

(2000) 07 DEL CK 0010
In the Delhi High Court
Case No : Criminal W. No. 297 of 2000

K.K. Bhardwaj

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 03-07-2000

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 309(1)
Penal Code, 1860 (IPC) — Section 120

Citation : (2001) CriLJ 570 : (2000) 86 DLT 784 : (2000) 54 DRJ 807 : (2000) 4 RCR(Criminal) 653

Hon'ble Judges : Usha Mehra, J;S.N. Kapoor, J

Bench : Division Bench

Advocate : Mr. H.K. Chaturvedi, for the Appellant; Mr. A.K. Dutt, for the Respondent

Judgement

Usha Mehra, J.—Mr. K.K. Bhardwaj, the petitioner herein was working as Inspector (Vigilance) in Delhi Electric Supply Undertaking (in short DESU). During the year 1982 one D.K. Sharma, Assistant Engineer, DESU was working in Zone 312, Saket, Malviya Nagar, District Nehru Place, New Delhi. It is alleged that the said Mr. Sharma entered into a criminal conspiracy with Mr. S.C. Yadav, Inspector and Mr. Abdul Wahab, Lineman and the present petitioner. Mr. D.K. Sharma authorised S.C. Yadav to draw 1002 MTLT PVT Tropedi Cable from DESU Store, Lawrence Road which docket was duly signed by D.K. Sharma for the maintenance of Sheikh Sarai Phase-II. Mr. S.C. Yadav Along with Mr. Abdul Wahab drew the said material on 30th November, 1982. Material was taken out in truck No. DHG-3272. The said truck was owned by Shri Sukhdev Singh. He was also the Driver of the said truck. The loaded truck was given to Shri Gulab Chand Jain and Shri Jawahar Lal at the instructions of the present petitioner, Mr. K.K.Bhardwaj. petitioner was waiting outside the store for the purposes of receiving the material for final disposal. Mr. Gulab Chand Jain and Mr.Jawahar Lal took the loaded truck towards Model Town after which Mr. S.C. Yadav, Mr.Abdul

Wahab and the petitioner left for their respective offices. The truck was handed over to Mr. Arvind Gupta near Gujranwala Town, Delhi. He took the loaded truck towards Karawal Nagar (Trans Yamuna) Delhi. Transportation charges were paid to the Driver by Mr. Gulab Chand Jain. The said material was sold for Rs. 30,000/-. Out of the said sale proceeds a sum of Rs. 6,000/-, Rs. 8,000/- and Rs. 4,000/- were paid to S.C. Yadav, K.K. Bhardwaj, the petitioner herein and Abdul Wahab respectively.

2. It was in this backdrop the petitioner was arrested. He was, however, released on bail. Since prima facie case was made out against the petitioner hence charges u/s 120-B read with Section 409 IPC were framed against him by the Chief Metropolitan Magistrate on 21st January, 1988.

3. The grievance of the petitioner is that charges were framed on 21st January, 1988 whereas till date prosecution has not even completed a single witness. Part statement of Mr. Jawahar Lal (PW-1) was recorded. But till date his remaining evidence has not been concluded. Prosecution has cited as many as 13 witnesses. For the examination of one witness it has taken almost a decade for the prosecution. How much time it will take to examine the remaining witnesses? May be life time of the petitioner. Already two of the co-accused have died during the pendency of this trial. Petitioner was summoned for 19th November, 1985 and since then he has been attending the Court regularly but the Trial has not proceeded. It is endlessly continuing. Statement of Mr. Jawahar Lal (PW-1) had been deferred from time to time for no fault of the petitioner.

4. It would not be out of place to mention that due to this incident petitioner and co-accused were placed under suspension. Co-accused D.K. Sharma challenged his suspension. The Division Bench of this court while accepting the Letter Patent Appeal No. 164/98 filed by the co-accused D.K. Sharma observed that:-

"It is nobody's case that appellants were responsible for delay in disposal of the criminal cases.

It was further observed that:

"From the averments made in the writ petitions and a copy of the proceedings of the criminal court, it seems that till date not a single witness has been examined. This is the position after nearly a decade of framing of charges. There were other accused as well. We are told that during this intervening period two of the accused died and one was discharged at the stage of framing of charges. It could not be disputed on behalf of the CBI that no witness in the criminal trial has been examined. We are constrained to observe that the attitude of the CBI has been absolutely callous. This is even evident from the manner in which CBI has assisted this Court."

