(2005) 02 OHC CK 0023

In the Orissa High Court

Case No : Criminal Rev. No 501 of 1996

S. Mohan Rao — APPELLANT

Vs

Republic of India, S.P., C.B.I. and Others — RESPONDENT

Date of Decision : 15-02-2005

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 329
Penal Code, 1860 (IPC) — Section 120B, 170, 420

Citation : (2005) CriLJ 2052 : (2005) OLR 127 Supp

Hon'ble Judges : R.N. Biswal, J

Bench : Single Bench

Advocate : A.K. Rao, K. Rath, P.K. Sendha, M.K. Mohanty and M. Sampat, for the Appellant; Sanjit Mohanty and S.K. Padhi, for the Respondent

Judgement

R.N. Biswal, J.—The petitioner being represented through his son-guardian has challenged the legality, propriety and correctness of the order dated 30-10-1996 passed by the Addl. Chief Judicial Magistrate, Bhubaneswar in S.P.E. case No. 8 of 1994 wherein he rejected the petition filed by him u/s 329 of Cr.P.C. to stop further proceeding of the case.

2. The petitioner and another were jointly facing trial in the aforesaid case for the offence under Sections 120-B/420/170 of the Indian Penal Code. On 21-11-1994 the petitioner filed a petition u/s 329 of Cr.P.C. before the Addl. Chief Judicial Magistrate, Bhubaneswar to postpone the further proceeding of the case on the ground of his unsoundness of mind and consequential incapability of making his defence.

3. Dr. Narasimha Reddy, Asstt. Civil Surgeon and Asstt. Professor or Psychiatry of the Govt. Hospital for Mental Care, Visakhapatnam and the son of the petitioner were examined to establish the case of the petitioner as witness Nos. 1 and 2 respectively. P.W. 1 proved Ext. 1 the medical report given by Dr. M. Vijaya Gopal, Superintendent of Govt. Hospital for Mental care, Visakhapatnam. As per Ext. 1 the petitioner was being treated as an out door patient from 25-5-1994 to

7-3-1995. During his follow up visits, he showed the features like dull and withdrawn nature. He was answering questions in low voice, expressing gouge fears. During his treatment he was referred to M/s. King George Hospital, where he was diagnosed to be suffering from hypertension, diabetes mellitus and nulti intoxot dementia. P.W. 1 stated that the petitioner had developed suicidal tendency and without proper escort, he could not be brought from Visakhapatnam to Bhubaneswar. He further deposed that the disease was incurable. P.W. 2 corroborated the evidence of Dr. Reddy and further deposed that the brain of the accused petitioner was scanned in M/s. Dolphin Diagnostic Services Limited at Vishakhapatnam. He filed five X-Ray plates and the scanning report (Ext. 4) granted by Dr. B.G.S.N. Murthy. Basing on the said scanning report (Ext. 4) Dr. M. Vijay Gopal, on 23-8-1995 made an endorsement on Ext. 3, the out patient book that the patient had not improved in his mental state, even after attending the hospital for last one year. In view of the changes in his brain as found in the C.T. scan report, he was not likely to be better in short time.

4. In his cross-examination witness No. 2, who was examined on 8-8-1996 admitted that his father did not attempt to commit suicide between the years 1994 to 1995 but expressed before him and others that he wanted to die. It transpired from his evidence that the aforesaid mental hospital is 5 to 6 kms. away from the house of the petitioner and he was being carried to the hospital in auto rickshaw. During his cross examination, he further stated that the accused-petitioner was neither kept in the house in tied condition nor in a closed room. He used to move freely in the house. On over all assessment, of the oral as well as documentary evidence , the Addl. Chief Judicial Magistrate held that the plea of suicidal tendency of the accused petitioner was a false one. He further held that first it must appear to him that the accused was of unsound mind and incapable of making his defence and the next stage was to enquire into the unsoundness of mind. In order to arrive at such conclusion the accused-petitioner should be present before him. Ext. 3 reveals that the accused petitioner attended the hospital last on 6-4-1996. The son of the petitioner was examined on 8-8-1996 i.e. four months after the last visit of his father to the hospital . There is no document to show that the accused petitioner was being treated after 6-4-1996. Under such circumstances the learned Addl. Chief Judicial Magistrate rejected the petition u/s 329, Cr.P.C. Being aggrieved with this order the petitioner has preferred this Revision.

5. Learned counsel appearing for the petitioner submitted that it was incumbent upon the prosecution to prove that the accused petitioner was not of unsound mind but no evidence whatsoever had been led from that side. So, in view of the evidence led on behalf of the accused petitioner, the trial Court ought to have believed the same and allowed the petition.

6. As per Section 329, Cr.P.C. if it appears to the Magistrate in Court at the stage of trial that the accused petitioner is of unsound mind and incapable of making his defence, the Magistrate in the first instant make take up the fact of such

unsoundness and incapacity and if he is satisfied that the accused is of unsound mind he shall record his finding and postpone further proceeding of the case. So, the first condition is that at the stage of trial, the Court must feel that the accused petitioner is of unsound mind and incapable of making his defence. Unless the Court feels so, the prosecution is not obliged to lead evidence to prove that the accused petitioner is of sound mind. Since in the present case the trial Court did not get any chance to see the accused petitioner during the period of his so called unsoundness of mind, the submission of the learned counsel for the petitioner is not tenable in this regard.

7. Learned Standing counsel appearing for the C.B.I. submitted that from the evidence of the son of the accused petitioner it is found that while his father was being carried from his house to the mental hospital, which is at a distance of about 5 to 6 kms away the petitioner never attempted to commit suicide. He has also not been kept in a closed room much less in tied condition. When the accused petitioner is moving freely in the house and did not attempt to commit suicide, it does not inspire confidence that he would commit suicide while being carried from Visakhapatnam to Bhubaneswar. Thus the lower Court has rightly rejected the petitioner.

8. As per Ext. 1 the medical report the petitioner had not developed in his mental condition till 7-3-1995. In his endorsement dated 23-8-1995 vide Ext. 3 Dr. M. Vijoy Gopal has stated that the patient was not likely to be better in near future. In the meantime more than 9 years have elapsed. He might have been completely cured or improved to a great extent by now . Unless the accused-petitioner is brought to the Court, it cannot get a chance to know about his mental condition. So the trial Court rightly rejected the petition and ordered for his production in Court. It is made clear that after the petitioner is brought to the trial Court, if the Court feels that he is of unsound mind and incapable of making his defence, he shall direct for re-enquiry into the matter to ascertain about the mental condition of the petitioner and on enquiry if it is found that in fact the accused petitioner is of unsound of mind, in consequence of which he is incapable of making his defence, he shall postpone hearing of the case till the accused petitioner recovers or else he shall proceed with the case as per law. After receipt of this order the trial Court shall fix a date for production of the petitioner safely. Accordingly, the Criminal Revision stands dismissed.

