

(1999) 09 AHC CK 0037
In the Allahabad High Court
Case No : Criminal Revision No. 760 of 1999

Gaffur

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 20-09-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 311, 313, 397
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302

Citation : (1999) 3 ACR 2034

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : S.K. Pundeer, for the Appellant; A.G.A., S.K. Srivastava and Sheshank Shekhar, for the Respondent

Judgement

B.K. Sharma, J.—Heard the learned Counsel for the revisionist and the learned Counsel for the opposite parties 3 to 8 as well as the learned A.G.A.

2. The facts leading to this revision are that on 27.10.1991, an occurrence took place in respect of which an" F.I.R. was lodged by Rakmuddin against the present accused opposite parties 3 to 8 at Police Station, Kotwali Dehat, district Saharanpur on which basis a Chik report was prepared and case Crime No 304 u/ s 147/148/149/ 302, I.P.C. was registered. In this F.I.R. the informant had stated that his brother and others came at the spot and saw the occurrence. The present revisionist Gaffur is real brother of the said informant. The deceased in the case was Mugluddin, who was the father of informant Rakmuddin and of Gaffur, the present revisionist. After investigation, a charge-sheet was submitted against the present accused-opposite party Nos. 3 to 8, in the Court of Magistrate concerned. Thereafter, the Magistrate committed the case to the Court of Sessions and after committal, the case became Session Trial No. 343 of 1996 under Sections 148, 302/149, I.P.C.

3. The present revisionist Gaffur was cited as witness No. 5 in the charge-sheet submitted by the Investigating Officer in this case. It appears that at the trial,

the informant Rakmuddin was examined as P.W. 1. He narrated the prosecution story in his examination-in-chief but when his cross-examination was being made, he was declared hostile by the learned A.D.G.C. (CrI.) and was cross-examined. Another prosecution witness Riyasat (P.W. 2) also turned hostile and at that stage, the rest eyewitnesses of facts, namely, Saddhu and Gaffur present revisionist were discharged on 5.3.1999 on the application of the same hostile informant Rakmuddin which was submitted before the learned Additional Sessions Judge, Saharanpur, by the learned A.D.G.C. (CrI.). On the same day, the present-revisionist Gaffur moved an application before the Additional Sessions Judge for recording his evidence at the trial pointing out that he is an eye-witness of the murder and in the first information, he has also been shown as an eye-witness and his statement u/s 161, Code of Criminal Procedure has also been recorded by the Investigating Officer in the case diary and in that statement, he had given eye-witness account of the occurrence; that the informant of the case Rakmuddin conspired with the accused persons of the case and so instead of stating the truth, has turned hostile and had given false application before the Additional Sessions Judge and offering to give an eye-witness account of the occurrence in Court and praying that his statement be recorded in the case on oath. There was also a prayer to reject the discharge application given by Rakmuddin before the Court. The learned Additional Sessions Judge has first passed orders allowing the application for discharge moved by the informant Rakmuddin and submitted by A.D.G.C. (CrI.) to him and discharged the witnesses Saddhu and Gaffur, (who is the present revisionist) and after this order, he had disposed of the application of the present revisionist the same day observing that Gaffur, present-revisionist has no locus standi to move the application and so his application is not maintainable. The learned Addl. Sessions Judge has also observed in his order that the evidence of the prosecution has been closed and that all the witnesses of fact have become hostile. He has also observed that there is a document on the file in which Rakmuddin and one Fakruddin have stated that somehow or other Rakmuddin's father Mugluddin got injured. He also observed in the order that it appears to me that Gaffur had moved this application with ulterior motive and has got no locus standi. With these observations, he rejected the application of the present-revisionist Gaffur for recording his statement. On the next day, i.e., 6.3.1999, he recorded the statements of accused persons u/s 313, Code of Criminal Procedure and then after hearing the arguments of the learned Counsel for the parties, in the session trial handed down the judgment of acquittal of the accused persons.

4. Now, in this revision, a preliminary objection has been raised by the learned Counsel for the accused opposite parties 3 to 8 that the present-revisionist Gaffur has no locus standi to prefer this revision. The learned Counsel for the revisionist has challenged this claim of the defence and contended that the present revisionist, who was not only an eye-witness of the occurrence but also a son of the deceased, was a person aggrieved by the order of acquittal of the accused persons in the case and so he had enough locus standi to prefer this

revision. Section 397, Code of Criminal Procedure, provides that the High Court may call for and examine the record of any proceeding before any inferior Criminal Court situate within its local jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior Court. Thus, if a clear illegality, and material irregularity comes in the notice of the High Court, it might even, suo motu invoke its jurisdiction to correct such mistake. The matter of locus standi came up before the Apex Court in the case of *Kishan Swaroop v. Government of NCT of Delhi* 1998 SCC 1587. The Apex Court in para 4 of its judgment had observed as follows:

In dealing with the revision powers of the High Court vis-a-vis the right of a private party to move in revision against an order of acquittal passed in a case instituted upon a police report, this Court observed in *K. Chinnaswamy Reddy Vs. State of Andhra Pradesh*, ; (on which judgment the High Court relied) as under:

It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice.

