
(2018) 01 GUJ CK 0064
In the Gujarat High Court
Case No : 557 of 2016

PRAVIN DHIRU VAJA KODI

APPELLANT

Vs

STATE OF GUJARAT

RESPONDENT

Date of Decision : 11-01-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 311](#), [Section 153](#) - Power to summon material witness, or examine person present - Inspection of weights and measures

Citation : (2018) 01 GUJ CK 0064

Hon'ble Judges : S.G. Shah

Bench : Single Bench

Advocate : YOGESH LAKHANI, MANAN MEHTA

Judgement

1. Heard learned senior counsel Mr. Yogesh Lakhani with learned advocate Mr. Jay M. Thakkar for the petitioner and learned APP Mr. Manan

Mehta for the respondent - State. Petitioner herein has challenged an order dated 08.07.2016 below Exhibit 250 in Special Atrocity Case No.13

of 2013 by the Additional Sessions Judge of Una, whereby an application by the learned APP to issue witness summons to the Principal of

Primary School of Ankroli has been allowed under Section 311 of the Code of Criminal Procedure (for short "the Code").

2. If we peruse such application, the prosecution has disclosed that one prosecution witness Rajuben has been examined and as per the case of the

prosecution, she is educated, since she has accepted the summons by putting her signature. But during her examination, she has disclosed that she

is illiterate and she is unable to read and write and, therefore, evidence of Principal of Ankroli Primary School is necessary to prove that said

witness is literate. The petitioner herein being original accused who is present in judicial custody has filed written reply cum submission at Exhibit

255 on 25.05.2016, which runs into 48 pages. The application at Exhibit 250 is dated 11.05.2016 and, therefore, there is no delay on the part of

the petitioner in objecting such application.

3. The sum and substance of the petitioner's objections before the trial court as well as before this Court is to the effect that the impugned order is

a result of manifest misreading of Section 311 of the Code and order suffers from grave infirmities and error of law and that the trial Court has

failed to consider the reply and written submissions at Exhibit 255; copy of which is produced at Annexure B. It is also submitted that impugned

order is not speaking order since no reasons are assigned for allowing such application, which results into allowing the prosecution to fill up the

lacuna in the investigation against the accused. It is also submitted that the trial Court ought to have appreciated that PW 29 Rajuben is a sister of

the accused, had not supported the case of the prosecution and she has been declared hostile and, therefore, evidence of newly summoned witness

is neither essential nor required for reaching just decision of the case. Copy of her deposition is produced at Annexure D. It is further submitted

that the impugned order is vague and it does not fall within the ambit of Section 311 of the Code. It is further submitted that the pleadings and

reasons before the trial court by the Additional Public Prosecutor in Exhibit 250 is smacked by Section 153 of the Indian Evidence Act (for short

the Act"), which confirms that no evidence shall be given to contradict the evidence of another witness. It is further submitted that PW No. 29 in

her deposition specifically stated that she is illiterate and does not know how to write, read or sign and, therefore, to contradict such version if

witness summons is issued as per the impugned order, then it is against the provisions of Section 153 of the Act. It is further submitted that the trial

Court has cursorily brushed aside the judgments of the Honourable Supreme Court of India and this High Court.

4. As against that, if we peruse the impugned order, it is quite clear that except making the statement that the Court has agreed with the

submissions of the public prosecutor and does not agree with the written submission by the advocate of the accused, there is no reason assigned

except narrating the factual details and that why and to whom the summons is to be issued and for what purpose. Therefore, if Exhibit 255 i.e.

written submissions by the accused before the trial court is disclosing several judgments and provision of Section 153 of the Act, then prima facie,

it can be said that the impugned order is not a speaking order, when the trial Court has not dealt with all submissions in proper perspective, even if

it is not to be dealt with line to line but when there are certain provisions of law and few judgments, it would be appropriate for any judicial

authority, more particularly, trial Courts, to refer those provisions of law and the citations and to make a precise statement that why those

judgments are not applicable. For all such reasons when impugned order is not a speaking order, there is reason to interfere with in such order and

to modify it suitably.

5. If we come to the merits of the case, the fact remains that in her deposition, the witness Rajuben, who is real sister of the accused, has turned

hostile when she deposed that she does not know anything about incident, when it is alleged that the victim was in love with her, who has been

killed. She categorically deposed that she is illiterate and she does not know how to read and write, though she admits about her photographs, she

denies any relation including love affair with the victim and she denies to have written any letter to anyone. She also refuses to identify the signature

alleged to be her on record, more particularly on witness summons and during cross examination by the APP she has denied almost each and

every sentence of her statement, before the Investigating Officer during investigation. On the contrary, she specifically deposed that police has

never inquired from her and has never recorded her statement.

5.1 It cannot be ignored that the charges against the petitioner are under Section 302, 324, 323, 436, 143, 147, 148, 149, 449 and 342 read with

Section 120B of the Indian Penal Code and Section 135 of the Gujarat Police Act and under Section 3(2)(5) and 15(1) (3) of the Schedule Caste

and Schedule tribe (Prevention of Atrocities) Act. It is also to be recollected that there are allegations in the charge sheet to the effect that victim

who belongs to the Schedule caste and witness were having love affair and on knowing such fact, the accused being family member of the witness

Rajuben have killed the victim. However, when Rajuben denies the story

regarding her love affair with the victim, the cause and purpose by the accused has been frustrated at the prosecution end and, therefore, probably they wanted to establish that victim Rajuben is not telling the truth and they should try to bring the correct fact on record.

