
(2004) 05 BOM CK 0016

In the Bombay High Court

Case No : Criminal Rev. App. No. 75 of 2004

Deorao Marotrao Bhagatkar

APPELLANT

Vs

Central Bureau of Investigation

RESPONDENT

Date of Decision : 06-05-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311

Citation : (2005) 107 BOMLR 828 : (2005) 1 MhLj 111

Hon'ble Judges : A.H. Joshi, J

Bench : Single Bench

Advocate : M.P. Khajanchi, for the Appellant;

Final Decision : Dismissed

Judgement

A.H. Joshi, J.—Rule. Heard forthwith by consent of learned counsel appearing on behalf of applicant.

2. This is a revision application filed under Sections 397 and 401 read with Section 482, Criminal Procedure Code read with Article 227 of the Constitution of India.

3. The case is under prosecution by the Central Bureau of Investigation. This is a revision petition by accused making a grievance that important prosecution witness Prabhuprasad Kisanlal cited by the prosecution, has not been examined. Application was filed by the accused seeking order that said unexamined prosecution witness be summoned and be examined. This application was opposed by the prosecution on the ground that accused was trying to delay the trial. Learned Additional Sessions Judge heard the said application and rejected it. The rejection of the application is, inter-alia, on the following grounds :-

(a) Upon the prosecution admitting the documents, case was fixed for arguments;

(b) The accused has submitted application for examining the defence witness which request was not rejected by the Court. Instead of bringing the defence

witnesses, accused submitted application in question;

(c) That, the Court was under transfer and under the directions of the High Court, it was necessary for the Court to have completed the part - heard trial; and

(d) That, the effort of insisting on prosecution to examine the witness which was declined by the prosecution, amounted to deliberate attempt to protract the trial.

4. In this application, the learned counsel for the petitioner has placed strong and fervent reliance upon Section 311, Criminal Procedure Code and urged that the jurisdiction of the Trial Court to call for and examine any witness at any time, is unfettered and necessary witness was omitted by the prosecution who was liable to be called and examined in view of the motion made by the accused and the jurisdiction being invoked thereby. Since, according to the learned counsel for applicant, the learned Trial Judge has committed grave error in not taking recourse to Section 311, Criminal Procedure Code and declined to permit evidence being recorded, this application is filed.

5. Learned counsel relied upon the following judgments :-

(1) Mohanlal Shamji Soni Vs. Union of India and another,

(2) Balbir Vs. State of Haryana and Another, .

(3) Sidhu Sukhdev Waghmare v. State of Maharashtra 2004 All MR (Cri) 5.

(4) Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, .

6. In all these judgments (except Zahira Habibulla, the Best Bakery case) the question before the Court was the prosecution was ineffectively conducted and the Courts having failed and prosecution having neglected to examine material witness, the prosecution had to suffer and the benefit thereof was to go to the accused and not to the prosecution.

7. In the Best Bakery case, however, issue that was addressed and has been ruled is on the question as to the concept of "justice to the victim of an offence" through duly pursued trial aiming at the object of Criminal Law. This case did not deal with the rights of the accused. Their Lordships of the Supreme Court in the Best Bakery case found that the prosecution was handled in an inappropriate manner and "nothing was coming forward on record as to why the persons named as witnesses may be given up where there is no material to show that the witness has been gained over or that there is no likelihood of witness speaking the truth in the Court and that no such material was brought to the notice of the Court below to justify the non-examination". The Honourable Supreme Court also found that material on record was totally silent on the said aspect. The above quoted observation of Their Lordships of the Supreme Court referred to acquittal of the accused which was consequence of inefficiently prosecuted trial and consequential impairment of "justice to the victim of offence" as necessary corollary thereof. The very objective underlying the Best Bakery case is totally on

a different footing and rather on the diagnose at opposite direction.

8. In any situation, an accused claiming that the prosecution witness who has been omitted by the prosecution should be examined, is an amazingly strange prayer. A prayer to examine such witness could be made in the event the defence wants to examine such witness as a defence witness. Such is not the case in the trial subject-matter of present application. The learned Additional Sessions Judge has observed that he had not rejected the application of the accused to bring the defence evidence. It is, therefore, obvious that it shall still be open for the accused/applicant if he wants to use the very person who is otherwise in the list of prosecution as its witness, to be the defence witness if being so advised and in his domain he would like to do so. However, in any eventuality, Section 311, Criminal Procedure Code is not a provision which is liable to be used at the behest of the accused, save and except in the circumstance narrated hereinbefore that such witness be the defence witness.

9. The present application is thus based on totally misplaced arguments as to refusal of the Trial Court to be erroneous exercise of its jurisdiction on account of refusal to accept the request of the accused to call for and examine the prosecution witness.

10. Criminal Revision Application is, therefore, having no merit and deserves to be dismissed, and the same is accordingly dismissed. Rule is discharged.