decision : 17-03-2010

Acts Referred:

Arms Act, 1959 — Section 25, 27
Criminal Procedure Code, 1973 (CrPC) — Section 164, 301(2), 311, 482, 540
Evidence Act, 1872 — Section 114, 60, 64, 91
Penal Code, 1860 (IPC) — Section 109, 120B, 201, 302, 307

Citation : (2010) CriLJ 3662

Hon'ble Judges : P.K Jaiswal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

P.K. Jaiswal, J.—In these two petitions u/s 482 of the Code of Criminal Procedure, 1973 (in short "the Code"), the petitioners are praying for quashment of order dated 24-11-2009 passed by 15th Additional Sessions Judge (Fast Track Court), Jabalpur in Sessions Trial No. 64/2006, whereby trial Court allowed the application filed by Mohd. Haleem (PW-3) for his re-examination.

2. Both the petitions can be disposed of by a common order, since one and same issue requires to be decided.

3. For the sake of convenience the brief history for disposal of these M.Cr.Cs. are taken from M.Cr.C. No. 12402/2009.

4. Brief facts of the case are that on 7-4-2004 an FIR was lodged by Sanjeev Singh at 22.10 hours at Police Station, Gorakhpur, Jabalpur giving rise to registration of offence vide Crime No. 276/2004 punishable under Sections 302, 307, 120-B, 201, 109/34, IPC and also under Sections 25 and 27 of the Arms Act, 1959, whereby it was alleged that at about 8.00 in the morning the first informant, namely Sanjeev Singh along with his companions, namely Rajnish alias Rajji Saxena, Chaman Kori, Ballu alias Balram Birha and Bablu alias Bassi

Musalman had gone to Mandla for taking part in sand contract and when in the night they were returning from Mandla in Centro Car bearing registration No. MP-20-FA/2655 of Bablu Musalman and reached near Kapur crossing at Katanga and while going towards Gorakhpur Bazar and reached Azad Chowk, at that time one motor cycle driven by Majid Karia of Naya Muhalla with Sarfaraj of Naya Muhalla with a pistol and Abbas with a weapon, came by the side of the car and opened fire which resulted injuries to Rajnish, Bablu and Chaman Kori. FIR was registered against Majid, Sarfaraj, Abaas, Mehmood, Maksood and one more unknown person. Rajnish alias Rajji died as a result of gun shot injuries. Police statement of Mohd. Haleem was recorded on 22-2-2005. After investigation, challan was filed on 20-12-2005 and the case was committed to the Court.

5. During pendency of the investigation on 6-10-2005 C.S.P. Shri Siddharth Choudhary, Police Station, Gorakhpur, filed an application before the JMFC, Jabalpur that Mohd. Haleem wants to record his confessional statement u/s 164 of the Code. Learned Magistrate directed the witnesses to appear on 7-10-2005. On 7-10-2005 CSP Siddharth Choudhary appeared before the Judicial Magistrate and produced the case diary. Learned Magistrate recorded the statement of Mohd. Haleem u/s 164, Code of Criminal Procedure and signed the order sheet dated 7-10-2005 and also appended his signature in the confessional statement.

6. Court statement of Mohd. Haleem (PW-3) was recorded before the 15th Additional Sessions Judge (Fast Track Court) on 12-11 -2007. Mohd Haleem (PW-3) appended his signature in the order sheet dated 12-11-2007 as well as in his Court statement.

7. On 28-11-2007 an application u/s 311 of the Code was filed by Govind Das Verma, father of the deceased for recalling and re-recording the statement of Mohd. Haleem (PW-3) on the ground that the accused persons facing trial have produced impersonator in place of material prosecution eye witness namely Mohammad Haleem on 12-11-2007 as P.W. 3 in the case and this impersonator has signed in the order sheet of the trial Court on 12-11-2007, after giving evidence projecting himself to be Mohammad Haleem. No sooner the objector had come to know about the said fact he had filed application along with his affidavit with his counsel Shri S. K. Verma. The case was adjourned for filing reply to 29-1-2007, 7-12-2007 and 15-12-2007. On 15-12-2007 as the objector and his counsel were absent, therefore, the application for conduction of enquiry with regard to the genuineness of material prosecution eye witness Mohd. Haleem was rejected by the trial Court. Relevant part of order dated 15-12-2009 reads as under : (Vernacular matter omitted.... Ed.)

