
(2005) 02 MP CK 0125

In the Madhya Pradesh High Court

Case No : Criminal Revision No. 1609 of 2004

Nandlal and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 14-02-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 199, 256, 257, 257, 311
High Court of Madhya Pradesh Rules, 2008 — Rule 1, 586
Penal Code, 1860 (IPC) — Section 201, 302, 34, 376(2), 420

Citation : (2005) 3 JLJ 131 : (2005) 4 MPLJ 98

Hon'ble Judges : U.C. Maheshwari, J

Bench : Single Bench

Advocate : Ashok Lalwani, for the Appellant; G.S. Ahluwalia, for the Respondent

Final Decision : Allowed

Judgement

U.C. Maheshwari, J.

This revision petition under Sections 397 read with Section 401 of the Code of Criminal Procedure ("The Code" in brief) is directed against the order dated 20th September, 2004, passed by III Additional Sessions Judge, Chhindwara, in Sessions Trial No. 237/96, whereby the expenses for recalling of witness was directed to be deposited by applicants.

Brief facts which are necessary for disposal of this revision petition are like that, the trial Under Sections 302, 376(2)(g) and 201 read with Section 34 of Indian Penal Code (for short "IPC") was pending and in its earlier stage one prosecution witness, regarding expert report of DNA test, Doctor G.V. Rao (P.W. 58) was examined, cross-examined and discharged but some of the documents in regard to said report were not submitted either by prosecution or by this witness at earlier stage of examination. Then an application u/s 91 of the Code was submitted by the applicants for calling all those documents, same was dismissed by the trial Court after which revision before this Court was preferred in which the order was set aside and remitted back to trial Court for deciding afresh,

which again dismissed, the same, the applicants again filed Criminal Revision No. 1184/04 before this Court which was also dismissed on 30.1.2003, then the matter went up to the Supreme Court by Special Leave Appeal (Criminal) No. 691/03, in which the following order was passed:

Leave granted.

Learned Counsel appearing for the Respondent State is directed to produce before the trial Court documents pertaining to both the DNA tests, i.e., the documents mentioned in item 1 of para 3 of the impugned judgment and the correspondence, if any, carried on by the prosecuting agency with the laboratory CDFD (CCMB), Hyderabad. No other documents to be produced. The Appellants to be permitted to inspect the documents after they are produced.

The appeal stands disposed of accordingly. No order as to costs.

Thereafter, in compliance of the said order, only few documents were submitted by prosecution but not all as directed. But as submitted by applicants that the non-production of the documents are not the subject-matter of this revision and therefore this aspect is not necessary to examine at this stage.

While the prosecution was directed to submit documents as they are related with the said report and witness. Dr. G.V. Rao, then defence was entitled to cross-examine this witness again in view of said documents and with this prayer, application Under Sections 311 of Code was submitted. This application was considered and allowed at earlier stage before passing the impugned order as appears from the order itself, and as directed the said witness did not appear inspite of intimation as per prescribed procedure and it was also reported before the trial Court that due to conviction in a criminal matter, the said witness had been dismissed or terminated or discontinued from that laboratory or office and is not available as regular employee and when he was called by the Court through process for his further cross-examination then he sent some message to the Court that subject to payment of Rs. 12,000/- as TA, DA he would appear for further cross-examination.

In these circumstances, the question of bearing expenses of this witness as per prosecution should be borne by applicants-accused because prayer for recalling was made by them, while the present applicants prayed that prayer for recalling this witness was in view of those documents which had been submitted at the later stage and the same were not on record when witness was examined and discharged at early stage so witness should be recalled on the expenses of non-applicant to give an opportunity of cross-examination to defence.

In the above said circumstances, by impugned order applicants-accused were directed to afford and deposit the expenses of the witness with further direction that after depositing this amount the witness be called for his further cross-examination. This order has been called in question by this revision.