5. Relying on the above observations Mr. H.K. Chaturvedi, counsel for the petitioner contended that for no fault of the petitioner criminal proceedings have been endlessly delayed. Prolonged criminal trial because of the fault of the

prosecution is a sufficient ground to set aside the trial as laid down by the Apex Court in the case of Raj Deo Sharma Vs. State of Bihar, reported in 1998 CrL. L.J. 4596 followed by clarification given by the Apex Court in Raj Deo Sharma No. II, reported in 1999 CrL. L.J. page 4541 (hereinafter called Raj Dev Sharma-I and Raj Deo Sharma-II).

6. Mr. A.K. Dutt, however appearing for the CBI contended that delay was not due to any negligence or lethargy of the prosecution. The delay in adducing the prosecution evidence was beyond the control of the C.B.I. In fact from 12th July, 1988 to April 1991 Trial Court file remained in the High Court. D.K. Sharma, co-accused filed a Criminal Revision in the High Court. It was listed as Civil Revision No. 76/88. The same was disposed of on 20th September, 1988. But the record of the Trial Court had not been sent back till April, 1991. It was thereafter that criminal trial could proceed. Therefore, the period from July, 1988 to April, 1991 cannot be counted nor C.B.I. can be held responsible for this delay. In fact this delay falls in the exception as mentioned in Raj Deo Sharma's case (Supra) where the Apex Court observed that if the Trial get postponed on account of the pendency of appeal or revision and on account of stay of the petition then that delay will not be counted nor attributed to the conduct of the prosecution. Secondly the delay took place due to sickness of Mr. Jawahar Lal (PW-1) and even otherwise on seven dates i.e. 4.8.95, 5.10.95, 7.6.96, 25.2.97, 21.4.97 and 9.10.98 lawyers were on strike. On four dates, namely, 17.9.91, 28.4.93, 13.3.95 and 17.4.96 Presiding Officer was on leave. On eight dates, namely, 6.2.92, 7.7.94, 23.11.94, 8.5.95, 2.12.96, 20.8.96, 15.10.97 and 2.7.98 Public Prosecutor was on leave and on three dates he sought adjournments. Trial also got delayed because accused persons filed applications for closure of the prosecution evidence which took time for disposal hence trial got delayed till 20.10.99. In view of the above circumstances, prosecution was disabled to complete its evidence. Thus the delay of trial could not be attributed to the prosecution nor it could be inferred that prosecution took advantage of its own fault.

7. We have carefully considered the arguments raised by Mr. H.K. Chaturvedi, counsel for the petitioner as well as of Mr. A.K. Dutt, Special Public Prosecutor of the C.B.I. and have also gone through the record of the Trial Court. To our mind, decision of this petition hangs primarily on the sole question as to whether the prosecution was disabled to adduce evidence due to exceptional circumstances beyond its control. Mr. Dutt tried his best to justify the delay by indicating that record of the Trial Court remained in the High Court till April, 1991. For this it cannot be said that prosecution was lethargic or callous. This argument of Mr. Dutt is without substance. The Criminal Revision stood disposed in September, 1988. Why prosecution did not take any step to ensure that file (record) is dispatched expeditiously. Neither any application was filed in the High Court seeking direction for the dispatch of the record nor any such request was made before the Trial Court. This act of the prosecution cannot be but called callous attitude. Prosecution did not take any care rather left it at the discretion of the

staff to send the record whenever it was felt convenient. No urgency was shown by the Prosecution Agency to procure the record. Had Prosecution Agency been interested in expeditious trial of the case it would not have slept over the matter for almost three years. Trial Court file remained in High Court from September, 1988 till April, 1991 but Prosecution Agency made no efforts to get it dispatched. Not even a whisper made in its reply affidavit as to what steps were taken to ensure that the trial file be received in time by the Trial Court.

8. As regard lawyers strike or Presiding Officer being on leave and/or Public Prosecutor taking adjournments, to our mind, neither one nor two adjournments on account of sickness of PW-1 nor four adjournments on account of Presiding Officer on leave nor absence of Public Prosecutor on seven occasions in a span of 13 years can be called a good cause for condoning the delay. The defense as set up by respondent does not fit into the exceptions carved out by the Supreme Court in the case of Raj Deo Sharma (*supra*). It is not the case of the respondent that PW-1 was present on all the dates i.e. when the lawyers were on strike or when the Presiding Officer was on leave. Perusal of the Trial Court record clearly depict that on most of the dates PW-1 was not present. Public Prosecutor had to seek adjournment because of non-availability of the witness. Moving of application by accused persons and seeking closure of the prosecution evidence because of delay of trial, to our mind, would not absolve the prosecution from its duty to expedite the trial. Record of the Trial Court show that on none of the dates when lawyers were on strike or Presiding Officer was on leave or case adjourned because of Public Prosecutor, prosecution witnesses were present. Inspire of the protest by the petitioner and the co-accused and seeking closure of prosecution evidence and dismissal of the case because of delay, the prosecuting agency did not bother to take any step nor made any effort to get the trial expedited. Except PW-1, whose statement was partly recorded, no other witness was produced or adduced. In this view of the matter, we are in respectful agreement with the observations of the Division Bench in LPA.No. 164/98 decided on 4th January, 1999 and as quoted above that the attitude of the Prosecution Agency in the criminal trial had been absolutely callous.

