

(2006) 01 AHC CK 0105

In the Allahabad High Court

Case No : Criminal Misc. Application No. 17835 of 2005

Mangesh Kumar (In Jail)

APPELLANT

Vs

State of U.P. and Munna Lal

RESPONDENT

Date of Decision : 05-01-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 304B, 498A

Citation : (2006) CriLJ 1436 : (2006) 2 DMC 175

Hon'ble Judges : Amar Saran, J

Bench : Single Bench

Advocate : U.C. Mishra and S.K. Dubey, for the Appellant; A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

Amar Saran, J.—This application has been filed by the applicant Mangesh Kumar for setting aside the order dated 30.8.2005 passed by the Additional Sessions Judge-VI/Special Judge (EC Act), Agra in S.T. No. 523 of 2003 (State v. Sanjay and Ors.) under Sections 498A/304B IPC and for directing the trial court to again summon P.W. 1, Munna Lal and permit the applicant to cross examine him.

2. P.W. 1, Munna Lal was the informant in the aforesaid case in which the allegations were that the applicant, who was the husband of the deceased Smt. Madhu, and other accused including the father and mother of the applicant had sprinkled kerosene oil and set her on fire and thereafter the report was registered on 29.5.2003 at about 12.30 P.M. After committal of the case, the informant was examined as P.W. 1 and eight other witness, which included the uncle of the deceased, mother of the deceased and the formal witnesses, such as Doctor, Station Officer, Circle Officer etc. have also been examined. Thereafter an affidavit dated 25.10.2004 was filed by the informant, P.W. 1, in which he appears to have resiled from the prosecution story. The applicant would like to re-examine this witness in order to demolish the prosecution case. The application

filed by the applicant for re-examining the witness has been rejected by the Special Judge by the impugned order on the grounds that nine witnesses have already been examined and the prosecution has even closed its evidence on 4.3.2005 and that the complainant P.W. 1, Munna Lal was subjected to extensive cross-examination. Learned Judge further observed that two decisions cited by the applicant, which have also been cited before me, viz. Laxmi Shanker v. State of U.P. (37) 1998 ACC 573 and Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, do not assist the applicant as in Laxmi Shanker's case it was observed that for proving certain papers for the just decision of the case, of the witness, who was examined earlier, may be recalled for further cross-examination and in Zahira Sheikh's case it was observed that Presiding Judge must not be a spectator or a mere recording machine, but should play an active role in the evidence collecting process. It was thereafter observed by the Special Judge that permitting cross-examination in order to enable a witness to resile from his earlier statement and to turn hostile would in fact make a court a spectator and a mere recording machine. However, the trial court appreciated the observations made by this Court in Yagya Pal v. State of U.P. (44) 2002 ACC 852 wherein this Court has held that in a non-compoundable case a witness should not be permitted to be recalled for further cross examination in order to enable him to resile from his earlier statement and to deny the prosecution case as such steps would be permitting compounding of an offence in a non-compoundable case by an indirect method, which is not legally permissible.

3. I think the trial court was perfectly justified in rejecting the application for recall of the witness in the above noted circumstances.

4. It may further be observed that it was in very extraordinary circumstances that the Apex Court had directed re-trial in order to enable Zahira Sheikh to give her testimony. In that case the witness has resiled from her statement u/s 161 Cr.P.C. nominating the accused and had turned hostile during the trial, but subsequently an application was moved on her behalf that she was interested in giving evidence in the case. It was a very grave incident in which 14 persons have been murdered and it was in that context that the Apex Court had observed in paragraph 39 as follows:

It will not correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society, fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm, Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

5. The Apex Court further observed in paragraph 44 as under:

Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law enshrined and jealously guarded and protected by the Constitution.

6. In the present case the informant had stuck to his testimony when he was examined as P.W. 1. The said testimony was even consistent with the dying declaration given by the accused. Now after nine witnesses have been examined and for some reason or the other, it is claimed that he has turned hostile. The Court is not to act in a manner so as to facilitate a witness to turn hostile, but what was emphasized in *Zahira Sheikh* was that effort should be made to enable a witness to speak truth. The decision was aimed as eliciting the truth from a witness who may have turned hostile as she may have been prompted by extraneous consideration to act in that manner.

7. In *Yagya Pal*'s case this Court has aptly observed in paragraph 7 that the law has made an offence u/s 302 IPC as not compoundable. Therefore, the offence for which the petitioners are being tried cannot be compounded legally. What is not legally permissible cannot be permitted to be done by the court indirectly. Therefore, the court has rightly refused to recall the witnesses for further cross-examination.

8. Learned Additional Government Advocate has drawn my attention to a recent decision of the Apex Court in *Mishralal and Ors. v. State of M.P. and Ors.* 2005 (2) JIC 999 wherein it has been mentioned that a witness, who was examined-in-chief and cross-examined fully, such witness should not have been recalled and re-examined to deny the evidence he had already given before the Court, even though that witness had given an inconsistent statement before any other Court or forum subsequently. It would be useful to quote paragraph 6 of the aforesaid decision in toto.

In our opinion, the procedure adopted by the Sessions Judge was not strictly in accordance with law. Once the witness was examined-in-chief and cross examined fully, such witness should not have been recalled and re-examined to deny the evidence he had already given before the Court, even though that witness had given an inconsistent statement before any other Court or forum subsequently. A witness could be confronted only with a previous statement

made by him. At the time of examination of P. W. 2 Mokam Singh on 6.2.1991, there was no such previous statement and the defence Counsel did not confront him with any statement alleged to have been made previously. This witnesses must have given some other version before the Juvenile Court for extraneous reasons and he should not have been given a further opportunity at a later stage to completely efface the evidence already given by him under oath. The Courts have to follow the procedure strictly and cannot allow a witness to escape the legal action for giving false evidence before the Court on mere explanation that he had given it under the pressure of the police or some other reason. Whenever the witness speaks falsehood in the Court, and it is proved satisfactorily, the Court should take a serious action against such witnesses.

9. In this view of the matter, it is immaterial that the learned Counsel for the applicant has made a concession that if time is spent for re-examining this witness, the applicant would not claim that for a ground of bail because order has already been passed by this Court for concluding the trial within two years.

10. In view of the aforesaid facts and circumstances I find no merit in this application, it is hereby rejected.