Having heard the learned Counsel Shri Ashok Lalvvani for the applicants and Shri

G.S. Ahluwalia for the State of Maharashtra Respondent, I am of the following views:

The counsel for the applicants has vehemently submitted that at the earlier stage when the said witness was cross-examined, applicants were not aware about these documents so the witness was not cross-examined on this point. He also submitted that during cross-examination of this witness some further report was also called and subsequently applicants received some information about other documents then the application for production of such documents was filed and before final adjudication on this application by the apex Court, the cross-examination of the said witness was already over and was discharged, and subsequently as directed by the Apex Court some documents have been submitted by the prosecution then certainly in view of these documents defence was entitled to cross-examine the expert and for that an application for recalling of witness was moved. His further submission was that when the documents are filed by prosecution at the subsequent stage and defence wants to cross-examine the witness then it is the duty of the prosecution to produce such witness on his own expenses before the Court for further cross-examination. So in any circumstances the burden of expenses could not be put upon the shoulder of applicants and without considering these aspects, burden of expenses was put forth over the shoulder of the applicants by trial Court. Therefore, according to this submission the order is not sustainable under the law. By supporting his contention he cited the case of Parshotam Das v. Emperor reported in AIR 1936 Lah 919 in which it is held:

Code of Criminal Procedure, (1898), Section 257-Accused summoning witness-Witness cannot refuse to attend Court when summoned-Fees of expert witness-Accused should not be burdened with costs of expert (if his demand is unreasonable) especially when Magistrate is empowered to enforce attendance of witness and to pay him reasonable dues.

He further placed reliance on the case of Ramchandra Modak Vs. Emperor, in which it is held:

The Magistrate then passed an order directing the witnesses to be produced upon the accused depositing the cost of their attendance, and fixed the 7th of March for this purpose. This order the Magistrate states to be u/s 257 Clause (2), of the Code but that stage had not yet arrived inasmuch as the further cross-examination of the witnesses after the charge was to be u/s 256 of the Code and full and proper opportunity was not given to the accused for that purpose. There was no application on behalf of the accused under Clause (1) of Section 257 applying to the Magistrate to issue any process for compelling the attendance of the prosecution witness for the purpose of cross-examination, and consequently Clause (2) of that section did not apply. The application for the accused made on the 24th of February and renewed on the 25th was an application u/s 256 of the Code, and the Magistrate so treated it. Therefore the Magistrate's order under Clause (2) of Section 257 of the Code imposing a condition upon the accused to

deposit costs for the purpose of summoning, that is, for the purpose of recalling the prosecution witnesses, is wrong and without jurisdiction. If the order be taken to come u/s 256, as is contended for by the learned Assistant Government Advocate, then the condition imposed by the Magistrate of depositing the expenses for recalling the prosecution witnesses is "ultra vires". That section does not lay down any condition, nor does it vest the Magistrate with any such power.

He also referred a case of Jit Singh Rattan Singh v. The State reported in AIR 1963 PH 143, in which it is held:

(9) The position that emerges on perusal of this rule is that in the summoning of witnesses in cases instituted or carried on by or under the orders or with the sanction of the Government or of any Judge, Magistrate, or any other public servant, or in those which are cognizable by the police, no distinction is made between witnesses summoned by the prosecution or the accused in the payment of their expenses. Where a Court summons a witness u/s 540 of the Code of Criminal Procedure his expenses have to be met by the State irrespective of the fact whether the case has been instituted by the police or one of the public officers of the Government or whether it is cognizable or non-cognizable and bailable or non-bailable.

(10) The case with which we are dealing falls both within the first and the third categories stated in this Rule. The Petitioner is being tried on a police challan and the charge against him is for an offence u/s 420, Indian Penal Code, which is cognizable by the police. It is, thus, evident that under Rule 1 of Chapter 9A of the High Court Rules and Orders, Volume III, the expenses of summoning a defence witness have to be met by the State and the Court is not justified in refusing to summon the witnesses of the accused merely because he has capacity to pay.

Although above said cases have been decided u/s 540 of the old Code of Criminal Procedure but the Section 311 of the new Code is more or less equivalent to this section.

He further referred to the case of Kodu Vs. Banmali, in which it is held:

11. The present case is one where the charge of adultery punishable u/s 467, Penal Code, has been framed against the accused. That offence is bailable and non-cognizable. In our opinion, the offence of adultery has no direct nexus with public interest (See Section 199, Code of Criminal Procedure). In the light of what has been said above, the question whether the Government should pay the travelling expenses and subsistence allowance of prosecution witnesses, who are to be summoned u/s 256, Code of Criminal Procedure, is within Rule 586(a)(ii) of the Rules and Orders (Criminal), framed by the High Court for subordinate Courts. We are of the opinion that the complainant should bear the expenses of the witnesses to be recalled. Since the point was not before the trial Court in this light, ends of justice require that Shri Bhaghel's request to give the complainant

a fresh opportunity to deposit the expenses should be allowed. We have already held that the learned Magistrate was in error in recording order of dismissal of the complaint.

