

Mir Mohd. Omar and Others

Vs

State of West Bengal

Criminal Appeal No. 467-468 of 1989

(K. Jagannatha Shetty, A. M. Ahmadi JJ)

08.08.1989

JUDGMENT

K. JAGANNATHA SHETTY, J. –

1. The special leave is granted and the appeal stands disposed of by this order.
2. The appellants-accused are facing trial for an offence under Section 302/34 IPC and alternatively under Sections 364/34 IPC before the City Sessions Court, 13th Bench, Calcutta in Sessions Trial No. 1 of November, 1987 (Session Case No. 5 of 1987). The prosecution examined in all 34 witness. The last witness examined is the investigating officer (PW 34). His examination went on for a number of days and came to an end on March 16, 1989. On the next day that is, on March 17, 1989, the court examined the accused under Section 313 of the Criminal Procedure Code and recorded their statements.
3. On March 21, 1989, the public prosecutor filed an application proposing some more questions to be put to the first appellant by way of re-examination under Section 313 of the Code. On the same day, the trial court by a considered order rejected that application. The relevant portion of that order runs as under :

"I think the Ld. P.P. can argue all these points at the time of advancing arguments in this case and the accused need not be re-examined on this point under Section 313 CrPC. The Ld. P.P. has also submitted that in question No. 6 and question No. 7 the word "these witnesses" should be replaced by the name of the witnesses. I think the names of the witnesses have already been put to the accused persons in the previous question. So in the question No. 6 and question No. 7 the name of the witnesses need not be mentioned again. Then it has been pointed out that the question No. 4 in place of the words " you all", the question should be written as 'Khurshed, Bhulu, Noor Alam and Tenea under your order'. I think it is implied. If other accused persons did anything at the order of one particular accused it is implied that all accused persons committed the mischief. So on this point also the accused need not be re-examined again. Lastly, it has been pointed out that in question No. 2 in place of PW 12 Abdullah Dawood the words " PW 7 Md. Mein "should be written. On perusal of the evidence on record I find PW 12 Abdullah Dawood is also a witness of the occurrence and so the question need not be corrected. Discussing the above circumstances the petition filed by the prosecution this day for re-examination of the accused persons under Section 313 CrPC for further re-examination is rejected."

4. On March 30, 1989 the public prosecutor applied for adjournment of the case on the ground that he would like to move the High Court against the aforesaid order dated March 21, 1989. The case was accordingly adjourned to April 18, 1989. It is said that in between these days some correction slip was filed in the court seeking 25 corrections in the statement of PW 34. The said slip was not accompanied by any application nor was it served on counsel for the accused. The trial court, however, in the interest of justice rectified the typographical errors in the statement of PW 34 but refused to make other corrections which would have changed the substantive part of his evidence.

5. The State moved the High Court with Criminal Revision No. 641 of 1989 praying : (i) Corrections be made in the evidence of PW 34 as per slip supplied to the trial court; (ii) Additional statement of the first appellant under Section 313 CrPC be recorded in respect of questions proposed by the prosecution; and (iii) Transferring the case to some other bench of the City Sessions Court as the trial Judge has acted with bias.

6. There was another revision application filed by Smt. Anushila Devi who claims herself to be a sister of the deceased Mahesh Kumar Agarwal and as a party interested in the case. She also sought transfer of the case from the 13th Bench to some other bench in the City Sessions Court on the apprehension that there would not be a fair trial in the case.

7. The High Court on examination of the records found that the corrections slip filed before the trial court was not part of the records in the case. The High Court called for an explanation from learned trial Judge who wrote to the High Court as follows :

"The correction slip as referred to has not been properly filed. It is not signed by anybody. The case number or the court number has not been mentioned in it. Nor any petition has been filed by the prosecution along with such concerned correction slip. Even the copy of the same has not been served upon the defence advocates. Still then as may as 16 typographical mistakes have already been corrected out of 25 mistakes as per correction slip. Other mistakes are not typographical mistakes and in the name of correction the evidence already recorded cannot be changed. So other mistakes have not been corrected."

8. He has also stated in the explanation :

"Unsigned correction slip in 3 loose sheet could not be sent earlier as the case recorded was forwarded in a hurry and the said correction slip is now enclose herewith."

9. The High Court however, was not satisfied with the explanation and expressed the view that the trial Judge has not followed the proper procedure envisaged in Section 278 of the Code since he has 'a closed mind'. The court also found fault with the procedure adopted by the prosecution but liberty was reserved to the latter to file an application for re-examination of PW 34.

