

State of Kerala

Vs

Babu

Criminal Appeal No. 761 of 1993

(G.B. Pattanaik, N. Santosh Hegde JJ)

04.05.1999

JUDGMENT

N. Santosh Hegde, J.

1. In a pending Sessions Case, on behalf of the accused persons, applications were made to summon the case diary of a case registered as Cr. No. 81/91 for confronting a witness with his previous statement as found in the said case diary and to recall the said PW-5. The learned Sessions Judge allowed the said applications which came to be challenged in criminal petitions filed before the High Court of Kerala by the State as well as the brother of the deceased. These petitions came to be dismissed by an Order of the High Court dated 17th August, 1993. Both the Sessions Court and the High Court held that there is no bar in law to summon the case diary of a case even other than the one which is being tried, for the purpose of contradicting the evidence of the prosecution witnesses. In this appeal by special leave, the State of Kerala has raised the following questions of law :

"(a) Whether the Statement of a witness recorded u/s. 161 of Cr.P.C. in one particular crime could be used against that witness in any other trial enquiry or proceedings by the accused ?

(b) Whether the learned Sessions Judge can call for the police diaries of a case which is not under inquiry or trial before him and permit it to be used by the accused for contradicting a witness examined in another case under trial before him ?

(c) Whether Section 162 of the Cr.P.C. permits the use of statement recorded under Section 161 of Cr.P.C. in any other proceeding other than the inquiry or trial in respect of the offence for which the investigation was conducted ?"

2. It is contended on behalf of the appellant that the case diary sought to be summoned being a case diary not of the case which is being tried in the sessions trial under Section 172 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'), it is impermissible for the court to summon the case diary nor the statements recorded therein could be permitted to be used for contradicting a witness who is being examined in a trial arising out of a totally different case.

3. On behalf of the respondents, it is contended that any prior statement of a witness can be used for the purpose of contradicting a witness as provided for in Section 162 of the Code and Section 145 of the Evidence Act. It was contended that in view of the fact that those provisions having been enacted for the benefit of the accused, a liberal construction should be given to the provisions of Section 172 of the Code. Reliance was placed upon a judgment of the High Court of Calcutta

rendered in the case of *Ahmed Mia and others v. Emperor, A.I.R. 1944 Cal. 243* and of this Court in *Khatri and others v. State of Bihar and others, 1981(2) SCC 493*. The brief facts necessary to appreciate the contentions of the parties in this appeal are as follows :

4. In the course of trial of Sessions Case No. 157/92, on the file of the Sessions Judge at Thrissur, it was noticed by the defence that on the very day of the incident which was subject matter of the sessions case, there was another crime registered in Cr.No. 81/91 and in that during the course of investigation, a statement of the witness who is being examined in the sessions case as PW-5, was recorded under Section 161 of the Code which, the defence has contended, contradicts the statement made by PW-5 in the course of the sessions trial. Therefore, for the purpose of establishing the contradiction in the evidence of PW-5 and in order to impeach the said witness, the defence wanted the case diary in Crime No. 81/91 to be summoned with a consequential prayer for recalling PW-5. This prayer to summon the case diary of Crime No. 81/91, having been allowed, the above controversy has arisen primarily based on the language of Section 172 of the Code.

5. Before examining the applicability of Section 172 of the Code, we will first consider the right of an accused to cross-examine a witness with reference to the previous statement of a witness in a trial. Section 145 of the Evidence Act provides :-

"A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

6. A perusal of this Section shows that this Section permits the cross-examination of the witness in any trial, with reference to his previous statement, to establish a contradiction and the manner in which such contradictions can be established. Section 155 of the Evidence Act provides that the previous statement of a witness can be made use of during the cross-examination of that witness for the purpose of impeaching the credit of the witness. Thus, it is seen it is the right of a party in a trial to use the previous statements of a witness either for the purpose of establishing a contradiction in his evidence or for the purpose of impeaching the credit of the witness. This right given to a party in a trial under Section 145 of the Evidence Act is somewhat controlled in criminal trials by the provisions made in the Code.

7. Section 161 of the Code provides that the police officer investigating a case is entitled to examine any person and reduce the statement of such person in writing. This statement recorded by a police officer under Section 161 even though is a previous statement for the purpose of Section 145 of the Evidence Act, such statement can be used for the purpose of establishing a contradiction or impeaching the credit of the witness only in the manner provided for in Section 162 of the Code. The use of the previous statement recorded under section 161 of the Code is controlled by Section 162 of the Code. The proviso which actually controls the use of Section 162 of the Code reads thus :-

"Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (I of 1872); and when any part of such statement is so

used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination."

