

(2017) 02 AP CK 0044

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 796 of 2017

K. Vittala Rao

APPELLANT

Vs

The State of Andhra Pradesh

RESPONDENT

Date of Decision : 13-02-2017

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311
Penal Code, 1860 (IPC) — Section 304B, Section 489A

Citation : (2017) 2 Crimes 194 : (2017) 1 HLT(CrI) 437

Hon'ble Judges : Sri A. Shankar Narayana, J.

Bench : Single Bench

Advocate : Sri Butta Vijaya Bhasker, Counsel, for the Petitioner; Addl. Public Prosecutor for the State of Andhra Pradesh, for the Respondent

Final Decision : Dismissed

Judgement

Sri A. Shankar Narayana, J.—Assailing the order, dated 30.09.2016 in CrI.M.P. No.11 of 2016 in Sessions Case No.129 of 2013 on the file of the II Additional Sessions Judge, Adoni, passed by its Full Additional Charge Court i.e., IV Additional Sessions Judge, Kurnool, the petitioners, who are arraigned as accused Nos.1 to 3, request to exercise the power under Section 482 of the Code of Criminal Procedure, 1973 (for short "the Code") to set aside the order and to afford a chance to them to recall P.Ws.1 to 3 and 5 and to cross-examine them further.

2. The petitioners are being prosecuted by the State for the charges under Section 304B and 498A read with Section 34 IPC.

3. The only ground, on which such a request was made before the learned II Additional Sessions Court is, that the petitioners engaged a new advocate in place of the advocate who cross-examined the witnesses, but the new advocate at the stage of examination under Section 313 of the Code found that the earlier counsel for the petitioners could not cross-examine the witnesses on the aspect of harassment meted out to the deceased in the hands of petitioners and,

therefore, it is just and necessary to cross-examine them.

4. The Court below answering the point whether such a request can be acceded to at the stage when the Sessions Case reached the examination of petitioners under Section 313 of the Code; referred to the fact-situation as reflected from the charge sheet and the witnesses examined amongst whom the material witnesses being PW.1- de facto complainant, who is none other than the junior paternal uncle of the deceased, PWs.2 and 3, parents of the deceased and PW.5, a neighbor of the deceased; referred to the ruling relied on by the learned Additional Public Prosecutor in *Beagari Pentaiah & others v. State of Andhra Pradesh*, 1998 (2) ALD (Cri) 627 rendered by a Hon''ble Single Judge of this Court, where a similar request was made by the accused therein; and the ruling relied on by the learned counsel for the petitioners in *Riyazuddin and others v. State of Uttar Pradesh*, 2001 CrL.L.J. 3907 rendered by a Hon''ble Single Judge of Allahabad High Court; opining that change of a lawyer is not a valid ground for recalling witnesses on the mere ground that some more questions have to be put to the witness, as held in *Beagari Pentaiah's Case* (Supra); and further opining that the test laid down in *Riyazuddin's Case* (Supra) as to the satisfaction to reach the just decision in the case being not adequately reasoned or explained and the reason assigned by the petitioners that they felt it necessary to cross-examine the prosecution witnesses 1 to 3 and 5 does not satisfy the Court to recall the witnesses is essential to just decision of the case; dismissed the petition.

5. Heard Sri Butta Vijaya Bhasker, learned counsel for the petitioners and the learned Additional Public Prosecutor appearing for the State of Andhra Pradesh.

6. The learned counsel for the petitioners would submit that the Court below went wrong in rejecting the request, despite bringing to the notice of the Court below that the earlier counsel did not cross-examine PWs.1 to 3 and 5 on relevant aspects resulting in prejudice to the case of the petitioners, and the present counsel after going through the depositions of these witnesses felt it just and necessary to recall them for further cross-examination.

i) It is his submission that, the Court below ought to have allowed the petition for just and complete decision of the case and the rejection resulted in prejudice/hardship being caused to the petitioners, though, acceding to such a request would not cause any prejudice to the prosecution or the de facto complainant and, therefore, sought to quash the order and to allow the petition to enable the petitioners to recall PWs.1 to 3 and 5 and to further cross-examine them.

ii) The learned counsel places reliance on the decisions of the Hon''ble Supreme Court in *Hoffman Andreas v. Inspector of Customs, Amritsar*, (2000) 10 SCC 430 and *Riyazuddin's Case* referred to by the Court below.