8. On 23-7-2008 the objector had filed an application u/s 301(2) of the Code. On 28-7-2008 the trial Court granted permission to the learned Counsel of the objector to assist the case of the prosecution under the control and direction of the Public Prosecutor. Thereafter, on 25-8-2008 objector filed the application through his counsel Shri A. Usmani, Advocate for conduction of enquiry regarding examination of impersonator as P.W. 3 in place of real true material eye witness

of the case of the prosecution.

9. On 2-9-2008 the said application was rejected on the ground that counsel of the objector has only to assist the case of the prosecution and he has no right to file an application without permission of Public Prosecutor. Relevant part of the order reads as under:

(Vernacular matter omitted. ... Ed.)

10. On 2-9-2008 one Shri Sheikh Nazeeruddin, Advocate along with witness Mohd. Haleem, S/o Mohd. Saleem has filed an application for granting protection to Mohd. Haleem and for his examination as a witness in the case. On 6-4-2009 the trial Court after going through the order sheet and the fact of the service on the person examined on 12-11-2007 as PW-3 in the name of Mohd. Haleem passed an order directing the Investigating Officer to conduct the enquiry with regard to the fact that the person who had appeared before the Court as the witness examined by the investigating agency was the witness examined during the course of investigation. On 18-4-2009 an application was filed by the accused having grudge against the Investigating Officer Rajesh Tiwari to the fact that he will not conduct the enquiry in an transparent impartial manner. Considering the above, trial Court ordered for enquiry regarding genuineness of witness PW-3 Mohd. Haleem and directed that the enquiry be conducted by CSP Siddharth Choudhary who had got recorded the statement of Mohd. Haleem u/s 164 of the Code before the Judicial Magistrate First Class, Jabalpur. The said officer conducted the enquiry in accordance with the order passed by the trial Court on 6-4-2009. Siddharth Choudhary, CSP gave appearance before the trial Court on 15-7-2009 and recorded the statement of person present in the trial Court namely Mohd. Haleem and submitted his report dated 15-7-2009 and contended that person present in the trial Court on 15-7-2009 was the same person whose statement u/s 164 of the Code was got recorded by him before the JMFC, Jabalpur. He has opined that for the purpose of finding out the truth, the signature of the witness on statement on oath u/s 164 of the Code and the order sheet of JMFC and application submitted by witness Mohd. Haleem on 2-9-2008 with the person signed on order sheet of the learned trial Court on 12-11-2007 who has examined as PW-3, thereafter the documents bearing the signatures of witness Mohd. Haleem and the person who has been examined as P.W-3 on 12-11-2007 signed on order sheet was also sent to the State Examination of Question Documents, Government of M.P., Bhopal, who after conducting the examination of the documents have found that the person who wrote the block enclosed signature stamped and marked EFGHIJ and BCD did not write the black enclosed signature stamped and marked-A which is forged signature.

11. After receipt of the opinion of the State Examiner dated 1-9-2009 in the trial Court on 10-9-2009, the trial Court has passed the impugned order dated 24-11-2009 and gave a specific finding that the person who has been examined on 12-11-2007 as PW-3 Mohd. Haleem is different from person who has given statement u/s 164 of the Code and on the basis of the same it has come on the

record that the person examined on 12-11-2007 is not the real genuine witness Mohd. Haleem (PW-3). The trial Court after appreciating the report submitted by Siddharth Choudhary, CSP and after considering the opinion of the State Examiner came to the conclusion that the witness examined in the trial Court on 12-11-2007 in the name of Haleem is not the real truthful witness and is some other person who has giving the evidence in the name of Mohd. Haleem and, therefore, directed for issuance of summons for examination of genuine prosecution witness Mohd. Haleem. It is this action by which the petitioners are aggrieved and filed these petitions u/s 482 of the Code.