In all above said referred cases, the main principle about bearing the expenses of prosecution witness had been decided and principles are also laid down in relating to recall witnesses and in all cases the defence was given an opportunity to cross-examination and examination of witnesses at the expenses of the prosecution.

While, on the other hand the counsel for the State of Maharashtra justified and supported the impugned order and his first submission was that the order impugned is only an interim order and as such is not revisable u/s 397/401 of Code and his second submission was that witness has already cross-examined by the defence at earlier stage so there was no requirement for further cross-examination and if the application for recalling the witness was filed by the applicants and the same was allowed then the imposition of the expenses on the applicants is proper in view of Section 312 of the Code which says as under:

312. Expenses of complainant and witnesses-Subject to any rules made by the State Government, any Criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court under this Code.

He also cited a case of *Sunderlal Patwa v. Digvijay Singh and Anr.* reported in 2003 (1) MPLJ 200 This case was not decided in relating to expenses of the recalled witnesses but the case was based only against that part of the order by which the trial Court refused permission to ask some questions from witnesses and ultimately in this reported case it was held that during cross-examination of witness if some questions are disallowed by trial Court then such order is an interlocutory order so the same cannot be interfered in the revision and in view of these facts and circumstance of the case this cited case is not profitable to him in any manner. He further relied on the case of *K.K. Patel and Another Vs. State of Gujarat and Another*, that was a case relating to charge and discharge and that situation is not in the case in hand therefore it does not give any strength to non-applicant-Respondent. He also placed reliance on case of *Rajendra Kumar Sitaram Pande and Etc. Vs. Uttam and Another*, . This case is based on taking cognizance in criminal matter and also speaks about the circumstance when complaint case can be dismissed, whether such order is interlocutory or not. Such a dispute is not involved in the present case and, therefore, this case law is distinguishable and not helping to the non-applicant-Respondent.

So far as his first submission is concerned, that the order is interlocutory and cannot be entertained in revisional jurisdiction, has not impressed me because by impugned order, applicants are directed to deposit a very huge amount for recalling of the witness while the concerning documents were not submitted by

the prosecution at the earlier stage when witness was cross-examined at first occasion and subsequently when at the efforts of the applicants up to the apex Court the documents are submitted, then, in view of this, the applicants are entitled to cross-examine the witness at the expenses of prosecuting agency. Suppose the impugned order is maintained and the applicants are not in a position to deposit the money of the expenses then they will be deprived of their valuable right to cross-examine by which they may prove their case and it is a settled principle of criminal jurisprudence that defence of the accused should never be prejudiced because of the act of the prosecuting agency.

In view of Section 312 of the Code, the trial Court was duty bound to direct the non-applicant-State to afford the expenses of witness in above mentioned circumstances but contrary to it, impugned order Was passed without supplying proper and cogent reasons. So non-applicant cannot be given any advantage just contradictory to provision of Section 312 of Code.

On scrutinizing all circumstances, the cross-examination had become necessary because of the act of prosecuting agency, therefore, this expenses could not be directed to be borne by applicants. While considering all these aspects, if the impugned order is maintained then this will affect the valuable right of the applicants because if this amount is not deposited by the applicants or they are not in a position to afford, then applicants would suffer with a great loss and, intention of legislature would be defeated therefore, impugned order cannot be said as an interlocutory order only. So I hold that in these circumstances revision is maintainable against such type of arbitrary order of the trial Court.

So far his second submission is concerned, that witness has already been cross-examined by the applicants, is not relevant while application for recalling of the witness has already been allowed by the trial Court. His last submission is that witness recalled by the applicants then they should borne his expenses, this submission is also not impressed me in view of the above said interpretation.

Counsel for the applicants Mr. Lalwani at the last submitted that for saving the right of cross-examination the applicants had deposited the amount as directed by the trial Court but under protest and subject to result of this petition.

After examining the above said legal position I have found apparent error of jurisdiction and perversity in the impugned order and, therefore, by invoking the revisional jurisdiction of this Court, the impugned order regarding payment of expenses of witness by applicants is hereby set aside and it is directed that the said expenses would be borne by prosecution and as submitted by Mr. Lalwani that under protest he has already deposited the said amount to save the right of cross-examination. If it is so, then the same amount shall be refunded to the applicants by non-applicant-prosecuting agency.

The revision petition is allowed.