
(2001) 09 PAT CK 0018
In the Patna High Court
Case No : Cr. Revision No. 627 of 2001

Sureshwar Sharma

APPELLANT

Vs

The State of Bihar and Jai Shankar Prasad Jha

RESPONDENT

Date of Decision : 21-09-2001

Acts Referred:

Citation : (2001) 09 PAT CK 0018

Final Decision : Allowed

Judgement

S.K. Chattopadhyaya, J.—Heard the learned Counsel for the Petitioner and opposite party No. 2 and with their consent this application is being disposed of at the time of admission it self.

2. The informant as Petitioner (sic) challenged the order of the revisions court dated 31.7.2001 setting aside (sic) order of the trial court dated 25.9.2000 who exercising its power u/s 311 of the Code of Criminal Procedure (In short "the Code"), directed recording of evidence of the informant and production of certain papers.

3. A brief fact is necessary to appreciate the point advanced on behalf c the parties. Charge in the case was framed on 10.5.99 under Sections 420 468 of the Penal Code and two witnesses were examined by the prosecution on 15.5.99. They were declared hostile but the Informant, who is the main witness of the case, was not examined by the prosecution for the reasons best known to it. No doubt, the case of the prosecution was closed on 16.9.2000 and statements u/s 313 of the Code were recorded on 20.9.2000. The trial court fixed the date 25.9.2000 for pronouncement of the judgment. But before pronouncement the trial court exercising its power u/s 311 suo motu summoned the informant for his deposition in court. The accused-opposite party impugned the said order before the revisional court and by the impugned order the revisional court agreeing with the prayer set aside the order of the trial court.

4. According to the revisional court though power u/s 311 of the Code gives wide

power to the court to examine, recall or re-examine any witness whose evidence is essential for just decision of the case but that jurisdiction cannot be used for filling up a lacuna in the prosecution case and it does not give a long rope to the prosecution to make it a tool in the hands of the prosecution for harassment of the accused or to abuse the process of the court in any manner. In support of its contention the revisional court has relied on the decision of this Court reported in Keshav Choudhary and Others Vs. State of Bihar, On perusal of the records the revisional court found that a large number of adjournments were given to the prosecution for adducing evidence but that was not availed of. He found that the Investigating Officer of the case is reported to be dead. The court took notice of the fact that the impugned order of the trial court does not indicate as to why the informant could not turn up earlier for his examination as witness. Considering all these aspects the revisional court was of the opinion that the order of the trial court u/s 311 was not justified and, as such, set aside the matter.

5. The pertinent question in this case is as to whether actually the trial court exercised its power u/s 311 to fill up the lacuna in the prosecution case?

6. It is to be borne in mind that after closing of the case date for pronouncement of the judgment was fixed but on the same very date trial court passed the order directing the informant to be present for examination. No application was filed either on behalf of the prosecution or by the informant and the court passed the order suo motu, which indicates that the trial court after hearing the parties had gone through the records of the case and found that in such type of cases the examination of the informant was very much essential for doing justice. Thus, it cannot be said by any stretch of imagination that the trial court passed the order to fill up the lacuna in the prosecution case because no prayer was made on behalf of the prosecution to this effect.

7. In the case of Rajendra Prasad, Appellant v. Narcotic Cell through its Officer-in-charge, Delhi, Respondent (1999(2) PCCR 52(SC)) : 1999 (105) CRLJ 3529 SC while dealing with practically the same question as to whether the court can exercise its power u/s 311 for doing justice their Lordships have held thus:

6. It is a common experience in criminal Courts that defence counsel would raise objections whenever Courts exercise powers u/s 311 of the Code or u/s 165 of the Evidence Act by saying that the Court could not "fill the lacuna in the prosecution case". A lacuna in prosecution is not to be equated with the fall-out of an oversight committed by a public prosecutor during trial, either in producing human is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a Court cannot fill up.

8. Their Lordships have further observed that:

lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should

normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. 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. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

9. Relying on the decisions of the said Court in the case of Mohanlal Shamji Soni Vs. Union of India and another, and in the case of Ram Chander Vs. State of Haryana, ultimately their Lordships have held that:

we cannot, therefore, accept the contention of the Appellant as a legal proposition that the Court cannot exercise power of re-summoning any witness if once that power was exercised, nor can the power whittled down merely on the ground that prosecution discovered laches only when the defence highlighted them during final arguments. The power of the Court is plenary to summon or even recall any witness at any stage of the case if the Court considers it necessary for a just decision. The steps which the trial Court permitted in this case for resummoning certain witnesses cannot therefore, be spurned down nor frowned at.

This decision of the Supreme Court has been relied by me in the case of Debashish Bose v. The State of Bihar and Ors. in Cr. Misc. No. 28392 of 1999 disposed of on 19.9.2001. reported in Debashish Bose Vs. The State of Bihar and Others

10. As noticed above, in me Instant case where opposite party No. 2 was charged for the allegation of cheating Sureshwar Sharma knowingly and dishonestly some papers as well as some judicial stamps while the Informant is working as peon in soma Company and gave bluff of promotion as Clerk. The Informant was compelled to sign on soma papers as well as on non-judicial stamps and the informant was forced by the accused for the purposes of cheating and forged documents were prepared on 18.2.1997. In such type of case P.Ws. 1 and 2 became hostile. Unfortunately, the Investigating Officer was dead and for the reasons best known to the (sic) the informant, who was cheated, was not examined. It is better to say less. Under these circumstances the trial court, while going through the case record found that the evidence of the informant was essential and he exercised its power u/s 311. I find no illegality in this order and I fail to appreciate how the revisional court took a different view without noticing the fact that the trial court in order to do justice in the case passed the order suo motu and not for filling up any lacuna in the prosecution case.

11. Learned Counsel for the opposite party has raised an objection that the informant cannot challenge this order before this Court because the trial court

did not pass the order either on his request or on the request of the prosecution.

12. Learned Counsel for the Petitioner countering this argument submits that it is now well settled that not only the informant but even an individual can move in revision against an order which if not challenged will perpetuate the illegality, which will be against all canon of justice. In support of his contention he has relied on a Division Bench decision of this Court in the case of Ram Bilash Prasad Vs. Binda Tanti and Others, wherein a revision against acquittal at the instance of the private party was held maintainable by their Lordships. According to this Court the illegality etc. can be brought to the notice of the revisional court by the informant or by a witness or by any other interested person in the litigation and it is for the revisional court to decide as to whether the revisional power is to be exercised or not to prevent miscarriage of justice. There is no fetter in exercise of the power of the High Court in a case where a matter is moved by a private party.

13. In the background of all the authoritative pronouncement of the Supreme Court as well as this Court, I am of the view that the impugned order cannot be sustained in law.

14. In the result, this application is allowed. The order dated 31.7.2001 passed in Criminal Revision No. 767 of 2000 is set aside and that of the order dated 25.9.2000 passed by the trial court is restored. The trial court is directed to proceed with the case.