
(2006) 11 MP CK 0067

In the Madhya Pradesh High Court

Case No : Criminal Revision No. 1568 of 2006

Nandlal and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 22-11-2006

Acts Referred:

Penal Code, 1860 (IPC) — Section 201, 302, 34, 376(2)(g)

Citation : (2007) 1 MPLJ 84 : (2007) 1 RCR(Criminal) 951

Hon'ble Judges : Rakesh Saksena, J

Bench : Single Bench

Advocate : Surendra Sing and Mr. Ashok Lalwani, for the Appellant; Shreyash Dharmadhikari, for the State, for the Respondent

Final Decision : Allowed

Judgement

Rakesh Saksena, J.—Applicants have filed this revision against the order dated 04.09.2006, passed by the learned Sessions Judge, Chhindwara, in Sessions Trial No. 237/ 96, rejecting their request for examining three witnesses in defence out of the total nine witnesses sought to be examined by them. The witnesses in respect to whom request was rejected are viz. (1) Dr. Anil Agrawal, Prof. Maulana Azad Medical College, New Delhi (2) Dr. R.K. Wright, 1000 Duck's, Nest Road, Turtletown, TN 37391, (USA) and (3) Mr. P.K. Satyanathan, District Government Pleader, District Court, Civil Lines, Nagpur.

2. The prosecution case is that the applicants are facing trial for the offences under Sections 302, 376(2)(g), 201 read with Section 34 of Indian Penal Code. The crime was registered with Jaripatka Police Station, Nagpur (Maharashtra), but by the order of Apex Court, the trial of the case has been transferred to Sessions Judge, Chhindwara. The incident is dated 28.03.1994. It is said that a maid servant viz. Manorama Kamble, who was employed at the house of accused/applicant, was found dead in the house. A report was lodged by them that she died due to electric shock. On post-mortem examination, the cause of death was revealed to be the throttling and that she was subjected to rape before death.

According to prosecution, the deceased had not died due to electric shock. However, an injury between the thumb and first finger of her hand was fabricated which was a post-mortem injury.

3. During the trial, the prosecution evidence started from 14th February, 1996 and was closed on 9th December, 1997. As many as 81 prosecution witnesses were examined along with Court witness. After recording of the statement of accused, they were called upon to enter the defence. On 08.08.1996, applicants filed a list of proposed defence witnesses before the Court. Learned Sessions Judge, except the aforementioned three witnesses, permitted applicants to summon rest of other witnesses.

4. Learned Sessions Judge refused to summon Dr. Anil Agrawal and Dr. R.K. Wright in defence on the ground that the prosecution had already examined the expert witnesses in respect to cause of death of deceased and defence had already cross-examined them at length. Therefore, it was not necessary for defence to examine other expert witnesses for rebutting the evidence of those witnesses. Prayer for summoning the witness P.K. Satyanathan was refused on the ground that he was Government Pleader in District Court, Nagpur and he had appeared in the case for State in bail applications filed by accused persons. Aggrieved by the aforesaid refusal, applicants have preferred this revision.

5. Learned Counsel for the applicants submitted that under the provisions of Section 233 of the Criminal Procedure Code, accused have right to adduce any evidence, they may have in support of their defence. If accused applied for issue of any process for summoning any witness to attend the evidence, the Court is bound to issue such process, unless it considered, for the reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.

6. Counsel submitted that in the case in hand, the prosecution has led evidence to prove that the injuries found on the hand of the deceased was not an electrical shock injury, but was a fabricated post-mortem injury and that the deceased had died due to throttling whereas the defence of applicants is that deceased had died by the electric shock, which she suffered from cooler in the house. According to him, in order to establish their defence and to rebut the prosecution evidence, it was necessary to examine the aforesaid expert witnesses in defence.

7. Learned Counsel for the State of Maharashtra submitted that applicants have no right to call for a second opinion from a medical expert. There is no provision in Code of Criminal Procedure, which gives right to accused to call for a second opinion from the private experts of their choice. He submitted that the expert witnesses sought to be examined by the accused had not examined the dead body, therefore, their evidence is not relevant.

8. Learned Counsel for applicants submitted that for a free and fair trial, it is necessary that accused be afforded opportunity to adduce evidence of the witnesses of their choice. Merely because experts sought to adduced in evidence

had not examined the dead body, their evidence is relevant as they can give their expert opinion on the basis of the reports already prepared by other experts. He submitted that in many cases, where the doctors performing the post-mortem examination are not able to give definite opinion about the cause of death, their reports along with preserved objects like viscera, slides etc. are sent to experts of Forensic Science Laboratory. He submitted that during examination of PW50, Dr. Pandey, Histopathology, it was observed by the Court that Dr. Pandey, who had two wax blocks and four slides of skin sample, shall produce the same before the Court, if defence counsel informs that he has arranged the expert and the apparatus to examine the said record on any fixed date. Counsel submitted that the defence can examine blocks and slides through its experts and on the basis of such examination, the experts of the defence can give evidence before the Court. In view of the liberty given by the trial Court by order dated 05.08.1997, passed during the cross-examination of Dr. Pandey, the defence had moved an application on 04.02.2006 seeking a direction to prosecution to arrange to send the slides and blocks for getting examined by their experts, whereupon, by order dated 06.02.2006, on the request of prosecution, the trial Court deferred the consideration of that application to the, stage of defence evidence. In support of his argument, Learned Counsel for applicants placed reliance on Mahe Aalam Vs. State of Uttar Pradesh, , Sudhir Kumar Dutt and Others v. The King, AIR 1949 FC 6, Habeeb Mohammad Vs. The State of Hyderabad, , Ronald Wood and Others v. State of West Bengal, AIR 1954 SC 455, Haripada Dey Vs. The State of West Bengal and Another, , Diva Kaluji Vs. Silver Cotton Mills Ltd., , Ashok Dubey v. State of M.P., 1980 MPLJ 300, Eshwaraiah and Another Vs. State of Karnataka, and Budha Satya Venkata S. Rao and Others Vs. State of A.P., .

