

(2015) 05 AHC CK 0262

In the Allahabad High Court

Case No : Criminal M. Application No. 13941 of 2015

Hazi Izlal

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 20-05-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 311, 482

Evidence Act, 1872 — Section 145, 155

Penal Code, 1860 (IPC) — Section 109, 147, 148, 149, 201

Citation : (2015) 2 ACR 2169

Hon'ble Judges : Anjani Kumar Mishra, J.

Bench : Single Bench

Advocate : Arvind Kumar Srivastava, for the Appellant; Ajit Ray, A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

Anjani Kumar Mishra, J.—Heard Shri Arvind Kumar Srivastava, learned counsel for the applicant and Shri Ajit Ray, learned A.G.A. for the State. This application under Section 482 , Cr.P.C. has been filed for quashing the orders dated 27.10.2014 and 25.4.2015 passed in Special Case No. 114 of 2008, State v. Izlal and others, under Sections 147 , 148 , 149 , 364 , 302 , 201 , 404 , 411 and 109 , I.P.C., Police Station Kotwali, District Meerut, arising out with Case Crime No. 190 of 2008, passed by the Special Judge, U.P. Gangsters and Anti Social Activities (Prevention) Act, Meerut.

2. It appears that an application under Section 311 , Cr.P.C. was filed by the prosecution to summon one Sushil Kumar son of Sukhveer. The said Sushil Kumar was named in the recovery memo wherein the recovery of knife, identity card of Puneet Khare (deceased) and a watch is stated to have been recovered from the applicant. Since the said Sushil Kumar was an independent witness of the aforesaid recovery, the application was filed by the prosecution for summoning him for deposing before the court.

3. This application was opposed by the applicant on the ground that the statement of the said Sushil Kumar had not been recorded under Section 161 , Cr.P.C. Neither he was named in the F.I.R. and, therefore, there was justification for summoning him to depose before the court.

4. The trial court by its order dated 27.10.2014 allowed the application of the prosecution under Section 311 , Cr.P.C. Against the order of 27.10.2014, an application under Section 482 was filed, being Application No. 46179 of 2014.

5. The High Court by the order dated 8.12.2014, disposed of the said application granting liberty to the applicant to move a fresh application, if so advised, under the relevant provision of law, for redressal of his grievance as raised in the said application. In case such application was filed the same was required to be considered and decided expeditiously in accordance with law after hearing the parties.

6. In pursuance of this order, the applicant filed an application before the trial court which application has been dismissed by the order dated 25.4.2015. It is therefore, that both the orders namely, the order dated 27.10.2014 allowing the prosecution's application under Section 311 , Cr.P.C. and the order dated 25.4.2015 rejecting the application filed, in pursuance of the direction of the High Court, have been challenged by means of this instant application under Section 482 , Cr.P.C.

7. The submission of the learned counsel for the applicant is that the person who has been summoned at the instance of the prosecution to depose before the court as a prosecution witness, is not named in the F.I.R., as a witness of the incident. It has further been contended that the police has never examined the said Sushil Kumar and has not recorded to statement under Section 161 , Cr.P.C. Under the circumstances, the said Sushil Kumar cannot be permitted to depose against the applicant. In case he is permitted and since his statement under Section 161 , Cr.P.C. has not been recorded there is no material available on the basis of which his statement can be contradicted nor will it possible for the defence to confront the said witness with his previous statement, as no such statement exists.

8. In support of his contention, learned counsel for the applicant has placed reliance on paragraphs 37 and 38 of the judgment of the Apex Court in the Kehar Singh and Others Vs. State (Delhi Administration), . He has also placed reliance upon the judgment in the Apex Court in Tahsildar Singh and Another Vs. The State of Uttar Pradesh, , specially paragraphs 19 and 26 thereof.

9. Learned A.G.A. has vehemently disputed the contentions of the learned counsel for the applicant. He has submitted that the court has very wide powers under Section 311 , Cr.P.C. to summon any person whose testimony, it has reason to believe, will have a material bearing upon the proceedings before the court. Since, the person, who has been summoned, is as an independent witness named in the recovery memo his testimony is extremely relevant and therefore,

the trial court has rightly allowed the application under Section 311 , Cr.P.C.

10. He has lastly contended that in case the submissions of the learned counsel for the applicant are accepted, no person can be examined as a witness in a criminal case till such time his statement has been recorded by the police under Section 161 , Cr.P.C.

11. I have considered the submissions made by the learned counsel for the parties and have perused the record.

12. From a bare perusal of the order dated 27.10.2014 it is clear that Sushil Kumar, the person who has been summoned to depose before the court is an independent witness named in the recovery memo prepared at the time certain allegedly incriminating items were recovered from the applicant. In such view of the matter, I see no illegality in order of the trial court having summoned him, to depose before the court at the instance of the prosecution.

13. Under the circumstances, the only issue that remains to be examined is as to whether a person, who has not been examined by the police during the investigation and whose statement has not been recorded by the investigating officer under Section 161 , Cr.P.C., can be permitted to depose against the accused.

14. In this context, I have gone through the first judgment relied upon by the learned counsel for the applicant, namely, the judgment in the case of Kehar Singh (supra). In this case, the Apex Court was examining as to whether a statement recorded before the Commission constituted under the Commission of Enquiry Act could be used to contradict a witness or impeach his credit. The observations relied upon by the learned counsel for the applicant as contained in paragraphs 37 and 38 of the said judgment have been made in this context. It is also in this context that the provisions of Section 155 of the Evidence Act have been dealt with and after due examination it has been laid down that the three sub-sections of Section 155 "indicate that there are two purposes for which a previous statement can be used. One is for cross-examination and contradiction and the other is for corroboration. The first purpose is to discredit the witness by putting to him the earlier statement and contradicting him on that basis. So far as corroboration is concerned it could not be disputed that it is none of the purposes of the defence to corroborate the evidence on the basis of the previous statement."

15. The Apex Court therefore, has interpreted Section 155 of the Evidence Act and has laid down that an earlier statement can be used for the purposes of contradiction and corroboration. The Apex Court has nowhere provided or held that till such time the statement of a person has been recorded under Section 161 , Cr.P.C., this testimony in a trial cannot be permitted.

16. In such view of the matter, the judgment cited does not support the contention of the learned counsel for the applicant.

17. Paragraph 19 of the judgment in the case of Tahsildar Singh (supra) relied upon by the learned counsel for the applicant, interprets the meaning of the word "contradiction" used in Section 145 of the Indian Evidence Act. In my considered opinion, even this judgment does not, in any manner, support the contention that has been raised by the learned counsel for the applicant.

18. Accordingly and in view of the discussion above, I am constrained to hold that the submission of learned A.G.A. has substance. In case, the argument of learned counsel for the applicant is accepted, no person, who is not named in the F.I.R. or who has earlier not been examined by the police during investigation and whose statement has not been recorded under Section 161 , Cr.P.C., can ever be permitted to depose in a trial. This application is therefore, wholly devoid of merits and is accordingly dismissed.