
(2008) 07 DEL CK 0193

In the Delhi High Court

Case No : Criminal M.C. No. 1303 of 2008

Shri Chandramauli Prasad and Others

APPELLANT

Vs

State of Delhi

RESPONDENT

Date of Decision : 03-07-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 205, 273, 317, 353, 540A
Penal Code, 1860 (IPC) — Section 308, 34

Citation : (2009) 2 ILR Delhi 48

Hon'ble Judges : Sudershan Kumar Misra, J

Bench : Single Bench

Advocate : K. Sunil, for the Appellant; Pawan Bahl, for the Respondent

Judgement

Sudershan Kumar Misra, J.—The petitioners are aggrieved of the order dated 17.4.2008 passed by Shri Rajender Kumar, Addl. Sessions Judge, Delhi in SC-No. 30/2006, whereby the application of the petitioners for exemption from personal appearance u/s 205 and 317 of the Cr.P.C., till such time the Court directs their appearance at a subsequent stage, has been rejected. This application was rejected on the ground that merely because the petitioner, who happens to be an accused before the trial court, is an advocate, or an agriculturist, or a businessman, and has to travel a distance of about 1100 k.m. on each hearing, cannot in itself be a ground for permanent exemption for appearance in the trial. Counsel for the petitioners has drawn my attention to the fact that in the application itself, which was moved before the Trial Court, the petitioners have pointed out that they have not been disputing their identity and, therefore, the proceedings before the Trial Court would not be hampered on any such ground. At the same time, they had also consented to the entire cross-examination and evidence being recorded in their absence. They also gave an undertaking to the effect that whenever their appearance would be required by the Court, they will present themselves before the Court.

2. It is well known that in criminal proceedings, the accused persons have a right

to be present during the trial to defend themselves either in person or through a counsel of their choice. This right has passed through many perils during the course of history. Tracing the history of this right of representation, the Supreme Court of United States in *Faretta v. Cal.* 422 U.S. 806 observed:

16. ...In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber. That curious institution, which flourished in the late 16th and early 17th centuries, was of mixed executive and judicial character, and characteristically departed from common-law traditions. For those reasons, and because it specialized in trying "political" offenses, the Star Chamber has for centuries symbolized disregard of basic individual rights. The Star Chamber not merely allowed but required defendants to have counsel. The defendant's answer to an indictment was not accepted unless it was signed by counsel. When counsel refused to sign the answer, for whatever reason, the defendant was considered to have confessed. Stephen commented on this procedure: "There is something specially repugnant to justice in using rules of practice in such a manner as to debar a prisoner from defending himself, especially when the professed object of the rules so used is to provide for his defense" 1J. Stephen, *A History of the Criminal Law of England* 341-342 (1883). The Star Chamber was swept away in 1641 by the revolutionary fervor of the Long Parliament. The notion of obligatory counsel disappeared with it.

17...By the common law of that time, it was not representation by counsel but self-representation that was the practice in prosecutions for serious crime. At one time, every litigant was required to "appear before the court in his own person and conduct his own cause in his own words." While a right to counsel developed early in civil cases and in cases of misdemeanor, a prohibition against the assistance of counsel continued for centuries in prosecutions for felony or treason. Thus, in the 16th and 17th centuries the accused felon or traitor stood alone, with neither counsel nor the benefit of other rights - to notice, confrontation, and compulsory process - that we now associate with a genuinely fair adversary proceeding. The trial was merely a "long argument between the prisoner and the counsel for the Crown.", As harsh as this now seems, at least "the prisoner was allowed to make what statements he liked.... Obviously this public oral trial presented many more opportunities to a prisoner than the secret enquiry based on written depositions, which, on the continent, had taken the place of a trial....