9. Prosecuting Agency cannot be allowed to take advantage of its own negligence and/or lethargic attitude. In similar circumstances, Apex Court in Raj Deo Sharma's case (*Supra*) where charges were framed on 4.3.93 and only three witnesses were examined by the prosecution till 1.6.95 held three years delay in trial as fatal. Petitioner challenged the same by filing a writ petition to quash the entire prosecution including the FIR on the ground that more than 13 years had lapsed since the institution of the FIR. It was held that due to delay the right of the petitioner of speedy trial had been violated. The Apex Court observed that accused is entitled to speedy trial. Though this right has not been enumerated as a fundamental right in the Constitution still the same is implicit in the spectrum of Article 21 of the Constitution. For this conclusion the Apex Court took into consideration its earlier decisions in the cases of Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, , Mrs. Maneka Gandhi Vs. Union of

India (UOI) and Another, , State of Maharashtra Vs. Champalal Punjaji Shah, , Madhu Mehta Vs. Union of India and Others, , Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc., . After analysing and considering various decisions, the Apex Court observed thus:

(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily Right to speedy trial is the right of the accused.

(2) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial.

(3) The concerns underlying the right to speedy trial from the point of view of the accused are:-

(a) the period of remand and pre-conviction detention should be as short as possible.

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself.

(4) Delay is a known defense tactic. It is usually the accused who is interested in delaying the proceedings. The delay ordinarily prejudices the prosecution. It must be found out who is responsible for the delay.

(5) While determining the question of undue delay all the attendant circumstances should be taken into consideration;

(6) Each and every day's delay does not necessarily prejudice the accused.

(7) Accused's plea of denial of speedy trial cannot be deleted by saying that the accused did at no time demand a speedy trial.

(8) Finally the court has to balance and weigh the several relevant factors - "balancing test" or "balancing process" and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may, shall be quashed. But where in a given case quashing of proceedings may not be in the interest of justice , it would be appropriate for the court to include an order to conclude the trial within a fixed time.

(10) It is neither advisable nor practicable to fix any time limit.

10. While interpreting Section 309(1) of Cr. P.C., the Apex Court observed that a Magistrate is empowered to close the prosecution evidence when the prosecution

is unable to produce its witness inspire of repeated opportunities. Hence after noting the provisions of Section 309(1) Cr. P.C. the Apex Court supplemented the proposition laid down in Abdul Rehman Antulay's case (Supra) by giving following directions:-

(1) In cases where the trial is for an offence punishable with imprisonment for a period not exceeding seven years, whether an accused is in Jail or not, the Court shall close the prosecution evidence on completion of a period of two years from the date of recording the plea of the accused on the charges framed whether the prosecution has examined all the witnesses or not, within the said period and the Court can proceed to the next step provided by law for the trial of the case.

(2) If the offence under trial is punishable with imprisonment for a period exceeding seven years, whether the accused is in jail or not the Court shall close the prosecution evidence on completion of three years from the date of recording the plea of the accused on the charge framed, whether the prosecution has examined all the witnesses or not within the said period and the Court can proceed to the next step provided by law for the trial of the case, unless for very exceptional reasons to be recorded in the interest of justice, the Court considers it necessary to grant further time to the prosecution to adduce evidence beyond the afore said time limit.

11. Subsequent thereto while explaining the decision in Raj Deo Sharma's main case, the Apex Court pointed out that the whole idea to speed up the trial in criminal cases was to prevent the prosecution from becoming a prosecution of the person arrayed in a criminal trial. No trial can be allowed to prolong indefinitely due to the lethargy of the prosecution agency or the State machinery. However, the Court prescribed certain exceptions on the basis of which the prosecution evidence could not be closed. Those are namely:-

(i) If the inability for completing the prosecution evidence within the aforesaid period is attributable to the conduct of the accused in protracting the trial, no Court is obliged to close the prosecution evidence within the aforesaid period in any of the cases covered by clauses (i) to (iii).

