
(2005) 10 JH CK 0033

In the Jharkhand High Court

Case No : Criminal Revision No. 1159 of 2003

Court on its own motion

APPELLANT

Vs

State of Jharkhand

RESPONDENT

Date of Decision : 24-10-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 320
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 307

Citation : (2006) 1 JCR 230

Hon'ble Judges : Amareshwar Sahay, J

Bench : Single Bench

Advocate : Nilesh Kumar, Amicus Curiae, for the Appellant; Umesh Kumar Choubey, for the Respondent

Final Decision : Allowed

Judgement

Amareshwar Sahay, J.—This Criminal Revision was instituted at the instance of the Hon'ble the Chief Justice, to decide the legality of the order dated 8.4.2003, passed by Sri Indradeo Mishra, Additional Sessions Judge, F.T.C. No. 1, Chatra, in Sessions Trial No. 73 of 1990, whereby the learned Additional Sessions Judge, allowed the prayer of the accused persons to recall the two eye-witnesses namely, Budhani Devi and Tulsi Ganjhu for further cross-examination by the defence on the ground that the parties have compromised their case outside the Court.

2. The facts in short are that a First Information Report being Simaria P.S, Case No. 91/1989 was registered u/s 324, 326, 307, 341/34 of the Indian Penal Code on the basis of the fardbeyan of one Khiru Ganjhu, against the accused Jitan Pathak, Narayan Pathak, Vishwanath Pathak and Dhaneshwar Mistri. It was alleged in the FIR that in the night of 20.9.1989, when the informant Khiru Ganjhu (now deceased) was going to his house alongwith Jethu Ganjhu, at that time the aforementioned four accused persons, who were armed with "sword", "farsa" and "bhala assaulted him after chase, due to which he fell down but,

thereafter, also the accused persons continued to assault him. After some time the police arrived at that place and then the accused persons said to have fled away from there. Thereafter, the police brought the injured Khiru Ganjhu on their police Jeep and got him admitted in the hospital for treatment.

3. On 21.9.1989 in presence of the Circle Officer of Simaria, the dying declaration of the aforesaid Khiru Ganjhu was recorded by the Officer-in-charge of Simaria Police Station in the hospital itself.

4. The injured Khiru Ganjhu succumbed to the injury and, thereafter, the charge-sheet was submitted against the accused persons u/s 147, 148, 149 and 302 of the Indian Penal Code. The charges were framed against the accused persons on 6.9.1994 by the Additional Sessions Judge and, thereafter, the trial begun.

5. As it appears that six prosecution witnesses were examined including the two eye-witnesses namely, Budhani Devi as PW 1 and Tulsi Ganjhu as PW 2, who were the widow and son respectively of the deceased Khiru Ganjhu. As it appears from the record that PW 1 and PW 2 were examined and cross-examined at length on 3.9.1997 and 18.11.1997.

6. On 22.8.2002 the Sessions Trial was transferred to the Court of the Additional Sessions Judge, Fast Track Court No. II, Chatra. Thereafter, it appears that on 20.11.2002 the accused Dhaneshwar Mistri filed a petition before the trial Court, praying therein to recall PW 1 Budhani Devi and PW 2 Tulsi Ganjhu for further cross-examination on the ground that some relevant questions could not be put to those two eye-witnesses. On the said petition both the parties were heard and then the learned Additional Sessions Judge, F.T.C. No. II rejected the prayer of the accused persons for recall of the aforesaid two eye-witnesses for their further cross-examination. The said order was not challenged in any higher Court and it became final.

7. On 20.1.2003 the Sessions Trial was again transferred from the Court of Additional Sessions Judge, F.T.C. No. II to the Court of Additional Sessions Judge, F.T.C. No. I, As it appears that on 19.2.2003 again a petition was filed before the trial Court on behalf of the accused persons to recall PW 1 Budhani Devi and PW 2 Tulsi Ganjhu, i.e., two eye-witnesses, who were already examined and cross-examined in the year 1997, mainly on the ground stated hereinbelow :--

That witness and the son of said victim Khiru Ganjhu and witness Budhani Devi w/o said Khiru Ganjhu has already been examined and they have been cross-examined even in the absence of some of the accused of this case.