5. So in exceptional cases where there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriages of justice, the High Court could entertain such revision and correct the illegality. Therefore, in the circumstances of the present case, it cannot be said that the revisionist had no focus standi. He was certainly a person aggrieved in two ways--being an eye-witness of the occurrence and son of the deceased. The order passed by the learned Additional Sessions Judge rejecting his application for taking his evidence in this case as an eyewitness of occurrence is not only unjust but illegal. When the complainant himself turned hostile in the case, then the learned A.D.G.C. (CrI.) ought not to have submitted the application of such a hostile informant of the case to the learned Additional Sessions Judge for discharge of the remaining witnesses. The Additional Sessions Judge also ought to have examined the witnesses mentioned in the discharge application who were the eyewitnesses of the occurrence in the charge-sheet, u/s 311, Code of Criminal Procedure and then decided the case. The reasoning given by the Additional Sessions Judge while rejecting the application of the present revisionist cannot be sustained. An eye-witness could certainly approach the trial court for recording his evidence on oath when the trial was still in progress, particularly when the informant of the case had turned hostile and was moving or had moved the Court for discharging the remaining eye-witnesses. Even if the learned Additional Sessions Judge has closed the prosecution evidence and had passed some order for recording the statement of the accused u/s 313. Code of Criminal Procedure when the application of the eyewitness was moved he could

still legally invoke his jurisdiction to examine the material witnesses in the case u/s 311, Code of Criminal Procedure. The learned Additional Sessions Judge was not at all justified in taking the view that the application has been moved with ulterior motive by the present revisionist. It was the bounden duty of the learned Additional Sessions Judge to examine all material witnesses relating to the case and even if the prosecution did not want to examine the revisionist as a prosecution witness, in all propriety he was required to examine this witness u/s 311, Code of Criminal Procedure to arrive at the truth in this case. The fact that the informant himself had turned hostile and other witnesses of fact have also turned hostile could not be a justification for rejecting the application of this witness of the occurrence as having been moved with ulterior motive. As a matter of fact when the informant had himself turned hostile in the case of murder relating to his own father, the learned Additional Sessions Judge had all the more justification to and was rather under legal obligation to examine this witness when he came forward to give his evidence at the trial.

6. The learned Counsel for the accused opposite parties 3 to 8 has not been able to support the order passed by the learned Additional Sessions Judge rejecting the said application on any legal ground. He has, of course, pointed out that this revision has been preferred against only the final judgment passed by the learned Additional Sessions Judge and that no revision has been preferred against the order dated 5.3.1999 passed by the learned Additional Sessions Judge rejecting his application for recording his evidence. However, when the learned Addl. Sessions Judge had finally decided the sessions trial itself after rejecting the said application of the present-revisionist, no useful purpose could be served by preferring revision against that order. The judgment of acquittal passed by the learned Additional Sessions Judge gets vitiated in law because of this material irregularity committed by him during the trial and so his judgment of acquittal could be successfully assailed before the Court on the ground that he had sought to give material evidence available at the trial against the accused persons, but the same was illegally refused by the trial Judge.

7. The learned Counsel for the accused opposite parties 3 to 8 has claimed that there was a cross-case and a revision is pending in respect of the judgment in that case also and that this revision, therefore, should not be heard separately but should be heard together with that revision. This contention of the learned Counsel, though seemingly attractive, cannot be sustained in this case. Hearing of revisions or appeals preferred against the judgments in two cross-cases about the same occurrence should generally be made on the same day and by the same Court. Hearing of revisions or appeals against the judgments of the trial court in two different trials relating to the same incident are normally made by the same Court and on the same day to avoid conflicting judgments but even in that situation, the evidence of one case cannot be read in another case. In the present case, we are not disposing of the case on merits. The fatal infirmity in the proceedings before the learned Additional Sessions Judge can lead to only one consequence, namely, the remand of the sessions trial to the learned

Additional Sessions for retrial and this would not involve any expression of opinion about the merits of the case. That being so, there will be no purpose of hearing the other revision alleged by the learned Counsel for the accused opposite parties 3 to 8 together with this revision.

8. Under the circumstances, there is no option than to set aside the judgment of acquittal passed by the learned Additional Sessions Judge and to make the remand of the case for retrial, with a direction to record the evidence of present-revisionist Gaffur at the trial u/s 311, Code of Criminal Procedure This remand, however, should not be taken as an expression of opinion about the merits of the case or the merits of the testimony that may be given at the trial by Gaffur present-revisionist. The trial court shall be free to appreciate the evidence of Gaffur on merits according to law.

9. For the reasons aforesaid, the revision is allowed and the judgment and order dated 8.3.1999 passed by Sri R.P. Tripathi, IInd Additional Sessions Judge, Saharanpur in Sessions Trial No. 343 of 1996, State v. Maqsood and 5 Ors. under Sections 148, 302/149, I.P.C, P.S. Kotwali Dehat, Saharanpur (Crime No. 304 of 1991) is set aside and the case is remanded to the learned Additional Sessions Judge for a fresh decision after recording the statement of Gaffur present-revisionist u/s 311, Code of Criminal Procedure and after recording the evidence of any other eye-witnesses of the case discharged earlier on the application of the informant aforementioned and cross-examination of any other witnesses which he may consider material in the case in his discretion and after recording further statement of accused-persons of the case u/s 313, Code of Criminal Procedure and giving them due opportunity to lead evidence in their defence and after hearing the counsel for the parties about the merits of the case.

Copy of this order be sent by the registry at once to the learned Additional Sessions Judge, Saharanpur, for information and compliance. The learned Additional Sessions Judge concerned to expedite the proceedings.