7. The only point that requires determination is:

Whether the learned Additional Sessions Judge went wrong in rejecting the

request of the petitioners to recall PWs.1 to 3 and 5, and whether interference is warranted?

8. In Hoffman Andreas's Case (Supra), the Hon''ble Supreme Court was deliberating a situation, where the counsel, who was engaged for defending the accused, had cross-examined the witnesses, but he could not complete the trial because of his death, and when the new counsel took up the matter, he was under the disadvantage that he could not ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects. In the said circumstances, opining that if the new counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interests of justice, particularly, when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. The Hon''ble Supreme Court further observing that the trial is basically for the prisoners and the Courts should afford the opportunity to them in the fairest manner possible, and in that case, the new counsel filed the petition for recalling the prosecution witnesses, even after the accused was called upon to enter his defence.

9. Two reasons are to be found for acceding to such a request in the aforesaid case:

First, on the demise of learned counsel on record, who had cross-examined the witnesses but could not complete the trial, disabled the new counsel, who took up the matter, to ascertain from the erstwhile counsel as to the scheme of the defence strategy which the predeceased advocate had in mind or as to why he had not put further questions on certain aspects;

Second, the examination of prosecution witnesses was not completed by which time the learned counsel on record suffered death and, thus, the request in the said case was made even before the accused was called upon to enter his defence.

Such a situation is not occurring in the present case. Concerning the first reason, the new counsel has every opportunity to approach the erstwhile advocate and to find out the scheme of the defence strategy which he did adopt or the reason as to why he had not put further questions on the aspect of harassment while cross-examining PWs.1 to 3 and 5. On the second, the Sessions Case reached the stage of examination of accused under Section 313 of the Code. Therefore, it is difficult to accede to the relief.

10. In Riyazuddin's Case (Supra), the fact-situation would reflect that after PWs.1 to 4 were examined during trial for an offence under section 302 IPC. The learned counsel on record left the brief on account of his poor health and the accused had no other option except to engage a new counsel to defend them. A similar application to recall PWs.2 and 4 was made on the ground that new counsel felt that both the witnesses are material witnesses and were not examined properly by the erstwhile counsel and that the result of the trial shall

mainly depend upon their testimony and, therefore, in the interests of justice, the learned Single Judge of the Allahabad High Court relying on the rulings in *Mehrunissa v. State of Maharashtra*, AIR 1981 SC 1861 : (1981) Cri LJ 1283, where the non-supply of material documents referred to in the grounds of detention; *Mohanlal Shamji Soni v. Union of India and another*, AIR 1991 SC 1346 : 1991 Cri LJ 1521; *Hoffman Andreas's Case* (Supra) referred to the ingredients of Section 311 of the Code opining that the documents filed along with the Criminal Miscellaneous Application would require some more opportunities were necessary to be given to the applicants/accused, acceded to the request directing the learned Additional District and Sessions Judge (VII), Kanpur Dehat to invoke his power under Section 311 of the Code to allow for re-examine/cross-examine the witnesses 2 and 4 on the particular specified date which shall be indicated and fixed at the pleasure and convenience of the learned concerned District and Sessions Judge on the prescribed conditions and the cost and expenses specifically indicated for the purpose of reexamination/ cross-examination with further directions. One thing is certain from the facts and circumstances occurring in *Riyazuddin's Case* (Supra), that being, the trial was not completed and the Sessions Case did not reach the stage of calling for the defence by the learned Sessions Judge.

11. Turning to the submission of the learned Additional Public Prosecutor that the order passed by the Court below does not suffer from any infirmity as at the stage of examination under Section 313 of the Code, a petition of this nature cannot be allowed, he places reliance on the decision of the Hon"ble Supreme Court in *State of Haryana v. Ram Mehar and Others*, (2016) 8 SCC 762 to fortify his submission. The learned Additional Public Prosecutor mainly relies on the expression of the Hon"ble Supreme Court in paragraph No.27. A similar ground which is agitated in the present case was raised by the defence. The stage in the said Sessions Case was for examination of defence witnesses on completion of the examination of accused under Section 313 of the Code. The Hon"ble Supreme Court expressing that in the fact-situation occurring therein the request does not arouse the judicial conscience within the established norms of Section 311 of the Code for exercise of such jurisdiction; and recall of witnesses indubitably cannot form the foundation, and if it is accepted as a ground, there would be possibility of a retrial and holding thus:

"37. There is a definite purpose in referring to the aforesaid authorities. We are absolutely conscious about the factual matrix in the said cases. The observations were made in the context where examination-in-chief was deferred for quite a long time and the procrastination ruled as the Monarch. Our reference to the said authorities should not be construed to mean that Section 311 Code of Criminal Procedure should not be allowed to have its full play. But, a prominent one, the courts cannot ignore the factual score. Recalling of witnesses as envisaged under the said statutory provision on the grounds that accused persons are in custody, the prosecution was allowed to recall some of its witnesses earlier, the counsel was ill and magnanimity commands fairness should be shown, we are inclined to

think, are not acceptable in the obtaining factual matrix. The decisions which have used the words that the court should be magnanimous, needless to give special emphasis, did not mean to convey individual generosity or magnanimity which is founded on any kind of fanciful notion. It has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not necessarily mean "the liberal approach" shall be the Rule and all other parameters shall become exceptions. Recall of some witnesses by the prosecution at one point of time, can never be ground to entertain a petition by the defence though no acceptable ground is made out. It is not an arithmetical distribution. This kind of reasoning can be dangerous. In the case at hand, the prosecution had examined all the witnesses. The statements of all the accused persons, that is 148 in number, had been recorded Under Section 313 Code of Criminal Procedure. The defence had examined 15 witnesses. The foundation for recall, as is evincible from the applications filed, does not even remotely make out a case that such recalling is necessary for just decision of the case or to arrive at the truth. The singular ground which prominently comes to surface is that the earlier counsel who was engaged by the defence had not put some questions and failed to put some questions and give certain suggestions. It has come on record that number of lawyers were engaged by the defence. The accused persons had engaged counsel of their choice. In such a situation recalling of witnesses indubitably cannot form the foundation. If it is accepted as a ground, there would be possibility of a retrial. There may be an occasion when such a ground may weigh with the court, but definitely the instant case does not arouse the judicial conscience within the established norms of Section 311 Code of Criminal Procedure for exercise of such jurisdiction. It is noticeable that the High Court has been persuaded by the submission that recalling of witnesses and their cross-examination would not take much time and that apart, the crossexamination could be restricted to certain aspects. In this regard, we are obliged to observe that the High Court has failed to appreciate that the witnesses have been sought to be recalled for further cross-examination to elicit certain facts for establishing certain discrepancies; and also to be given certain suggestions. We are disposed to think that this kind of plea in a case of this nature and at this stage could not have been allowed to be entertained." Even the observations of the Hon"ble Supreme Court contained in paragraph No.38 are also apt to quote:

"38. At this juncture, we think it apt to state that the exercise of power Under Section 311 Code of Criminal Procedure can be sought to be invoked either by the prosecution or by the accused persons or by the Court itself. The High Court has been moved by the ground that the accused persons are in the custody and the concept of speedy trial is not nullified and no prejudice is caused, and, therefore, the principle of magnanimity should apply. Suffice it to say, a criminal trial does not singularly centres around the accused. In it there is involvement of the prosecution, the victim and the victim represents the collective. The cry of the collective may not be uttered in decibels which is physically audible in the

court premises, but the Court has to remain sensitive to such silent cries and the agonies, for the society seeks justice. Therefore, a balance has to be struck. We have already explained the use of the words "magnanimous approach" and how it should be understood. Regard being had to the concept of balance, and weighing the factual score on the scale of balance, we are of the convinced opinion that the High Court has fallen into absolute error in axing the order passed by the learned trial Judge. If we allow ourselves to say, when the concept of fair trial is limitlessly stretched, having no boundaries, the orders like the present one may fall in the arena of sanctuary of errors. Hence, we reiterate the necessity of doctrine of balance."

12. For the reasons that; i) the examination of prosecution witnesses has been completed and the Sessions Case is coming up for the examination of applicants under Section 313 of the Code; ii) that the ground agitated that the earlier advocate did not cross examine PWs.1 to 3 and 5 on the aspect of harassment that was found out by the new advocate of the petitioners/applicants themselves without assigning convincing reasons to satisfy the conscience of the Court to accede to their request; and iii) acceding to such a request would lead to virtually a re-trial of the prosecution case; absolutely there is no merit in the present request. The order passed by the learned Additional Sessions Judge does not suffer from any legal infirmity, nor it is patently illegal warranting interference.

13. Therefore, the present Criminal Petition to quash the order under challenge is dismissed at the stage of admission itself. As a sequel thereto, miscellaneous petitions, if any, pending in the petition, stand disposed of.