

(2014) 02 GAU CK 0013
In the Gauhati High Court
Case No : Criminal Petition No. 619 of 2013

Md. Sahnur Ali, Md. Samsul Ali and Chand Mohammed	APPELLANT
Vs	
The State of Assam	RESPONDENT

Date of Decision : 21-02-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311 397 401 482
Evidence Act, 1872 — Section 60 64 91
Penal Code, 1860 (IPC) — Section 143 147 148 149 302

Citation : (2014) 3 GLD 578 : (2014) 2 GLT 897

Hon'ble Judges : A.K. Goswami, J

Bench : Single Bench

Advocate : R.D. Lal and Mr. M. Pandit, for the Appellant; K. Munir, Addl. P.P., Assam, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Goswami, J.—By this petition under sections 482, 401, read with section 397 of the Code of Criminal Procedure, 1973, for short, the Code, the petitioners pray for setting aside and quashing the impugned order dated 30.07.2013 passed by the learned Additional Sessions Judge, Kamrup, Rangia, in Sessions Case No. 38(K)/2002 whereby the learned Court rejected the petition filed by the petitioners u/s 311 of the Code. I have heard Mr. R.D. Lal, learned counsel for the petitioners and Mr. K. Munir, learned Additional Public Prosecutor, Assam.

2. From the petition filed by the petitioners, it appears that one Samsul Ali lodged an ejahar stating that on 29.08.1997 at about 9:30 a.m., Md. Sahnur Ali, Faznur Ali, Majnur Ali, Chand Mohammad and some others, by forming an unlawful assembly, attacked Md. Islam Ali, Nilima Bibi, Karim Ali, Ranu Begum, Khabiruddin and some others and inflicted bodily injuries to them, as a result of which Karim Ali succumbed to his injuries. Accordingly, Rangia P.S. Case No. 232/1997 under sections 147/148/149/448/326/302 I.P.C. was registered. Charge-sheet was submitted by police and on being committed, Sessions Case

No. 38(K)/2002 was registered in the Court of Sessions Judge, Kamrup and case is presently pending in the Court of the Additional Sessions Judge, Rangia.

3. It also appears that in respect to the said incident, Sahnur Ali had lodged an ejahar, registered as Rangia P.S. Case No. 231/1997 under sections 147/148/143/341/326 I.P.C. and in respect of the same, Sessions Case No. 56(K)/1997 is registered.

4. In the body of the petition, Sessions Case No. is shown as 38(K)/2012, but the same is actually Sessions Case No. 38(K)/2002. There is also some confusion with regard to the number of the other Sessions Case shown as 56(K)/2007 in the impugned order. It is reflected both ways - Sessions Case No. 56(K)/2007 as also Sessions Case No. 56(K)/1997 referring to them as the cross-case. In the petition, the case is described as Sessions Case No. 56(K)/2007. Be that as it may, the number of case is not very relevant for the purpose of this case.

5. The petitioners filed a petition u/s 311 of the Code praying for examination of Kulsum Bibi (PW 13), Dr. Hemanta Mahanta (PW 15), the I.O. Mina Kant Deka (PW 17) and Nilima Begum (P.W. 18) and also to examine some persons who were working in the field nearby the place of occurrence. Prayer was also made to examine 1. Anar Ali, 2. Gamir Ali, 3. Dr. Hirendra Kumar Bhattacharjee (P.W. 4) and 4. Dr. D.N. Bhattacharjee (P.W. 12) in Sessions Case No. 56(K)/2007.

6. It is stated in the petition that there was no intention of delaying the proceedings and if the examination of the persons named were not considered to be of vital importance, they would not have made the prayer at the belated stage.

7. In addition to the oral submissions, Mr. Lal has also submitted written argument. Learned counsel submits that prosecution witnesses have not been cross-examined properly and as a result, the defence case is not at all presented. It is submitted by him that ends of justice demands that the petitioners be permitted to cross-examine the said witnesses and also to examine witnesses in Sessions Case No. 56(K)/2007.

8. Mr. K. Munir, learned Additional Public Prosecutor, Assam has supported the impugned order. It is submitted by him that the petition was filed merely to delay the proceeding which has been pending for long.

9. It appears from the order of the learned Additional Sessions Judge that from 28.09.2009, Sessions Case No. 38(K)/2002 was pending for argument. On 15.09.2012, a petition u/s 311 of the Code to examine one Dr. H.K. Bhattacharjee as defence witness to prove the injury sustained by Samsul Ali and Chand Mohammed Ali, who were allegedly the injured in Sessions Case No. 56(K)/2007, was filed. On 28.09.2012, the petition was withdrawn and accordingly, the same was dismissed as not pressed.

10. Argument was heard on 01.10.2012 and the case was fixed on 18.10.2012. However, the Presiding Officer was transferred as a result of which Judgment could not be pronounced and the case was again fixed for argument. The present

petition u/s 311 of the Code was filed on 23.04.2013.

11. In Sessions Case No. 38(K)/2002, the accused had adduced evidence of six witnesses between the period 21.01.2006 to 23.10.2008. The prosecution evidence was closed long back on 23.12.2004.