9. I have heard the counsel for the parties at length and gone through the record.

10. In the case of Mahe Aalam (supra) referring to the provisions of Section 233 of the Criminal Procedure Code, learned Single Judge of Allahabad High Court observed that the provisions of the Code not only safeguard the rights of the accused, they also ensure that accused gets fair trial and ensure that if the accused wants to adduce any evidence in defence, the Court shall ensure that he gets a proper opportunity to adduce the same. He stands on the same footing as was the prosecution and he cannot be discriminated so far production of witness is concerned. This right of the accused is not a mere formality but it is an essential part of a criminal trial. Every opportunity has to be given to the accused so that he may adduce evidence in his defence. The Court in the trial has to ensure that the accused gets a fair and proper opportunity to defend himself.... The right given to accused for getting the witnesses summoned to whom he wants to examine in his defence is a statutory right which has been recognized in the Court and given to accused to defend after the prosecution has closed its evidence and accused has been called upon to enter his defence. When the accused exercises such defence, the Court is obliged to summon such witness he wants. The only ground on which he may be refused to summon the defence witness is that the Court has to be satisfied that such prayer was made for

purposes of vexation or delay or for defeating the ends of justice.

11. In case of Sudhir Kumar Dutt (supra), Federal Court, in reference to Section 257 of the Criminal Procedure Code (1898) held that the provisions were mandatory and Court had no discretion to refuse to issue process, unless it was of opinion that application should have been refused for reasons stated in the Section.

12. In the case of Habeeb Mohammad (supra). Supreme Court held that the conviction arrived at without affording opportunity to the defence to lead whatever relevant evidence it wanted to produce cannot be sustained.

13. In the case of Ronald Wood (supra), Apex Court held that though the evidence on record may tend to establish a strong case against the accused, he is entitled to rebut and if the certain documents would furnish good material for rebutting that case, the Court, by declining to issue process for the examination of the witnesses connecting with those documents, would deprive the accused of an opportunity of rebutting it. The accused cannot be convicted without an opportunity being given to him to present his evidence and if it is denied to him, there is no fair trial and conviction cannot stand. Similarly in the case of Haripada Dey (supra), the Supreme Court observed : "However, if the prosecution proves its case by evidence of the witnesses then it is the bounden duty of the accused if he wants to prove his defence to adduce evidence in support of his contentions and if he does not do so he has only to thank himself for it."

14. In the case of Bai Diva (supra), Bombay High Court held that even where a doctor has not examined the patient and his evidence as an expert is based on probabilities, still he as an expert is entitled to answer all hypothetical questions put to him, The only safeguard being that the hypothesis are correctly put to the expert.

15. In the case of Ashok Dubey (supra), this Court observed that the medical witness when called an expert is not a witness of fact, his evidence as an expert is evidence of opinion, which the Court may or may not accept, depending upon the data he has collected and the reasons he has given for coming to certain conclusion.

16. From the above legal propositions, it is settled that the accused has a right to adduce evidence in his defence and to summon the witnesses. The only ground on which his request can be turned down is that the application for summoning the defence witnesses is made for the purpose of vexation, delay or for defeating the ends of justice. In the present case, since the accused wanted to examine experts of their choice in order to establish their defence and rebut the evidence of experts, examined by the prosecution, their request for summoning Dr. Anil Agrawal and Dr. R.K. Wright cannot be turned down merely on the ground that prosecution has established its case by examining their experts already and that accused have cross-examined them.

17. Learned Counsel for the applicants has filed opinion of Dr. Agrawal as well as of Dr. R.K. Wright, which apparently runs counter to the opinion given by the experts examined by the prosecution. Dr. Anil Agrawal is said to be the Professor of Forensic Medicine. Maulana Azad Medical College, New Delhi and Dr. R.K. Wright is said to be a Forensic Pathologist. Their evidence cannot be said to be irrelevant in the case.

18. The objection raised by counsel for the State that there is no provision in the Code of Criminal Procedure to examine any foreign witness, therefore, applicants cannot be permitted to examine Dr. Wright, who is resident of USA, is devoid of merit. There is no provision in the Code to restrict the right of accused to examine the witnesses who only live in India. Merely on the ground of residence of a witness outside the India, the right of accused to summon and examine him in his defence cannot be curtailed. The trial Court has also committed error in refusing to summon witness P.K. Satyanathan on the ground that he happened to be the Government Pleader in District Court. Nagpur and that he had appeared on behalf of State in the bail application filed by the accused. On the ground of his appearance as an Advocate in the case, he cannot be held to have been disentitled from being a competent witness if his evidence is otherwise relevant. Applicants cannot be debarred from examining him in their defence for establishing their plea of alibi by his evidence.

19. On due consideration of all the facts and circumstances appearing in the case and the legal propositions discussed hereinabove, I am of the opinion that this revision deserves to be allowed.

20. Accordingly, this revision is allowed. Impugned order rejecting prayer of applicants to summon Dr. Anil Agrawal, Dr. R.K. Wright and P.K. Satyanathan as witness in their defence is set aside. The trial Court is directed to summon the aforesaid witnesses in defence, in accordance with law.