That now the said two witnesses who were the karta and the main witnesses and the son of the informant of the case do not want to contest the case and want to compromise the case with the help of the well wishers of the villagers.

That the good relationship was restored in between the said karta and the witness of the case of the informant Khiru Ganjhu and.

That the compromise would bring the peace and will also end the enmity for ever.

9. Thereafter, it appears that on 5.4.2003, an affidavit said to have been sworn by PW 1 Budhani Devi and PW 2 Tulsi Ganjhu was filed before the trial Court reiterating the same very fact which was stated in the petition dated 19.2.2003.

10. The learned Additional Sessions Judge, F.T.C. No. 1 ordered to put up the petition dated 19.2.2003 on 7.4.2003 for hearing and then by the impugned order dated 8.4.2003 allowed the prayer of the defence to recall of PW 1 and PW 2 for further cross-examination and directed the Public Prosecutor to produce those two eyewitnesses for further cross-examination and put up this case on 17.4.2003.

11. On 17.4.2003 those two PWs 1 and 2 were recalled and they were further cross-examined by the defence wherein they completely changed their earlier version made in Court during trial. The compromise petition was also exhibited and marked as Ext: 3.

12. In such circumstances, now the point for consideration is as to whether the impugned order dated 8.4.2003 passed by the trial Court allowing the defence to recall PW. 1 and PW 2 for further cross-examination on the ground of compromise was legal, valid and justified and was in accordance with law.

13. Section 311, Cr PC empowers a Court to summon any person as a witness or examine any person though not summoned as a witness or recall or reexamine any person already examined if his evidence appears to be essential to the just decision of the case. For ready reference Section 311, Cr- PC is quoted herein below :--

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.

14. From a bare perusal of the above provision it is apparently clear that the powers u/s 311, Cr PC can be exercised by the Court to recall or re-examine any witness for further examination at any stage of the trial, only on the condition that the evidence of such witness was essential, for the just decision of the case. The Court must get satisfy that such recalling and re-examination of the witness was essential to the adjudication of the case in hand.

15. In the present case as I have already noticed in the forgoing paragraphs that prior to the passing of the impugned order dated 8.4.2003, on earlier occasion also, an application was filed on behalf of the accused persons for recalling the same very PWs 1 and 2 for their further cross-examination and after hearing the parties the said prayer was already rejected on 3.12.2002 itself by the Additional

Sessions Judge, F.T.C. No. II before whom the trial was pending at that time.

16. In this view of the matter, since, once the said prayer was already rejected on 3.12.2002 itself, there was no occasion for the learned Additional Sessions Judge, F.T.C. No. 1, to whom the Sessions Trial was subsequently transferred for disposal, to reconsider the prayer again for recall of PW 1 and PW 2. In fact, he had no jurisdiction to pass an order for recall of PW 1 and PW 2 for further cross-examination as the said order amounted to recall or review of the earlier order passed by the same Court. The learned Additional Sessions Judge, F.T.C, No. 1 was not having any inherent jurisdiction to review or recall the earlier order passed by the same Court and, therefore, on this ground alone the impugned order is liable to be set aside.

17. From the impugned order it further appears that the learned Court below has held that since those two witnesses namely Budhani Devi (PW 1) and Tulsi Ganjhu (PW 2) have stated that good feelings restored between the parties and they have compromised the case outside the Court and since the witness Tusli Ganjhu is the son of the deceased and the witness Budhani Devi is the wife of the deceased and, therefore, their further cross-examination was essential for the ends of justice.

