
(2013) 02 SC CK 0008
In the Supreme Court Of India
Case No : Criminal Appeal No. 527 of 2013

Fazal Khan

APPELLANT

Vs

State of (NCT) of Delhi

RESPONDENT

Date of Decision : 14-02-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 233(3), 311, 313
Penal Code, 1860 (IPC) — Section 302

Citation : (2014) 1 CCR 86 : (2014) 1 CCR 336 : (2013) 2 JCC 963

Hon'ble Judges : T.S. Thakur, J; Sudhansu Jyoti Mukhopadhyaya, J

Bench : Division Bench

Advocate : Gurbaksh Singh and Abhijat P. Medh, for the Appellant; K. Radhakrishnan and D.S. Mehra, for the Respondent

Final Decision : Dismissed

Judgement

Leave granted.

1. This appeal arises out of an Order dated 19th October, 2012, passed by the High Court of Delhi whereby Criminal Miscellaneous Case No. 3536 of 2012 and Criminal Miscellaneous Application No. 17497 of 2012 have been dismissed and the order passed by the Trial Court refusing permission to the Appellant to lead evidence in defence affirmed. The Appellant is facing trial for the alleged commission of an offence punishable u/s 302 of the Indian Penal Code together with one Parmod @ Sunny. Upon conclusion of the prosecution evidence, statements of both the accused persons were recorded u/s 313 of Code of Criminal Procedure, 1973 [for short, 'Code of Criminal Procedure.']. on 30th July, 2012. In answer to one of the questions put to the Appellant in the course of that statement, viz, whether he wished to lead any evidence in defence, the Appellant appears to have answered in the negative. The other accused person, namely, Parmod @ Sunny, however, appears to have answered the question in the affirmative and was allowed to file a list of witnesses. Six days after the statement of the Appellant was recorded u/s 313 Code of Criminal Procedure.,

the Appellant filed a list of witnesses on 6th August, 2012, in which he proposed to examine as many as five witnesses, named in the said list and prayed for issue of summons to the said witnesses. That application was considered by the Trial Court and rejected by its Order dated 15th September, 2012, primarily on the ground that the Appellant had not opted to lead evidence in defence in his statement u/s 313 Code of Criminal Procedure. And that since no separate application had been filed seeking permission to examine any witnesses, the list-cum-application filed by him for summoning of the witnesses was not tenable.

2. The Appellant then appears to have filed a formal application purporting to be one u/s 311 Code of Criminal Procedure., in which he again proposed to examine five witnesses cited by him earlier. In the said application, the Appellant explained the reason why he did not opt to lead evidence in defence in the statement u/s 313 Code of Criminal Procedure. Briefly put, the explanation was that when his statement was recorded u/s 313 Code of Criminal Procedure., his counsel was not present in the Court. The proxy counsel appearing on his behalf did not understand the implication of the question put to the Appellant. The Appellant, therefore, was under a handicap and unassisted by his counsel, stated that he did not wish to lead any evidence in defence. The Trial Court dismissed even this application by its Order dated 20th September, 2012. The Trial Court held that while the accused had the right to lead evidence in defence, no explanation was given as to why he did not opt to examine any witnesses when he was asked to lead evidence in defence.

3. The dismissal of the application was then assailed by the Appellant before the High Court in Criminal Miscellaneous Case No. 3536 of 2012, which has been dismissed by the High Court, as noticed above. The High Court has taken the view that the Appellant having made a statement declining an opportunity to lead evidence in defence was not entitled to go back on that statement. The High Court also felt that the Appellant was trying to derail the trial in the guise of a prayer to lead evidence in defence.

4. We have heard Mr. Gurbaksh Singh, counsel appearing for the Appellant and Mr. K. Radhakrishnan, learned senior counsel appearing for the State. In our view both the Trial Court as also the High Court fell in error in declining the prayer made by the Appellant. It is not in dispute that on 30th July, 2012, the date when the statement of the Appellant was recorded u/s 313 Code of Criminal Procedure., his counsel was not present in the Court. The presence of Avneet Kaur, proxy counsel is recorded in the interim order passed by the Trial Court on that date. The explanation offered by the Appellant for his making the statement that he did not wish to lead evidence in defence, therefore, gets support even from the interim order passed by the Court.

5. That apart, denial of an opportunity to lead defence evidence can lead to gross miscarriage of justice. Even assuming that in a given situation, an accused, especially one charged with a capital offence, makes a statement u/s 313 Code of Criminal Procedure. That he does not wish to lead evidence in defence but

subsequently, realises the mistake and wishes to produce such evidence, the prayer for summoning such evidence can not be summarily rejected. The Trial Court would in such cases do well to examine whether the prayer, no matter belated, was mala fide intended to prolong and delay the conclusion of the trial. There is no gainsaying that the right of the accused to lead evidence in defence is a valuable right not only because of demands of fairness and justice that must permeate the judicial determination of his guilt or innocence but one that is recognised u/s 233(3) Code of Criminal Procedure. Such a invaluable right cannot be scuttled simply because of an accused making a statement u/s 313 Code of Criminal Procedure. Declining at that stage to lead evidence.

6. In the case at hand, the reason for making of the statement has been explained by the Appellant in the application which, in our view, ought to have been accepted and the Appellant allowed to examine the witnesses cited in the list. It is important to note that the co-accused in the case had been allowed to lead evidence in defence and on the date the Appellant made the application seeking permission to file the list of witnesses or the application for permission to adduce evidence as also on the date the said applications were dismissed by the Trial Court, the defence evidence of the co-accused was still being recorded. It was, therefore, not correct to say that permitting Appellant to lead evidence would have resulted in prolongation of the trial.

7. In the result, we allow this appeal, set aside the order passed by the Trial Court as also that passed by the High Court and direct that the list of witnesses filed by the Appellant shall be taken on record and the witnesses listed therein summoned and examined. Mr. Gurbaksh Singh, Learned Counsel for the Appellant submits that although the Appellant is in jail and so is the co-accused, he shall ensure that dasti summons are taken by the Appellant's pairakar and served upon the witnesses. He submitted that the Trial Court could post the case on any two dates of hearing to conclude the evidence of the defence witnesses. We, accordingly, direct that the Trial Court shall issue dasti summons to the pairakar representing the Appellant accused and grant opportunities to the Appellant for examination of the witnesses cited by him.