(ii) Where the trial has been stayed by orders of the Court or by operation of law such time during which the stay was in force shall be excluded from the aforesaid period for closing the prosecution evidence.

12. These directions were in addition to the directions given in "Common Cause" A Registered Society Vs. Union of India AIR 1996 SC 1619, as modified by the Bench in Common Cause, A Registered Society Throough its Director Vs. Union of India and others, . It was also made clear that the inability for completing prosecution evidence if attributable to the conduct of the accused only then the court is not obliged to close the evidence of the prosecution. But at the same time the prosecution cannot be allowed to take advantage on any such vague premises, however, if it is found that there was absence of Presiding Officer in a Trial Court either on account of physical disability or due to the delay in taking

over the charge of the Court, it would be a valid cause which disabled the prosecution from adducing evidence. Unfortunately Mr. Dutt cannot take advantage of this exception in the facts of the present case. In the case in hand, in a span of 13 years Presiding Officer was on leave for four different dates and that too once a year like he was on one day leave in 1991, one day in 1993, one day in 1995 and one day in 1996. For these four days leave in six years it cannot be called a sufficient ground to say that this disabled the prosecution from examining the witnesses. The Apex Court when mention about the delay due to Presiding Officer's leave was in fact dealing with an eventuality when Court work remained closed for long period due to the absence of a Presiding Officer and not due to chance leave for a day by the Presiding Officer. Similarly the ground of delay due to taking of seven leave by the Public Prosecutor in a span of 11 years, such plea requires summary rejection. It is a sham defense set up by the respondent to cover up its own fault. Even otherwise arguments of the prosecution that delay was due to demitting of office by the Public Prosecutor was rejected by the Apex Court in Raj Deo Sharma's case. The Court while rejecting such an argument said that it is the outlook of the State to see that there is no unnecessary delay in appointing a Public Prosecutor to the existing vacancy. The State cannot take advantage of its own inaction. None the less to avoid any possible dislocation of the Trial on account of any such eventuality, a period of three months shall be excluded from the period fixed under directions (i) & (iii) for enabling the State Government to appoint a Public Prosecutor to that office. Apex Court reiterated that it would not permit the Trial Court to flout the mandate given in Section 309(1) of the Cr. P.C. unless the Court has very cogent and strong reasons to do otherwise. No Court has permission to adjourn examination of witnesses who are in attendance beyond the next working day.

13. Therefore, it is abundantly clear that three months period was given by the Apex Court when the Public Prosecutor demitted the office and new Public Prosecutor had not been appointed for a long period. But in the facts and circumstances of this case, as pointed out above in a span of 13 years Public Prosecutor took leave only on eight different dates i.e. one leave in a year. He did not examine witness for lack of documents on three dates. This eventuality cannot be compared with the exceptions mentioned by the Apex Court in Raj Deo Sharma's case. Hence no benefit can be derived by the respondent on this count.

14. Now turning to the third ground taken by the respondent i.e. seeking condensation of the delay on account of layers strike. It must be mentioned that lawyers were on strike on seven different dates. As already mentioned above, we had perused the record of the Trial Court and found that on all these dates when lawyers were on strike PW-1 was not present. Every time prosecution had been seeking adjournment on one pretext or the other Evidence of PW-1 has not been concluded due to callous attitude of the prosecution. It has allowed the trial to drag on for almost twelve years from the date charges were framed prosecution has cited thirteen witnesses. Why those were not produced. If PW-1 was sick on a particular date other witnesses could have been examined. No Explanation

given.

15. Explanation rendered by the prosecution in the counter affidavit does not justify the delay nor fall in the exception as carved out by the Apex Court. This is a case where the prosecution has not only been callous but also its attitude had been one of lethargic. It allowed trial, to drag beyond reasonable period of time. Therefore, to our mind, act of respondent amounted to violation of Article 21 of the Constitution of India. It is shocking that a period of 13 years has lapsed and as yet not a single witness has been examined. Unfortunately because of the lethargic and callous attitude of the prosecution the Trial dragged on. Even otherwise in Crl. W. No. 915/99 this Court vide order dated 17th December, 1999 has already quashed the proceedings before the Trial Court emanating from case PIR. No. RC 13/84-DLI in respect of the co-accused. Therefore, we see no reason to differ with the same.

16. In the above circumstances, we make the Rule absolute. This writ succeeds. Proceedings before the Trial Court emanating from the FIR RC-48/84-DLI dated 17.7.84 are quashed. Petition stands disposed.