6. However, once charge-sheet is filed and trial is started, provisions of Section 153 of the act prohibits the prosecuting agency to do so. The

Section 153 of the Act reads as under;

153. Exclusion of evidence to contradict answers to questions testing veracity. - When a witness has been asked and has answered any question

which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him,

but, if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1.-If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2. -If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted

6.1 The bare reading of Section 153 of the Act makes it clear that no evidence shall be given to contradict the witness so far as it tends to shake

his credit by injuring his character. Even if he has answered any question which is relevant to the inquiry falsely, he may be afterwards be charged

for giving false evidence. Thereby the Indian Evidence Act is very much clear that there cannot be any further evidence to contradict any witness

and that too with the question , which is not relevant to the inquiry on hand. Whereas in the present case, the question regarding whether witness

Rajuben is literate or not is not a real issue before the Court. But, in any case, if she has answered falsely to any such question, the section permits

the prosecution to charge her for giving false evidence. But, it is to be done afterwards and not immediately in the same trial.

6.2 In view of such clarity of the section, no further discussion is required and, thereby, there may not be any option but to reject such application.

The most interesting part of the section is two explanations attached with the section and when there are only two explanations provided under the

statute, now it becomes clear that for rest of the issues, no evidence can be given to contradict any such witness. Such explanations are regarding prior convictions of the witness and his evidence may be regarding previous conviction. Therefore, if witness states that he has not faced any prior conviction, then evidence may be given regarding his previous conviction and similarly, if any question is tending to impeach his impartiality and answer it by denying the facts suggested, the witness may be contradicted but not in any other case. It is also clear and obvious that in the present case, none of the explanations is under reference and, therefore, practically prosecution is barred by giving any evidence to contradict the witness when it is only for the purpose to verify that she is literate or illiterate. Though prosecution is free to charge her for giving such false evidence, the word used is ""afterwards"" for allowing to charge and, therefore, it becomes clear that it cannot be done at the stage of inquiry and trial against the accused.

6.3 Petitioner is therefore relying upon the provisions of Section 153 of the Act, which is described and explained in reply at Exhibit 255

(Annexure B). However, the trial Court has probably failed to even read those written arguments. Even illustrations are given in the act, which are as under;

The principal underlying Section 153 of the Evidence Act is to limit the right to call evidence to contradict witnesses on collateral questions and

exclude all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principle matter in dispute. In other

words a party may not in general impeach the credit of this opponents witnesses by calling witnesses to contradict him on irrelevant matters. The

section must be strictly constructed and narrowly interpreted.

This protection is enacted because otherwise the courts would drift into irrelevant controversies and if a pitched battle is going to be fought over

the character of every witness, suits and proceedings would become simply interminable and instead of trying cases, the Judge will be trying

witnesses.

The reason of this rule which restrict the right to give evidence in contradiction, is that it is an object of primary importance to confined the attention

of the court as much as possible to the specific issues, without some such rule so

many collateral questions of fact might be raised in the course of long trial that the specific question to be determined might be lost sight of and the trial itself inordinately lengthened. The exceptions refer to two matters which are easily susceptible of proof and are so important as to strike at the very root of the witness's trustworthiness while no great expenditure of time need be involved in ascertaining how the facts stand.

6.4 Whereby, it becomes clear that even if it is proved that witness is not telling the truth so far as her knowledge of reading and writing is

concerned, it would not prove the prosecution case that accused have killed the victim and, therefore, such evidence is not required, at this stage.

7. Petitioner is also relying upon following decisions;

(1) AIR 2000 SC 185 between State of Karnataka vs. K. Yarappa Reddy, wherein the Honourable Supreme Court has held that;

Where in a murder trial, it was alleged that husband of eye-witness and accused's-father had loan transaction on which they later fell out, however

the eye-witness was not asked about alleged loan transaction, her evidence cannot be contradicted by citing other witness to say about any such

transaction. As the general rule of evidence is one of prohibiting evidence on collateral issues and since it is only by way of exception that such

evidence can be permitted, the Court must guard that the defence evidence falls strictly within the exception. The basic requirement for adducing

such contradictory evidence is that the witness, whose impartiality is sought to be contradicted with the help of such evidence, should have been

asked about it and he should have denied it. Without adopting such a preliminary recourse it would be meaningless, if not unfair, to bring in a new

witness to speak something fresh about a witness already examined.

(2) AIR 1999 SC 1311 between Vijayan @ Vijaykumar vs. State Rep. By Inspector of Police, wherein in para 31, the Honourable Supreme

Court has held that;

The rule limiting the right to call evidence to contradict a witness on collateral issues excludes all evidence of fact which are incapable of affording

any reasonable presumption or inference as to the principle matter in dispute.

(3) AIR 1959 Calcutta 342 between Kamal Kanto Das vs. The State, wherein the division bench of the Calcutta High Court has held that;

Where the witness who was questioned whether he was not an active criminal and whether he was not under police surveillance denied the suggestions and the evidence given to contradict him ad nothing to do with the previous conviction or with the impeachment of his impartiality but only tended to impeach his character.

(4) AIR 1952 Allahabad 289 between Ram Bali & Ors. vs. State, wherein the division bench of the Allahabad High Court has held that;

A party may not, in general, impeach the credit of his opponent's witnesses by calling witnesses to contradict him on irrelevant matters, and his answers thereon will be conclusive.

8. Perused the written submissions at Exhibit 255 which confirms that petitioner has argued at length before the trial Court, but the trial Court has

failed to appreciate such defence and, therefore, there is reason to interfere with in such order. Therefore, impugned order dated 08.07.2016 is

hereby quashed and set aside. Thereby application at Exhibit 258 stands rejected. Rule is made absolute to that extent. Direct service is permitted.