I fail to understand as to how the learned Court below could arrive to this finding that further cross-examination of those eye-witnesses, i.e., PW 1 and PW 2 was essential for the ends of justice. The learned trial Court failed to appreciate that it was a case of murder and the FIR of which was initially registered under Sections 324, 326, 307, 341/34, IPC on the basis of the statement of the injured Khiru Ganjhu himself, who subsequent to the lodging of the FIR succumbed the injury causes by the accused persons - and in course of investigation the injured Khiru Ganjhu had made dying declaration by taking the name of the accused persons as his assailants. The learned Court below should have further appreciated the fact that the aforesaid two eye- witnesses, i.e., PW 1 and PW 2 had fully supported the prosecution case, when they were examined and cross-examined at length and, therefore, the prayer for recall of those witness for further cross-examination on the ground of compromise was certainly meant that the intention of the defence was to undermine the whole prosecution case.

18. If the witnesses are recalled subsequent to the conclusion of their evidence in Court at the behest of the accused on the basis of affidavit subsequently filed by them contradicting their previous statement made in Court that will certainly amount to failure of justice. If such a course is permitted then it maybe possible that the witnesses under the threat or temptation or under any other pressure or for monetary gain may file affidavit subsequent to the conclusion of their evidence in Court contradicting their previous statement, which certainly shall hamper the cause of justice.

19. This Court in the case of Ajit Pas-wan and Anr. v. State of Jharkhand reported in 2005 (4) JLJR 175 : 2005 (4) ECC 210, has held that the provision of Section

311, Cr PC cannot be allowed to be used by the defence as a tool to undermine and demolish the case of the prosecution, which is not permissible under the law.

20. Moreover, since the accused persons were facing trial for the offence u/s 302, IPC the same was not compoundable also under the provisions of Section 320, Cr PC.

21. The Supreme Court in the case of Ram Lal and Another Vs. State of Jammu and Kashmir, , has held that an offence, which the law declares to be non - compoundable even with the permission of the Court cannot be compounded at all.

22. Thus, in view of the fact that the offence was not compoundable even with the permission of the Court and, therefore, by allowing to recall PW 1 and PW 2 for further cross-examination on the ground of compromise was in other words amounted to allowing the offence to be compounded, which was not permissible under the law in view of Section 320, Cr PC.

23. In the present case it further appears from the record that subsequent to the impugned order dated 8.4.2003, PW 1 and PW 2 were further cross-examined by the defence and there those two witnesses gave a complete go-by their earlier statements made in the Court during trial and tried to totally demolish the case of the prosecution.

24. From the facts and circumstances of the present case, it cannot be said that the power u/s 311, Cr PC was exercised by the trial Court for the just decision of the case.

25. Of course the Court may exercise the power u/s 311, Cr PC for recall or re-examining any witness who has already been examined, if it finds that there is some ambiguity in the testimony of any witness or there is some strong justifiable cause to recall the said witness for the just decision of the case.

26. In the present case, I find that the learned Court below has committed grave illegality in allowing the defence to recall for further cross-examination of the two eyewitnesses, i.e., PW 1 and PW 2 only on the basis of the fact that a compromise was arrived at in between the accused persons and those PW 1 and PW 2.

27. In view of my discussions and findings above, I hold that the impugned order is wholly illegal and without jurisdiction and, therefore, this revision application is allowed, the impugned order dated 8.4.2003 is hereby set aside and, consequently, further cross-examination of PW 1 and PW 2 made pursuant to the impugned order dated 8.4.2003 is also held to be illegal, as such, the said further cross-examination is directed to be expunged.

Since, it is a very old Sessions Trial and, therefore, the trial Court is directed to expedite and conclude the trial as expeditiously as possible preferably within a period of four months from the date of receipt/production of a copy of this order.

28. Before parting with this case, I am constrained to observe that the learned Additional Sessions Judge, F.T.C. No. 1 has shown undue haste in considering and allowing favourably the prayer of the defence for recall of PW 1 and PW 2 therefore, his action requires to be enquired into. Therefore, it is desirable that the High Court should look into the action to the Court below in its administrative side and determine as to whether any action is called for or not ?

Let the Registry of the High Court bring this order to the notice of the Hon''ble the Chief Justice.