

(2015) 02 GUJ CK 0029

In the Gujarat High Court

Case No : Criminal Revision Application No. 460 of 2006

State of Gujarat

APPELLANT

Vs

Natubhai Somabhai Vasava

RESPONDENT

Date of Decision : 27-02-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 313
Prevention of Food Adulteration Act, 1954 — Section 13(2)

Citation : (2015) 2 Crimes 423

Hon'ble Judges : S.G. Shah, J.

Bench : Single Bench

Advocate : Jirga Jhaveri, A.P.P., for the Appellant; Y.J. Patel, Advocates for the Respondent

Final Decision : Allowed

Judgement

S.G. Shah, J.—The prosecution agency - State has preferred this revision application challenging the judgment and order dated 01.04.2006 by the Presiding Officer and Additional Sessions Judge, Fast Track Court No. 3 of Vadodara in Criminal Revision Application No. 64 of 2003. By such impugned judgment FTC has set aside the order dated 04.03.2003 by the JMFC, Shinor below exhibit 100 in Criminal Case No. 420 of 1988.

2. By such impugned order, the trial Court has allowed an application of the Food Inspector to recall the witness to prove the acknowledgment of statutory notice under Section 13(2) of the Prevention of Food Adulteration Act, 1954, which was served upon the respondent - accused.

3. The original complaint is filed by the Food Inspector for adulteration of food stuff, which was seized from the shop of the accused and when there is positive report of public analyst regarding adulteration, the proceeding was initiated. It seems that pending trial, even after adducing evidence of several witnesses when Food Inspector has noticed that though notice under Section 13(2) of the Prevention of Food Adulteration Act has been served upon the accused and that

his office has received acknowledgment slip duly signed by the accused, unfortunately the same could not be produce and prove on record. Therefore, considering that, it may go in favour of the accused for confirming the acquittal on such technical ground only, an application to recall the witness to produce and prove such acknowledgment slip was filed at exhibit 100.

4. The trial Court has after hearing both the sides, allowed such application relying upon the decision of the Honourable Supreme Court reported in Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi, , the trial Court has also relied upon Section 313 of the Code of Criminal Procedure for recalling or examining any witness at any stage of the trial, if he is able to disclose certain facts regarding offence. However, when such order was assailed by the original accused, the FTC Judge has set aside the same by impugned judgment observing that such application is nothing but an attempt to fill up lacuna in the prosecution case and that filling up of lacuna is not permissible. For the purpose learned Judge has relied upon some observations made in the decision of the Honourable Supreme Court reported in Rameshwar Dayal and Others Vs. State of Uttar Pradesh, and 1991 Cri.L.J. 1521 (SC).

5. Unfortunately, both the Courts below have failed to disclose the citations properly, in as much as, name of the parties and any other details are not disclosed in impugned judgments. Irrespective of merits and decision of this revision application, it is necessary to convey all the trial Courts and first appellate Courts to be more presize while referring any decision. Thereby they must disclose the name of the parties and basic facts and determination by the concerned Court before relying upon any such decision. It is clear and obvious that few lines from head note cannot be treated as a final decision or determination in such reported case and that no decision can be taken in any case based upon reading one or few lines of such cited cases without ascertaining that whether facts, circumstances, evidence and law in cited cases are sufficient to apply to the case on hand, considering the facts, circumstance and evidence of such case on hand.

6. The impugned order is passed under Section 311 of the Code of Criminal Procedure which reads as under:

"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."

6.1 Bare reading of the section makes it clear that any Court may at any such inquiry or trial, summon any person as a witness or examine any person though not summon or to re-examine any person already examined, if his evidence is

essential to arrive at a just decision of the case. Therefore as rightly observed and considered by the FTC Judge in impugned order, the amplitude of powers vested in the Court under Section 311 of the Code is very wide as much as the Court may re-examine any witness if his evidence appears to be essential to the just decision of the case. The definition of the word "Just" is not found in the code but its meaning is wide enough, more particularly when evidence is available with prosecution and when it could not be proved for one or another reason, there is no ground to refuse the prosecution to prove it. If we consider the term "Just" in most common sense then also "Just" denotes what is considered morally right, fair or good and reasonable and proper.