12. Section 311 of the code reads as follows:

311. Power to summon material witness, or examine person present. Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

13. A reading of Section 311 would demonstrate that the Section can be divided into two parts in as much as the Section uses both the expressions "may" in the first part and "shall" in the second part. The first part, thus provides for purely discretionary power to the Court enabling it at any stage of the enquiry, trial or other proceedings (i) to summon any person as a witness, or (ii) examine any person in attendance, though not summoned as a witness, or (iii) recall or re-examine any person already examined. The second part casts an obligation on the Court to mandatorily (i) summon and examine, or (ii) recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

14. The language of the Section which contains words such as "at any stage" or "of any enquiry, trial or other proceeding", "any person", "any such person" will go to show that the Section is expressed in the widest possible amplitude and does not limit the discretion of the Court in any manner. However, it goes without saying that the jurisdiction of the Court must be dictated and guided by the exigency of the situation coupled with fairplay and good sense.

15. In *Zahira Habibullah Sheikh and Another Vs. State of Gujarat and Others*, the Apex Court considered the scope and ambit of section 311. It was laid down as follows:

26. ... The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness

who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

28. As indicated above, the section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the court. Sections 60, 64 and 91 of the Evidence Act, 1872 (in short "the Evidence Act") are based on this rule. The court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and

has to be determined by the Presiding Judge.

29. The object of Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by the court gives evidence against the complainant, he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a court arises not under the provisions of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned by the court could not be termed a witness of any particular party, the court should give the right of cross-examination to the complainant.

16. Thus, there is no doubt that the object of section 311 of Code is to ensure that there may not be failure of justice on account of mistake of either party in bringing valuable evidence on record or leaving ambiguity in the statement of the witnesses examined from either side. The bottom line is whether examination of the witnesses is essential for the just decision of the case. There is also no manner of doubt that though the section confers a very wide power on the court to summon witnesses, the discretion conferred is to be exercised judicially. The power has to be exercised by the court only after being satisfied that interest of justice demands summoning of witnesses. If a party wants the court to exercise the power u/s 311 of the Code, it will be obligatory on its part to place material before the court to enable the court to be objectively satisfied to take recourse to such power.

17. Though in the petition u/s 311 of the Code filed before the learned Trial Court, the petitioners have employed the expression "examination" of the witnesses named (in the body of the petition and in the prayer, the word "re-cross" is scored out), the submissions of the learned counsel of the petitioners as also the written argument submitted make it clear that the petitioners want to further cross-examine P.W. 13, P.W. 15, P.W. 17 and P.W. 18 in Sessions Case No. 38(K)/2002.

18. The prayer made in the petition u/s 311 of the Code reads as follows:

Under the circumstances it is prayed that your Honour may be pleased to admit this petition, hear the parties and after hearing be pleased to recall the witnesses namely P.W. 13 Kulsum Bibi, P.W. 15 Dr. Hemanta Mahanta, P.W. 17 Mina Kant Deka, and P.W. 18 Nilima Begum and other witnesses who were working nearby the place of occurrence for examinations and your Honour may further be pleased to accord permission to examine some witnesses viz.; (1) Anar Ali, (2) Gamir Ali (3) P.W. 4 Dr. Hirendra Kumar Bhattacharjee in Sessions Case No. 56(k)/07 and (4) P.W. 12 Dr. D.N. Bhattacharjere in Sessions Case No. 56(K)/07, for meeting the ends of justice.

19. In the petition, no material is laid as to why Anar Ali and Gamir Ali are required to be examined. In fact, the learned trial Judge had also taken note of the fact that no ground whatsoever was shown as to why Anar Ali and Gamir Ali

are required to be examined. It will be relevant to note that Dr. H.K. Bhattacharjee, who was examined as PW 4 in Sessions Case No. 56(K)/1997 was also examined as PW 12 and while he was examined as PW 12, the name was recorded as Dr. D.N. Bhattacharjee and the deposition was signed by Dr. H.K. Bhattacharjee. Learned Additional Sessions Judge, in the impugned order, had noted that Dr. Bhattacharjee in his examination as PW 4 and PW 12 had spoken about the same report and same particulars of injured Samsul Ali and Chand Mohammad Ali and that the said inadvertent mistake in recording the name and his examination twice has no material bearing in as much as there is no confusion about the identity of PW 4 and PW 12, who is one and the same person and accordingly, held that their examination is not necessary for the just decision of the case. In view of the above, rejection of the prayer for examining witnesses in Sessions Case No. 56(K)/2007 does not require any interference.

20. It is to be noted that in the petition filed u/s 311 Cr.P.C., the petitioners had prayed for examination of some witnesses who were working nearby the field where the occurrence had taken place. It is as vague as anything. On such a vague prayer, the petition could not have been allowed with regard to such witnesses.

21. It has also been pleaded in the petition that PW 13, PW 15, PW 17 and PW 18 be recalled for examination as due to sickness of the senior counsel, the case had to be conducted by the junior counsel and as a result, some vital facts could not be brought to notice of the court. In the light of the aforesaid, Mr. Lal had argued that, in effect, the petitioners are praying for cross-examination of the said witnesses.

22. The petitioners had cross-examined the witnesses. No material has been placed in the instant case indicating the vital facts which were not brought on record and which, if allowed to be brought on record, would have facilitated a just decision. It would appear that cross-examination of the witnesses must have taken place in between 23.12.2004, which is the date on which prosecution evidence was closed and 21.01.2006, the date when defence started examining their witnesses. No explanation is given why such a prayer had to be made after lapse of so many years. That the witnesses could have been cross-examined better cannot be a ground for exercise of power u/s 311 of the Code. In view of the above discussion, I am of the considered opinion that there is no merit in this application and accordingly, the same is dismissed.