12. It is submitted by learned Counsel for the petitioners that learned trial Court without appreciating the facts and circumstances of the case in proper perspective, has ordered for re-examination of PW-3 whereas the matter has attained the finality. It is further urged that subject matter of an application for re-calling/re-cording the statement of PW-3 has already been rejected on 15-12-2007 and 2-9-2008 and the said orders attained finality as no revision or petition was filed against the said orders and the learned trial Court without properly appreciating the provisions engrafted u/s 311 of the Code passed the impugned order which is not permissible under the law, and ends of justice would be defeated. In support of the said contention, learned Counsel for the applicant drew my attention to the decision of the Apex Court in the case of Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, and Satyajit Banerjee and Others Vs. State of West Bengal and Others,

13. In the case of Zahira Habibullah, Sheikh and Anr. (supra) which arose from mass killing during the Gujarat riots, commonly known to the public as the "Best Bakery case". It is submitted that there was an extraordinary situation in which the Apex Court was convinced that the entire prosecution machinery was trying to shield the accused i.e. the rioters. It was also found that the entire trial was a farce. The witnesses were terrified and intimidated to keep them away from the Court. It is in the aforesaid extraordinary circumstances that the Apex Court not only directed a de novo trial of the whole case but made further directions for appointment of the new prosecutor with due consultation of the victims. Retrial was directed to be held out of the State of Gujarat.

14. By placing reliance on Satyajit Banerjee and Ors. (supra), it is further urged that the law laid down in Zahira Habibullah, Sheikh and Anr. (supra), in the aforesaid extraordinary circumstances, cannot be applied to all the cases against the established principles of criminal jurisprudence including the present case. Lastly, it is submitted that the direction of the trial Court to re-record the evidence of Mohd. Haleem (PW-3) already recorded at the trial Court cannot be erased or wiped out from the record of the case. The impugned order is totally without jurisdiction as it suggests that the evidence of PW-3 already recorded on 12-11-2007 should be given no consideration. With the aforesaid, he prayed for quashing the impugned order dated 24-11-2009.

15. On the other hand, Shri A. Usmani, learned Counsel for the objector, made

strenuous efforts to support the impugned order passed by the trial Court and submits that where the accused person is facing trial from the date of commission of offence of murder of the son of the objector, has tampered the evidence and for the purpose of finding out the truth of the case, the trial Court passed the impugned order dated 24-11-2009 for issuance of summons to witness Mohd. Haleem. It is further submitted that the said order was passed after the enquiry conducted by CSP (Police), Siddharth Choudhary with the help of expert opinion of State Examination of Question Documents, Govt. of M.P., Bhopal based on the documentary evidence on record, the accused persons facing the trial has never objected for the same and has not challenged the order of conduction of enquiry of the trial Court dated 6-4-2009 but merely made an singular objection to this regard that the enquiry be not conducted by Investigating Officer Rajesh Tiwari only. Learned trial Court has discovered the truth after the conclusion of the enquiry that the witness present in the Court is the witness cited by the Investigating Agency and thereafter only the summons for his examination was issued by the trial Court. He further submitted that on the earlier occasion when the objector had raised the plea for conduction of enquiry, his prayer was declined firstly on the ground that none has appeared in the trial Court to press the application and in absence of adverse finding and thereafter on the ground that the counsel assisting the prosecution has no locus standi to file such an application and, therefore, it cannot be said that earlier order dated 15-12-2007 and 2-9-2008 had attained finality and prayed for dismissal of both the petitions.

16. Section 311 of the Code reads as follows:

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.

The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court the duty of examining a material witness who would not be otherwise brought before it. It is couched 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 it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

17. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

18. As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: It is, that the Courts shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Evidence Act, 1872 (in short "the Evidence Act") are used on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the, best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may, result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

19. Power to summon any person as a witness or to recall and re-examine can

be exercised at any stage of the proceedings. Provided examination of such person is essential for just decision of the case and opportunity to rebut should be given to the other parties, whether new evidence is admitted u/s 311 of the Code. The Apex Court in the case of Jamatraj Kewalji Govani Vs. The State of Maharashtra, and Mohanlal Shamji Soni Vs. Union of India and another, held in paras-10, 17, 18 and 27 as under:

10. It is cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties withholds any evidence which could be produced and which, if produced be unfavourable to the party withholding such evidence, the Court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions-whether discretionary or obligatory-according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

17. The law is clearly expounded in the case of Jamatraj Kewalji Govani Vs. The State of Maharashtra,) (referred to above) wherein Hidayatullah, J. as he then was, while speaking for the Bench about the unfettered discretionary power of the Court as envisaged u/s 540 of the Code has stated thus:

It is difficult to limit the power under our Code to cases which involve something arising ex improviso which no human ingenuity could foresee, in the course of the defence. Our Code does not make this a condition of the exercise of the power and it is not right to embark on judicial legislation. Cases that go far are of course not quite right. Indeed they could be decided on fact because it can always be seen whether the new matter is strictly necessary for a just decision

and not intended to give an unfair advantage to one of the trial side.... It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial 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 exercises 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. If the Court has acted without the requirements of a just decision, the action is open to criticism but if the Court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction.