8. Therefore, it is seen even in a criminal trial the previous statement of a witness can be used by the accused for the limited purpose mentioned in Section 162 of the Code as provided for in Section 145 of the Evidence Act. The object of enacting Section 162 is noticed by this Court in the case of *Tasildar Singh and Anr. v. State of U.P., A.I.R. 1959 SC 1012*, wherein it was held thus :

"It is, therefore, seen that the object of the legislature throughout has been to exclude the statement of a witness made before the police during the investigation from being made use of at the trial for any purpose, and the amendments made from time to time were only intended to make clear the said object and to dispel the cloud cast on such intention. The Act of 1808 for the first time introduced an exception enabling the said statement reduced to writing to be used for impeaching the credit of the witness in the manner provided by the Evidence Act. As the phraseology of the exception lent scope to defeat the purpose of the legislature, by the Amendment Act of 1923, the section was redrafted defining the limits to confine it only to contradict the witness in the manner provided under section 145 of the Evidence Act. If one could guess the intention of the legislature in framing the section in the manner it did in 1923, it would be apparent that it was to protect the accused against the user of the statements of witnesses made before the police during investigation at the trial presumably on the assumption that the said statements were not made under circumstances inspiring confidence. Both the section and the proviso intended to serve primarily the same purpose i.e., the interest of the accused."

9. Therefore, on a reading of Section 162 of the Code bearing in mind the object of the said Section and Section 145 of the Evidence Act, it is clear that an accused in a criminal trial has the right to make use of the previous statements of a witness including the statements recorded by the investigating agency during the course of an investigation for the purpose of establishing a contradiction in the evidence of a witness or to discredit the witness. The question then arises how does the accused confront the previous statement made by a witness in the course of an investigation to establish the contradiction in the evidence given by the witness in that trial. So far as the statements made during the course of investigation of the case being tried is concerned, there is no difficulty because an accused is entitled under Section 207 of the Code for the supply of free copies of the documents referred to in the said Section which includes the previous statement recorded under sub-section (3) of Section 161 of the Code. The accused does not have such a right as a matter of course in regard to other previous statements; more so, in regard to the statements recorded by the investigating agency under Section 161 in a case other than the one that is being tried by the Court. Therefore, in the instant case, the accused made an application for summoning the case diary of Crime No. 81/91 invoking the provisions of Section 172 of the Code. But the State contends that this Section does not apply to summoning the case diary of cases other than the one that is being tried. Therefore, we will now examine the contention of the State with reference to Section 172 of the Code which Section reads thus :

"172. *Diary of proceedings in investigation.* - (1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply."

10. Sub-section (1) of the above Section mandates that every police officer making an investigation shall maintain a case diary of that case in which among other entries, shall maintain the statements of the witnesses examined by him during the course of his investigation. Sub-section (2) of the same Section empowers a criminal court *to send for such police diaries of a case under inquiry or trial in such Court*, (emphasis supplied) and permits the use of such diaries, not as evidence in the case, but to aid it in such inquiry or trial. The words used in sub-section (2) of Section 172, more particularly "police diaries of a case under inquiry or trial in such Court," indicate it is only that police diary in which the concerned investigating officer had made entries of his investigation and which pertains to the case being tried by the Court alone can be sent for. Sub-section (3) of Section 172 further imposes restrictions in the manner in which such diaries can be used by the Court. It also specifically bars the right of an accused or his agent to call for such diaries. Thus, on a plain language of this Section, it is clear that this Section cannot be used for the purpose of summoning a case diary which does not pertain to the investigation of the case which is being tried by the Court. It also stands to reason because so far as the accused is concerned in the case in which he is being tried, he would have been supplied with all the documents referred to under Section 207 of the Code. Therefore, the question of he using the entries in the case diary would not arise. Section 172 is specifically meant for the contingencies when court finds it necessary to look into the case diary for the purpose of finding an aid in the trial or for the purpose of assisting the police officer to refresh his memory. Therefore, Section 172 does not contemplate summoning of the case diary for the purpose of assisting the accused to have a look at the previous statements of the witness for using it for his benefit, as contemplated in Section 162 of the Code. The trial court and the High Court in this case proceeded on the footing that there is no bar under the Code to summon the case diary relating to the cases other than the one that is being tried. Hence, placed reliance on Section 172 of the Code. We are unable to subscribe to that part of the finding of the courts below that the source of power to summon the case diary of a case other than the one that is being tried, emanates from Section 172 of the Code. Respondents have sought to place reliance on a Division Bench judgment of the High Court of Calcutta in the case of Ahmed Mia and others v. Emperor, A.I.R. 1944 Cal. 243 wherein the High Court observed thus :-

