

(2011) 02 AHC CK 0182

In the Allahabad High Court

Case No : Criminal Miscellaneous Application No. 381 of 2011

Shekhar Tewari

APPELLANT

Vs

The State of U.P. and Another

RESPONDENT

Date of Decision : 02-02-2011

Acts Referred:

Information Technology Act, 2000 — Section 2(1)
Criminal Procedure Code, 1973 (CrPC) — Section 161, 311
Evidence Act, 1872 — Section 165, 3, 45, 65A, 65B(1)

Citation : (2011) 2 ACR 1839 : (2011) 1 APLJ 222 : (2011) CriLJ 1447 : (2011) 3 RCR(Criminal) 309 : (2011) 3 RCR(Criminal) 309

Hon'ble Judges : Narayan Shukla, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Shri Narayan Shukla, J.—Heard Mr. Dilip Kumar, learned Counsel for the Petitioner and Mr. I.B. Singh, learned Senior Advocate Special Public Prosecutor as well as Mr. Salil Srivastava, learned Counsel for opposite party No. 2.

2. The Petitioner has challenged the order dated 21.01.2011 passed by the Special Judge, Ayodhya Prakaran/Additional Sessions Judge, Lucknow in Session Trial No. 446 of 2009 and 447 of 2009.

3. By means of order impugned the Petitioner's application being Application No. 192-B to summon P.W.10 and to take the sample of her voice and photographs of her face and body for seeking expert opinion of any of the Central Forensic Laboratory has been rejected. The learned Sessions Judge has rejected the application on the ground that neither the witness D.W.11 nor accused provided D.V.D. to the Investigating Officer which is recording of interview of P.W.10 Smt. Shashi Gupta for investigation nor did they raise such objection during the course of the investigation. Further during the course of examination of P.W.10 no such application was moved on behalf of the accused and the statements of witnesses have to be evaluated in the light of the transcript of interview of

P.W.10 demonstrated on Screen as well as on the basis of D.V.D. provided by the D.W.11. The learned sessions court has also considered the factum of delay in the matter and keeping in view the past efforts made by the accused to delay the proceedings, the application in question has also been treated in the same series.

4. The learned Counsel for the Petitioner submitted that since P.W.10 who is sole eye-witness of the incident, has disowned the contents of the First Information Report dated 24.12.2008 and now the number of persons who were about 11, have been made the accused where as they were not named in the First Information Report in order to test the veracity of their statements, therefore, it has become necessary to test her voice. It is stated that though through her statement recorded u/s 161 Code of Criminal Procedure during the course of the investigation she reiterated the version of the First Information Report but in her examination-in-chief she has given absolutely contrary statement before the trial court. It is the duty of the Investigating Officer to collect all the materials, which are relevant in the matter but they failed to do so. It is further stated that P.W.10 has already consented during the course of examination to give the sample of her voice and photographs. Earlier the Petitioner's application for such request was rejected on the ground that unless it is verified that person shown by T.V. Channel is the same, she cannot be directed to be produced for the expert opinion. Now after examination of D.W.11 who interviewed her and has verified her that she (P.W.10) is the lady who was interviewed by him and it is the lady who was present in the court when DVD was operated, it has become relevant to call upon her in exercise of powers provided u/s 311 of Code of Criminal Procedure (hereinafter referred to as the Code) and to take sample of her voice and photographs and sent those to the laboratory for testing.

5. Mr.I.B. Singh, learned Senior Advocate opposed the prayer of the Petitioner and submitted that the trial has been delayed too much despite repeated direction of the Court at several stages. He further invited the attention of this Court towards the order passed by the Hon''ble Supreme Court in S.L.P.(Crl.) No. (s)-9628-9629/2010, in which on 17.01.2011 by allowing the appeal the Hon''ble Supreme Court observed that the trial shall now be heard and decided expeditiously. He also furnished a list of cases which had been filed by the Petitioner and almost have been dismissed, to establish that the Petitioner has made much efforts to delay the proceedings. Therefore, he submitted that in light of the observation of the Hon''ble Supreme Court for any reason no interference is warranted by this Court and prayed for dismissal of the petition to conclude the trial expeditiously. He further submitted that if the Court interferes with the proceedings and allows the application, it would be sending the matter for investigation and now the case is at the stage of arguments, therefore, at this stage, the further investigation is not permissible. He also invited the attention of this Court towards the several provisions of the Act which provide the stages of trial and submitted that now the stage of Section 233 i.e. Entering upon defence has become over and it is the stage of Section 234 i.e. Arguments, therefore, it is not permissible under law to go back for providing opportunity of defence.

6. Mr.I.B. Singh, learned Senior Advocate also pointed out that earlier also an application was moved to call upon the same very witness, but this Court has turned down the same very request in light of the case of Hanuman Ram Vs. The State of Rajasthan and Others,

7. In support of his contentions, he cited a decision of Vinod Kumar v. State 1981 Cri.L.J.927 in which the Delhi Court has held that "there is no such provision in the Indian Evidence Act in respect of recording of sample voice. Further Section 45 of the Evidence Act makes evidence of an expert upon a point of law, or of science, or art or as to identity of handwriting or finger impressions admissible. But evidence of an expert of comparison of sample voice with disputed one has not been made admissible under any provisions of the Evidence Act."