7. Therefore, it is clear that allowing to prove the evidence which is already in existence, is certainly a fair practice. If we permit the technicalities as observed by the FTC, though defects in prosecution case cannot be cured by allowing at belated stage and examining witnesses in support thereof or allowing the prosecution under NDPS Act to tender original case records and sample of contraband material after conclusion of arguments and fixing date of judgment is not permissible, then with due respect it would result into chaos in criminal trial. Though we may not and I have no intention to blame any authority or any person in any manner, it becomes clear that in such cases it would be easy for the accused to see that certain documents may be omitted or left out from the proceedings/evidence at the hands of some corrupt or improper or negligent persons, who are in-charge of such prosecution and thereby accused would get an undue advantage. In any case the observations in judgment of Madras High Court *Danday Knit Garments and Another Vs. Subiksha Spinners (P.) Ltd.*, and Bombay High Court (1996 Cri.L.J. 365) as recorded in para 5 of the impugned judgment, whereas except for the observations in single line in the judgment referred in para 7 of the impugned judgment, the settled legal position is very much clear by the later judgment of the Honourable Supreme Court between *Mohanlal Shamji Soni Vs. Union of India and another*, , wherein Honourable Apex Court has categorically held that any person can be summoned as a witness or recall for re-examine at any stage of proceedings when essential. Further, power of Court to recall any witness or witness already examined or to summon any witness can be invoked even if evidence in both the sides is closed so long as the Court retains seisin of the criminal proceedings.

8. The said judgment has been considered by Honourable Supreme Court in *A. Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam Represented by Its President etc.*, quoting it as under:

"34. In *Mohanlal Shamji Soni Vs. Union of India and another*, , this Court observed that in such a situation a question that arises for consideration is whether the presiding officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and

administering justice? It is a well accepted and settled principle that a Court must discharge its statutory functions - whether discretionary or obligatory - according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done." 8.1 Whereas in P. Sanjeeva Rao Vs. The State of A.P., and in Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi, , the Honourable Apex Court has held that;

"14. The extent and the scope of the power of the Court to recall witnesses was examined by this Court in Mohanlal Shamji Soni Vs. Union of India and another, , where this Court observed:

"The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair-play and good sense appear to be the only safe guides and that only the requirements of justice command and examination of any person which would depend on the facts and circumstances of each case." 8.2 It is also followed in Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, .

8.3 Whereas in latest decision by the larger bench of three Judges in Rajaram Prasad Yadav Vs. State of Bihar and Another, , now the Honourable Apex Court has laid down following principles for exercising powers under Section 313 of the Code.

"a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311, Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) The exercise of power under Section 311, Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of Section 311, Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that 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.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311, Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

9. Therefore, though by and large it can be said as observed in the impugned order that witness cannot be recalled to fill up the lacuna, the powers vested in the Court under Section 311 of the Code of Criminal Procedure are wide enough and it can be exercised. Now following principles laid down by the larger bench of

the Honourable Supreme Court in the case of Rajaram Prasad (supra), if we go through all such principles, it cannot be said that in the present case the prosecution wanted to fill up the lacuna but it can certainly be said that the production of acknowledgment on record would be necessary for just decision of the case. The scrutiny of full bench judgment confirms that restrictions or conditions by the Court is only to the effect that if any witness examined pursuant to order under Section 311 of the Code of Criminal Procedure, then accused must get fair chance to prove his defense even on such evidence which is adduced pursuant to order under Section 311 of the Code of Criminal Procedure. No doubt, it is basic principle of criminal jurisprudence that accused must be provided with reasonable opportunity to protect his right. In the present case, the facts are some what different, in as much as, the document being acknowledgment of statutory notice which is now required to be proved on record is practically known to the accused and, thereby, non pressing for non-production of such documents by the prosecution would result into advantage to the accused and dis-advantage to the prosecution but in any case it cannot be said that it is for the filling up the lacuna in the prosecution case. It is obvious that the Court does not have to see the advantage or disadvantage of particular litigant but Court has to consider the documents, which is necessary for just decision or not. It is obvious that when notice is duly served upon the accused, that fact is certainly proved on record and it is proper for just decision of the Case.

10. Therefore, there is material illegality in the impugned judgment, which results into determination of disturbing such judgment by setting it aside. Therefore, revision application needs to be allowed and hence it is allowed. Thereby impugned judgment and order dated 01.04.2006 in Criminal Revision Application No. 64 of 2003 by the FTC, Vadodara has been quashed and set aside resulting into restoration of judgment and order dated 04.03.2002 by JMFC, Shinor below exhibit 100 in Criminal Case No. 420 of 1988. Rule is made absolute.