"Section 172 relates to the Police diary made in respect of a case under enquiry or trial by the Court which calls for it and therefore does not in terms apply where the diary relates not to the case which was actually being tried by the Court but to the counter case, but the principles set out in the section apply. There is no provision in the Criminal Procedure Code which would prevent the Court from looking into the diary of the counter case, or from using the diary in the counter case in the way laid down in S. 172(2)."

11. These observations of the court proceeded on the basis that there is no provision in the Criminal

Procedure Code which would prevent the court from looking into the diary of the counter case or from using the diary in the counter case in the way laid down in Section 172(2) of the Code. There can be no quarrel in regard to the fact that there is no prohibition in the Criminal Procedure Code against any court from looking into the diary of a counter case or from using the diary of a counter case in the trial of another case. But this does not mean that the right of the court to summon the case diary of another case is derived from Section 172 of the Code or by the application of principles of Section 172 because *ex facie* Section 172 of the Code does not help the accused in making use of a case diary. Therefore, we are of the opinion that the judgment of the Calcutta High Court does not fully support the case of the respondents. On the contrary, it is seen that this Court in Khatri's case (*supra*) has observed thus :

"It will thus be seen that the bar against production and use of case diary enacted in Section 172 is intended to operate only in an inquiry or trial of an offence."

which also indicate the fact that Section 172 relates to summoning of the case diary of a case which is under enquiry or trial only.

12. The High Court in the impugned judgment proceeded on the basis that a statement recorded by an investigating officer in any case which was under investigation, being a statement made under Section 161 of the Code, the same can be used for the limited purpose provided under Section 162 of the Code read with Section 145 of the Evidence Act. There can be no quarrel with this approach of the High Court in regard to the use of the previous statements of a witness made in the course of another investigation being used in the course of another criminal trial. This is because, as seen from the observations of this Court in the case of Tahsildar Singh (*supra*), the very object of enactment of Section 161 of the Code and Section 145 of the Evidence Act is to create a right in the accused to make use of the previous statements of the witnesses for the purpose of contradiction and for impeaching the merit of the witness. This right has not been taken away by Section 172 of the Code and, as noticed above, there is no prohibition in regard to this right of the accused either under the Code or under the Evidence Act. But the question for consideration is, how does the accused exercise this right with reference to a previous statement of a witness made in another case which is recorded by the investigating officer in that case under the provisions of Section 161 of the Code. In our opinion, this right certainly does not flow under Section 172 of the Code nor is the accused entitled to these previous statements under Section 207 of the Code. But, this does not mean that the accused is denied of his limited benefit of using the said previous statements recorded during the course of another investigation. The answer to this question, in our considered view, lies in Section 91(1) of the Code which reads thus :

"91. *Summons to produce document or other thing.* - (1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed -

(a) to affect Sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority."

13. The language of Section 91 is much wider than the language of Section 172 and by no stretch of imagination it could be contended that the case diary maintained under Section 172 of the Code is not a document as contemplated under Section 91(1) of the Code. If that be so and if the court comes to the conclusion that the production of such document is necessary or desirable then, in our opinion, the court is entitled to summon the case diary of another case under Section 91 of the Code *de hors* the provisions of Section 172 of the Code for the purpose of using the statements made in the said diary, for contradicting a witness. When a case diary, as stated above, is summoned under Section 91(1) of the Code then the restrictions imposed under sub-sections (2) and (3) of Section 172 would not apply to the use of such case diary but we hasten to add that while using a previous statement recorded in the said case diary, the court should bear in mind the restrictions imposed under Section 162 of the Code and Section 145 of the Evidence Act because what is sought to be used from the case diary so produced, are the previous statements recorded under Section 161 of the Code.

14. In this view of the matter, in our opinion, a case diary of another case, not pertaining to the trial in hand can be summoned if the court trying the case considers that production of such a case diary is necessary or desirable for the purpose of trial, under Section 91 of the Code.

15. For the above reasons, this appeal fails and the judgments impugned are confirmed though for a different reason as indicated above.

Appeal dismissed.