
(2000) 11 MAD CK 0116

In the Madras High Court

Case No : Criminal O.P.No. 21914 of 1998 and Cri. M.P. No. 10620 of 1998

Narendra Kumar Mohnot

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 21-11-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 173, 311, 482

Evidence Act, 1872 — Section 165

Penal Code, 1860 (IPC) — Section 120

Citation : (2001) CriLJ 1605 : (2001) 1 LW(Cri) 331 : (2001) 3 RCR(Criminal) 56

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : C.P. Palanichamy, for the Appellant; A, Packiaraj, Spl. P.P. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

M. Karpagavinayagam, J.—The Central Bureau of Investigation filed a charge sheet against the petitioner and two others for the offences under Sections 120-B read with 420, 468, 471 read with 468, I.P.C. in the year 1995. The prosecution has examined 14 witnesses, out of 24 witnesses cited in the charge sheet. At that point of time, the prosecution filed an application u/s 311, Cr. P.C. praying for permission to examine 5 more persons as additional witnesses.

2. The petitioner/accused objected to the said application on the ground that the names of additional 5 witnesses were not mentioned in the charge sheet and out of the 5 persons, 4 persons were treated as accused during investigation. Therefore, they cannot be treated as witnesses and their statements cannot be construed as statements recorded u/s 161, Cr. P.C.

3. The trial Court, while rejecting the objection of the petitioner/accused, upheld the contention of the prosecution and allowed the application. This petition u/s 482, Cr. P.C. is against the said order.

4. I heard Mr. C.P. Palanichamy, the counsel appearing for the petitioner and Mr. A. Packiaraj, the learned counsel appearing for the C.B.I.

5. The case of the prosecution is this :--

In pursuance of the conspiracy, the petitioner and two others cheated the Income Tax Department by collecting various amounts from the assesseees and without making payments, by producing forged pay-in-slips showing that payments were made into the bank. A1 to A3 collected various amounts towards payment of Income Tax from Ashok Kumar, Neelakandan, Sukidevi and Mithalal and without remitting the monies so collected, they submitted Income Tax Returns on behalf of the said four assesseees enclosing 4 forged pay-in-slips, as if the amounts collected were paid into the bank and thereby, cheated the Income Tax Department.

6. While the F.I.R. was registered, it is true that these 4 assesseees were arrayed as accused, as the prosecution felt that they were also party to the production of the said forged pay-in-slips to the Income Tax Department. But, during the course of investigation, while they were examined by the Investigating Officer u/s 161, Cr. P.C., it was revealed that they were not party to the criminal conspiracy, but they handed over the amounts to the petitioner for getting the pay-in-slips from the bank. However, the petitioner and other two accused prepared forged pay-in-slips without payment of monies into the bank and produced the same to the Income Tax Department. Therefore, on completion of investigation, the above said 4 accused were not prosecuted and the charge sheet was filed only against the petitioner and two others.

7. Though the Investigating Officer obtained statements from the assesseees u/s 161, Cr. P.C., they were not cited as witnesses in the list of witnesses. On the other hand, it is submitted that at the time of filing of charge sheet, the statements obtained from the said 4 assesseees were filed along with the charge sheet.

8. According to the prosecution, these 4 persons, namely, assesseees are important witnesses to prove that they had already handed over the monies to the petitioner for paying Income Tax. It is submitted by the prosecution that the omission of their names in the list of witnesses is only due to oversight. Under those circumstances, they filed an application u/s 311, Cr. P.C. to summon those 4 assesseees and also to summon the handwriting expert, who has given opinion about the forgery in the disputed documents, which have already been filed along with the charge sheet.

9. The only contention urged by the counsel for the petitioner is that the statement obtained from these 4 assesseees cannot be construed to be the statement of witnesses u/s 161, Cr. P.C. as they were accused during the course of investigation and that the prosecution cannot be allowed to fill up the lacuna.

10. In the facts and circumstances of the case, I am not able to countenance the

point urged by the counsel for the petitioner.

11. Though the names of 4 assesseees were mentioned as accused in the F.I.R., on perusal of their statements, it is clear that they were not party to the conspiracy and other allied offences committed by the petitioner and two other accused. It is their categorical statement that they handed over the monies to the petitioner for paying Income Tax. So, the nature of the statements itself would show that they were not accused and they can be the best witnesses to prove the offences against A1 to A3.

12. There is no dispute in the fact that the statements of these persons have been filed along with the charge sheet before the trial Court. Moreover, it is not correct to contend that the statements of the accused during the course of investigation cannot be construed to be statements u/s 161, Cr. P.C. since Section 161, Cr. P.C. refers "any person" which means, it relates to not only witnesses but also accused. But, in this case, as noted above, the statements given by them would disclose that they did not commit any offence. On the other hand, they were the victims at the hands of the petitioner.

13. It is true that while filing the charge sheet, the Investigating Officer or the Public Prosecutor should have perused the charge sheet and other documents and verified as to whether the names of all the persons have been mentioned in the list of witnesses. This is really an omission. But, this should not be taken as a ground to curtail the liberty of the prosecution to place the best evidence before the Court.

14. In the same way, the name of the handwriting expert also was omitted to be mentioned in the list of witnesses, though his opinion and statement formed part of the report filed u/s 173, Cr. P.C.

15. Therefore, in my view, the prosecution, at least during the course of trial, has woken up from their slumber and performed their duty by filing the said application u/s 311, Cr. P.C. for summoning these 5 witnesses.

16. In this context, it would be worthwhile to refer to the observation made by the Supreme Court in *Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi*, which is as follows :-

It is common experience in criminal Courts that defence counsel would raise objections whenever Courts exercise powers u/s 311 of the Code or u/s 165 of the Evidence Act, 1872 by saying that the Court could not "fill the lacuna in the prosecution case". A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by the Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such lapses or mistakes during the conducting of a case cannot be understood as a lacuna which a Court cannot fill up.

Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

17. In the above decision, the earlier decision of the Supreme Court in Mohanlal Shamji Soni Vs. Union of India and another, , which has been cited by the petitioner, had also been referred.

18. In the light of the above observations, the filing of an application u/s 311, Cr. P.C. in the present case cannot be considered to be the process to fill up the lacuna.

19. As held by the Apex Court in the above decision, the second part of Section 311, Cr. P.C. imposes upon the Court an obligation of summoning any witness and the only condition prescribed in that the evidence sought to be obtained is essential for the just decision of the Court. It is cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue.

20. In the light of the above settled law, in my view, the summoning of the 5 witnesses by the trial Court is quite essential for taking just decision of the case in exercise of the power conferred u/s 311, Cr. P.C. as these persons would be the important witnesses to give the best evidence.

21. In view of the above, the petition is liable to be dismissed, as devoid of merits and accordingly, it is dismissed. Consequently, Cri. M.P.No. 10620 of 1998 stands dismissed. The trial Court is directed to go on with the trial and dispose of the same as expeditiously as possible, since the case relates to the year 1995.