10 As to the claim for re-examination of the accused under Section 313 of the Code, the High Court said as follows :

"We have heard at length Mr. Durga Pada Dutta, the learned advocate appearing on behalf of the accused opposite parties who frankly conceded that point Nos. 1,2,3,4 and 5 could be allowed. But objections were raised with regard to point Nos. 6 and 7 when it was suggested by the prosecution that a question should have been put

regarding seizure of hair on November 5, 1986 of forwarding the same to the FSI for comparison with the scalp hair of deceased Mahesh Kumar Agarwal and the report of the FSL. It was suggested in point No. 7 that a question should be put regarding presence of accused Omar near the crossing of B.B. Ganguly Street and C.R. Avenue at about 1.15 a. m. on November 5, 1986 when the IO's testimony was not very clear on the point. "... " We would have allowed ordinarily the application filed on March 21, 1989 with regard to points Nos. 1 to 5 and would have left the question on point Nos. 6 and 7 to the trial Judge on the basis of concessions made by Mr. Dutt, the learned advocate for the accused opposite parties and also on the basis of our own opinion on this aspect of the case but then since we direct the trial court to hold the re-examination of PW 34 on a proper application being filed by the prosecution in this regard. We would expunge not only the examination under Section 313 CrPC which is already on record in respect of accused Mir Mohd. Omar but also in respect of the other accused persons and direct the court below to proceed afresh in the matter after the recording of evidence including the re-examination of PW 34 is complete and we would direct the court below further to hear out the submissions of the prosecution as well as defence regarding framing of proper questions under Section 313 CrPC."

11. The High Court also accepted the demand for transfer of the case and the matter was left to the Chief Judge, city Sessions Court either to try the case by himself or to transfer to some other bench regard being had to the congestion of the different benches.

12. In this appeal, the accused have challenged the legality of the order of the High Court.

13. We have heard Mr. A.D. Giri, learned counsel for the appellants and learned Advocate General for the State of West Bengal, besides Mr. P. P. Rao, learned senior counsel for the private party. We have also perused the material on record. We find it difficult to support the impugned order. It seems to us that the High Court has needlessly interfered with the discretion exercised by the trial court with regard to correction slip as well as on re-examination of the accused under Section 313 of the Code. We do not find any infirmity in the procedure followed by the trial Judge and if there is any, it is only in the order of the High Court. The High Court was uncharitable to the trial Judge when it observed that he has 'a closed mind'. It may be noted that the correction slip was not filed when the day to day evidence of PW 34 was recorded and read over to him. Nor it was filed on the last day of recording his evidence. It does not bear any signature or the date. The trial Judge however, thought fit to correct typographical errors in the statement of PW 34 which he would have corrected even otherwise. He refused to make any correction or alter the substantive part of the evidence. Indeed, he was right in not tinkering with the substantive part of the evidence on the basis of an unsigned correction slip.

14. In the sessions trial the court has limited jurisdiction with regard to correction of the recorded evidence of any witness. Section 278 provides :

"278. Procedure in regard to such evidence when completed.-(1) As the evidence of such witness taken under Section 275 or Section 276 is completed it shall be read over to him in the presence of the accused, if an attendance, or of his pleader, if he appears by pleader, and shall, if necessary be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is

read over to him, the magistrate or presiding judge may, instead of correcting the evidence make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary."

15. The object of Section 278 is twofold : firstly to ensure that the evidence of the witness as recorded is accurate and secondly to give the witness concerned an opportunity to point out mistakes, if any. If the correction suggested by the witness is one which the Judge considers necessary he will make it at once as required by sub-section (1) but if the correction is such that the judge does not consider necessary, sub-section (2) requires that a memorandum of the objection be made and the judge add his remarks, if any, thereto. In the present case, the learned trial Judge corrected all the typographical errors which he considered necessary but refused to carry out the substantive part of his deposition. The section is not intended to permit a witness to resile from his statement in the name of correction. The learned trial Judge was justified in refusing to effect the change which he thought was intended to change the earlier version. He did not make a memorandum as the correction slip was unsigned and was not properly filed. Now, since the correction slip as well as the remarks of the learned trial Judge have become a part of the record, nothing more need be done as the provisions of Section 278 are substantially complied with.

16. We equally see no justification for the High Court for giving liberty to the prosecution to file an application for re-examination of PW 34. In fact it will be seen from the operative portion of the impugned order the High Court proceeds on the assumption that PW 34 would be recalled for further examination. Here again it may be noted that the prosecution has closed the evidence. The accused have been examined under Section 313 of the Code. The prosecution did not at any stage move the trial Judge for recalling PW 34 for further examination. In these circumstances, the liberty reserved to the prosecution to recall PW 34 for re-examinations is undoubtedly uncalled for.

17. There is yet another grave error committed by the High Court. It has expunged the entire examination under Section 313 of the Code of all the accused. We fail to understand the need for this extraordinary step. It is unfortunate that the High Court should make that order. Assuming it was on account of its permission to re-examine PW 34, even in that case it would be sufficient to further examine the accused with reference to the additional circumstances, if any, appearing against the accused on such re-examination. The object of Section 313 was that the accused may be given an opportunity of explaining each and every circumstance appearing against him. The trial Judge need not consult or hear the public prosecutor or the counsel for the accused as to the nature of the circumstances or the type of questions to be put to the accused. It is his duty to examine the accused as per law. It is, however, open to the prosecution to invite the attention of the court if any incriminating circumstances is left out and not put to accused. We reserve liberty to the prosecution in this regard.

18. The question of transfer of the case to another bench of the City Sessions Court also does not arise now. We are told that the trial Judge has since retired and another judge has taken over his place. He shall, therefore, take up this case expeditiously and proceed preferably day to day, as earlier ordered by the High Court.

19. In the result, the appeal is allowed and the order of the High Court is reversed. This order shall be communicated to the trial court within two days by courier service. The parties should appear before the trial court on August 14, 1989 to receive further orders.

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