8. On the other hand, learned Counsel for the Petitioner submitted that it is always open to the court to summon any person as a witness at any stage of trial if his evidence appears to it to be essential to the just decision of the case.

9. Learned Counsel for the Petitioner also indicated some relevant provisions of the Information of Technology Act, 2000, Section 2(1)(t) is extracted below:

(t)electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

Sections 65A and 65B(1) of the Indian Evidence Act are extracted below:

65-A. Special provisions as to evidence relating to electronic record-The contents of electronic records may be proved in accordance with the provisions of Section 65B.

65-B. Admissibility of electronic records-(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter refereed to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

Explanation:- For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

Section 3 of the Indian Evidence Act is extracted below:

"Relevant"-One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

"Facts in issue"-The expression "facts in issue" means and includes-any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows. Explanation-Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue, is a fact in issue.

"Document"-"Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

10. In light of the aforesaid provisions he submitted that since he has disowned the contents of the First Information Report as well as the statements recorded during the course of investigation in order to test the veracity of her statement, testing of her voice has become relevant for the purpose of evidence in the matter.

Section 311 of the Code, which is extracted below:

311. Power to summon material witness, or examine person present-Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

11. The scope of Section 311 of the Code has been discussed by the Hon''ble Supreme Court in the case of Hanuman Ram Vs. The State of Rajasthan and Others, in which the case of Mishrilal v. State of M.P. 2005 SCC 1712 has been considered. In that very case the Hon''ble Supreme Court has held that once the witness was examined-in-chief and cross-examined fully, such witness should not have been recalled and re-examined to deny the evidence he had already given before the court, even though that witness had given an inconsistent statement before any other court or forum subsequently.

12. By discussing the scope of Section 311 of the Code the Hon''ble Supreme Court held that there is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

13. The object of Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision

of the case.

14. The object of the Section 311 of the Code is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society.

15. On the point of admissibility of Tape recorded conversation as evidence, the learned Counsel for the Petitioner cited a decision of the Hon'ble Supreme Court rendered in the case of R.M. Malkani Vs. State of Maharashtra, the relevant para 23 of which is reproduced hereinunder:

23. Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape-record. A contemporaneous tape-record of a relevant conversation is a relevant fact and is admissible u/s 8 of the Evidence Act. It is *res gestae*. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible u/s 7 of the Evidence Act. The conversation between Dr. Motwani and the Appellant in the present case is relevant to the matter in issue. There is no dispute about the identification of the voices. There is no controversy about any portion of the conversation being erased or mutilated. The Appellant was given full opportunity to test the genuineness of the tape recorded conversation. The tape recorded conversation is admissible in evidence.

16. In the aforesaid case it has been held by the Hon'ble Supreme Court that the tape recorded conversation is admissible relevant evidence and, therefore, it is admissible. If it is not tested by unfairness, there is no reason to exclude this evidence.

17. It is stated that P.W. 10 was interviewed voluntarily. Being so it is always admissible as evidence as has been held by the Hon'ble Supreme Court.

18. In the light of the aforesaid facts and circumstances of the case as well as law laid down as above, I am of the view that fair trial is a paramount consideration and the case must be tried fairly after collecting all the relevant evidence for a just decision. Though there is a direction of the Hon'ble Supreme Court to expedite the trial, but it does not mean to ignore the material evidence, which is necessary for just decision. After enactment of the Information Technology Act, 2000 all the documents including electronic records are included under the definition of Evidence Act. No doubt, there is contrary statements of P.W. 10 and D.W. 11. D.W. 11 has identified her as the same lady, who was interviewed by him. It is the duty of the court to get all relevant evidence for the purpose of the fair trial. I am of the view that after testing her voice as well as her photographs by the laboratory, which is permissible under the Indian Evidence Act, there would be more relevant evidence for a decision of learned trial Judge. The ground of delay, which is exceptional clause, is not so much important to consider it as to ignore the relevant evidence.

19. u/s 165 of the Indian Evidence Act, the Judges have ample powers to order for production of documents or things in order to discover or to obtain proper proof of relevant facts.

20. The provision of Section 165 of Indian Evidence Act is extracted below:

165-Judge's Power to put questions or order production.-The judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or things; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this section shall not authorize any judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under Sections 121 - 131, both inclusive if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask u/s 148 or 149; nor shall be dispense with primary evidence of any document, except in the cases hereinbefore excepted.

21. On the basis of the discussion made above, I hereby quash the order dated 21.01.2011 passed by the Special Judge, Ayodhya Prakaran/Additional Sessions Judge, Lucknow in Session Trial No.446 of 2009 and 447 of 2009 and allow the application No. 192-B moved by the Petitioner. Being conscious that the trial be not delayed, I hereby issue a direction to the court below to record the voice of P.W.10 and take her photograph and send the sample thereof for testing in any of the recognized laboratories forthwith. The laboratory shall send the report within fifteen days, which shall be placed before the trial court immediately thereafter for further proceeding.

22. In the aforesaid terms, the petition is allowed.