18. The next important question is whether Section 540 gives the Court carte-blanche drawing no underlying principle in the exercise of the extraordinary power and whether the said section is unguided, uncontrolled and uncannalised. 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.

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 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.

20. Scope of Section 311 of the Code again came for consideration before the Apex Court in the case of Raj Deo Sharma Vs. The State of Bihar, In para-9 of the said judgment, the Apex Court was pleased to observe thus:

We may observe that the power of the Court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the seven Judge Bench in Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc., Cri LJ 2717 nor in Kartar Singh's case 1994 Cri LJ 3139, such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the Court u/s 311 of the Code. We make it clear that if evidence of any witness appears to the Court to be essential to the just decision of the case it is the duty of the Court to summon and examine or recall and re-examine any such person.

21. It is true that successive applications for recall of a witness u/s 311 of the Code are not maintainable, but in the present case, the first application was rejected on the ground that the same has been filed just to delay the trial and second application was dismissed on the ground that the same was not filed by the Public Prosecutor and scope under Sub-section (2) of Section 311 of the Code is very limited. Thereafter, the trial Court after holding enquiry from the then City Superintendent of Police, Shri Siddharth Choudhary and after calling the report of hand-writing expert from the State Examination, came to the conclusion that Mohd. Haleem who had given his confessional statement was not the same person who was examined as PW-3 and he was not the real truthful witness and was some other person who had given evidence in the name of Mohd. Haleem, the earlier rejection order would not bar for summoning the witness u/s 311, when the same is found necessary for the ends of justice.

22. In the present case the allegation against the petitioners/accused persons are that they had produced an impersonator in place of material prosecution eye-witness Mohd. Haleem on 12-11-2007 as PW-3 and this impersonator has signed the order sheet of the trial Court dated 12-11-2007 after giving evidence projecting himself to be Mohd. Haleem whereas this fact was came to the knowledge of the trial Court when enquiry was conducted and report was submitted by Siddharth Choudhary, the then CSP and report of State Examination of Question Documents, Government of M.P., Bhopal that PW-3 Mohd. Haleem is different from the person who has given statement u/s 164 of the Code and PW-3 is not the real truthful witness and in place of Mohd. Haleem. Court statement of some other person has been made before the trial Court. Thus, I am of the view that learned trial Court for the purpose of finding out the real genuine truthful witness has passed the impugned order for examination of real genuine witness Mohd. Haleem.

23. The trial is pending and the learned trial Court before finally deciding the case thought to exercise its power u/s 311 for just and proper decision of the case to find out the guilt or innocence. In such a situation, I am of the considered opinion that the power of the trial Court u/s 311 of the Code cannot be said to be not an act u/s 311 of the Code for doing justice and come to a correct conclusion. To arrive at the truth of matter is the responsibility of the trial

Judge. If the trial Judge was satisfied that Mohd. Haleem is the material prosecution eye-witness and on 12-11-2007 in his place impersonator has signed the order sheet of the trial after giving evidence projecting himself to be Mohd. Haleem, such an exercise of power u/s 311 of the Code cannot be said to be arbitrary illegal or beyond the jurisdiction. It is for the trial Judge to look into the prosecution and defence evidence and other material on record and, to give a finding of acquittal or conviction. Section 311 of the Code empowers the trial Judge to recall any witness or witness already examined or summoned any witness, if it is felt necessary in the interest of justice at various stages mentioned in the Code.

24. From the discussion made above and after going through the impugned order, I find that the impugned order does not suffer from any infirmity of law and does not call for any interference by this Court. No case for quashing/setting aside the impugned order dated 24-11-2009, as prayed by the petitioners is made out.

25. Petitions filed u/s 482 of the Code by the petitioners have no merit and both the petitions are, accordingly, dismissed.