22...With the Treason Act of 1695, there began a long and important era of reform in English criminal procedure. The 1695 statute granted to the accused traitor the rights to a copy of the indictment, to have his witnesses testify under oath, and "to make... full Defence, by Counsel learned in the Law." It also provided for court appointment of counsel, but only if the accused so desired. Thus, as new rights developed, the accused retained his established right "to

make what statements he liked." The right to counsel was viewed as guaranteeing a choice between representation by counsel and the traditional practice of self-representation. The ban on counsel in felony cases, which had been substantially eroded in the courts, was finally eliminated by statute in 1836. In more recent years, Parliament has provided for court appointment of counsel in serious criminal cases, but only at the accused's request. At no point in this process of reform in England was counsel ever forced upon the defendant. The common-law rule, succinctly stated in *R. v. Woodward* [1944] K.B. 118 : [1944] 1 All E.R. 159, has evidently always been that "no person charged with a criminal offence can have counsel forced upon him against his will.

3. It is on these lines that the Sixth Amendment to the Constitution of United States gives the accused the right to be present in proceedings. The Supreme Court of United States in the above case further held:

12. ...In other settings as well, the Court has indicated that a defendant has a constitutionally protected right to represent himself in a criminal trial. For example, in *Snyder v. Massachusetts* 291 U.S. 97, the Court held that the Confrontation Clause of the Sixth Amendment gives the accused a right to be present at all stages of the proceedings where fundamental fairness might be thwarted by his absence. This right to "presence" was based upon the premise that the "defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself....

4. In the same context, their Lordships of the judicial Committee in the case of AIR 1933 218 (Privy Council) said:

9. ...It is an essential principle of our criminal law that the trial of an indictable offence has to be conducted in the presence of the accused; and for this purpose trial means the whole of the proceedings, including sentence. There is authority for saying that in cases of misdemeanour there may be special circumstances which permit a trial in the absence of the accused, but on trials for felony the rule is inviolable unless possibly the violent conduct of the accused himself renders it lawful to continue in his absence....

5. On the same lines, the Code of Criminal Procedure, 1898 recognized the requirement for the presence of the accused at certain stages of the proceedings. It also deals with the issue of exemption from such presence. A Full Bench of Allahabad High Court in *Sultan Singh Jain Vs. The State*, while noting the observations of the Privy Council in *Basil's case* (supra) held as follows:

8. There is no section in the Criminal Procedure Code which provides that the accused must be present at every hearing of the case, though there are several sections in the Code which show that the presence of the accused at certain stages of the proceedings is specifically provided for. It is, however, one of the vital principles of the administration of criminal justice, which is universally

acknowledged, that in a criminal trial the Court should not proceed ex parte against an accused person.

It further held that:

10. While, therefore, it cannot be denied that the presence of the accused at the trial is necessary, the Code itself shows that the trial Court has a discretion in certain circumstances to exempt the personal attendance of the accused. There is no specific section to that effect except Section 205, Criminal P.C., but it is implied in some of the other sections in the Code. For example, Section 353, Criminal P.C., provides for recording of evidence in the presence of the accused and is as follows:

"Except as otherwise expressly provided all evidence taken under Chapters XVIII, XX XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader".

Section 353 mentioned above is akin to Section 273 of the present Code. Interestingly, upto the year 1923, these Sections were the only provisions in the Code relating to exemptions from personal attendance of the accused persons. However, in 1923, Section 540A was added to the Code by an amendment. The Section read as follows;

540A. Provision for inquiries and trial being held in the absence of accused in certain cases.- (1) At any stage of an inquiry or trial under this Code where two or more accused are before the Court if the Judge or Magistrate is satisfied, for reasons to be recorded, that any one or more may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

6. This Section was added to tackle the situation where two or more accused were there in a case and some of them were present and others were absent. In such a case, the accused which were present suffered from unnecessary hardship as the absence of other accused resulted in lengthy and protracted trials. The scope of this Section was widened by an amendment to the Section in 1955. The Section reads as;

540-A. Provision for inquiries and trial being held in the absence of accused in certain cases.- (1) At any stage of an inquiry or trial under the Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he

thinks fit, and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.

7. This amendment enabled the Court to dispense with the attendance of the accused when he is represented by a pleader if such attendance is not necessary to secure the ends of justice. Section 317 of the present Code is also similarly worded. It therefore follows that there should not be any compulsion on the accused person to appear in person at every stage of trial. In this connection, the Supreme Court in *M/s. Bhaskar Industries Ltd. Vs. M/s. Bhiwani Denim and Apparels Ltd. and Others*, observed that;

14. ...The concern of the Criminal Court should primarily be the administration of criminal justice. For that purpose, the proceedings of the Court in the case should register progress. Presence of the accused in the Court is not for marking his attendance just for the sake of seeing him in the Court. It is to enable the Court to proceed with the trial. If the progress of the trial can be achieved in the absence of the accused, the Court can certainly take into account the magnitude of sufferings which a particular accused person may have to bear with in order to make himself present in the Court in that particular case.

8. In this regard, the counsel for the petitioners has also relied upon the case of *Bhagwan Das and Others Vs. State*, whereby it is stated as follows:

4. ...The law enjoins that an accused should be present during the course of the trial more to safeguard his interests than to cause him inconvenience. In a case where the accused himself applies to the court to be exempted from personal appearance, then a court should grant the request unless it is of opinion that in the interests of justice it is necessary that the accused should be present throughout the course of the trial, or unless there are some other good reasons for directing the presence of the accused throughout the course of the trial....

9. The counsel for the petitioners has also cited a judgment of Madras High Court in *A. Sundara Pandian v. State* 1987 (3) Crimes 655 where it was held as follows:

3. ...Courts should not hesitate to dispense with the personal appearance of the accused, unless the interest of the prosecution would thereby suffer or under the Code itself the presence of the accused is statutorily required.

10. In another decision, the Jharkhand High Court in the case of *Dr. Prakash Amrut Mody and Anr. v. State of Jharkhand* reported as 2008 (1) BLJ 58 has held:

8. ...The test basically is the assurance that the court's proceedings would not be hampered by allowing the personal attendance of the accused to be dispensed with. It would no doubt also depend upon the gravity of offence. The approach of the Magistrate should be to see whether personal attendance is absolutely necessary for the purpose of case. While considering prayer for protection u/s 205 Cr.P.C., the Magistrate should not adopt too technical or stringent approach through the discretion should not be used liberally on the mere asking of it. Regard should be had to exceptional special circumstances and the

inconvenience which the accused is likely to suffer on account of distance or physical disability or for any such good reason, if his personal attendance is insisted upon on each and every date till the conclusion of the trial.

11. In *S.V. Muzumdar and Others Vs. Gujarat State Fertilizer Co. Ltd. and Another*, the Supreme Court observed as follows;

13. ...It has to be borne in mind that while dealing with an application in terms of Section 205 of the Code, the Court has to consider whether any useful purpose would be served by requiring the personal attendance of the accused or whether progress of the trial is likely to be hampered on account of his absence....

12. In the case of *Bhaskar Industries Ltd. (supra)*, the Supreme Court has stated that in such circumstances, some precaution must nevertheless be taken by the Court before granting exemption to the accused. The following passage from paragraph 17 of the said decision is relevant:

17. ...One precaution which the court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the court that he would not dispute his identity as the particular accused in the case, and that the counsel on his behalf would be present in court and that he has no objection in taking evidence in his absence...

13. Provisions requiring the presence of the accused which mandate that the trial be held in his presence are enacted for the benefit of the accused and have their genesis in the limited approach of the legal system in England of the late 16th and early 17th Centuries that operated to the prejudice of the accused, such as the court of the Star Chamber. If the accused person himself does not wish to avail of the right of personal appearance on every date; if he reposes the fullest confidence in the court and in his advocate, and is confident that justice will be meted out to him even in his absence, then, provided his absence does not prejudice him in any way or hinder the progress of the trial, it is not necessary for the Trial Court to insist on his presence.

14. In the case at hand, as already pointed out, the accused have undertaken not to raise any issues with regard to their identification, and also that they will present themselves whenever their personal appearance is required. They have also categorically stated that they have no objection in the court taking evidence in their absence.

15. In that view of the matter, the petition deserves to be allowed. The petitioners are exempted from personal appearance in SC-30/2006 in *State v. Shri Raja Ram Yadav and Ors.* arising out of FIR No. 166/99 under Sections 308/34 IPC, Police Station Dilshad Garden, and are permitted to appear through counsel. It would however be open to the Trial Court to direct the personal presence of all or any one of the petitioners whenever required.

16. The petition stands disposed of.

Crl. M.A. 4923/2008

17. Since the petition has been disposed of, this application does not survive and is also disposed of accordingly.