SUPREME COURT OF INDIA

Rambhau

Vs.

State of Maharashtra

Crl.A.No.636 of 1995

(Umesh C. Banerjee and K.G. Balakrishnan JJ.)

26.04.2001

JUDGMENT

U.C.Banerjee, J.

1. There is available a very wide discretion in the matter of obtaining additional evidence in terms of Section 391 of the Code of Criminal Procedure. A plain look at the statutory provisions (Section 391) would reveal the same and the same reads as below:

> "391. Appellate Court may take further evidence or direct it to be taken
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> (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.
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> (2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the appellate Court, and such Court shall thereupon proceed to dispose of the appeal.
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> (3) The accused or his pleader shall have the right to be present when the additional evidence is taken.
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> (4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

2. A word of caution however, ought to be introduced for guidance, to wit: that this additional evidence cannot and ought not to be received in such a way so as to cause any prejudice to the accused. It is not a disguise for a re-trial or to change the nature of the case against the accused. This Court in the case of *Rajeswar Prasad Misra v. State of West Bengal and another*[1] in no uncertain terms observed that the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. This Court was candid enough to record however, that it is the concept of justice which ought to prevail and in the

event, the same dictates exercise of power as conferred by the Code, there ought not to be any hesitation in that regard. Be it noted that no set of principles can be set forth for such an exercise of power under Section 391, since the same is dependant upon the fact-situation of the matter and having due regard to the concept of fair play and justice, well being of the society.

3. Incidentally, Section 391 forms an exception to the general rule that an Appeal must be decided on the evidence which was before the Trial Court and the powers being an exception shall always have to be exercised with caution and circumspection so as to meet the ends of justice. Be it noted further that the doctrine of finality of judicial proceedings does not stand annulled or affected in any way by reason of exercise of power under Section 391 since the same avoids a de novo trial. It is not to fill up the lacuna but to sub-serve the ends of justice. Needless to record that on an analysis of the Civil Procedure Code, Section 391 is thus akin to Order 41 Rule 27 of the C.P.Code.

4. On the factual backdrop of the matter in issue, it appears that against an order of acquittal for the offence punishable under Section 13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, the High Court reversed the finding of acquittal and held the accused persons guilty for the offence for which they were charged and convicted them for the offence under Section 13 (2) of the Prevention of Corruption Act and sentenced the Appellant No.1 to suffer rigorous imprisonment for a period of two years and to pay a fine of Rs.5,000/- and as against accused No.2, the imprisonment period was for one year together with a fine amount of Rs.3000/- and hence the Appeal before this Court. Before going into the factual score further, it is convenient to note at this juncture that during the course of hearing of this appeal, the High Court thought it fit to conduct an additional examination of both the accused persons with a reasoning as below: We have examined them to rectify the irregularity as cropped up and pointed out by the defence. The word irregularity in common English parlance means and implies contrary to rule. This Court in the case of *The Martin Burn Ltd. v. The Corporation of Calcutta*[2] while explaining the meaning of irregularity observed: A point was, however, made that Section 131 (2)(b) apply only to a cancellation on the ground of irregularity, that is a procedural defect such as, absence of notice, omission to give a hearing etc., There is, however, no reason to restrict the ordinary meaning of the word irregularity and confine it to procedural defects only. None has been advanced. Such a contention was rejected and we think rightly in 57 Calcutta W.N.882: (AIR 1953 Calcutta 773). That word clearly covers any case where a thing has not been done in the manner laid down by the statute, irrespective of what that manner might be. Blacks Law Dictionary defines the word as not according to rule and not regular i.e. which stands contrary to rule. As noticed above, the purpose of introduction of Section 391 (earlier Section 428) in the statute book has been for the purpose of making it available to the Court nor to fill up any gap in the prosecution case but to oversee that the concept of justice does not suffer. The High Court itself records to rectify the irregularity, the issue therefore, is whether this rectification by an additional evidence is a mere irregularity or goes to the root of the issue and instead of sub- serving the ends of justice, the same runs counter to the concept of justice.

5. It is at this stage however, the entire factual set up ought to be adverted to. On 19-01-1989 one Mr. Hiwanje lodged a complaint of abuses and quarrel between Sangamlal and his wife. The Appellant No.1 being the Sub-Inspector called them to the Police Station on 23-1-1989 and on their reporting at about 9.30 a.m., Appellant No.1 demanded Rs.1500 from Sangamlal for terminating the proceedings. With the intervention of the Appellant No.2 however, the demand was settled at Rs.1300/-. The complainant (PW 1) Sangamlal, however, at around 1245 hours lodged a report with the Anti Corruption Bureau and accordingly a Panchnama was drawn. One Purushottam Manapure was introduced as Panch and 13 tainted currency notes of 100 denomination were entrusted to the complainant P.W.1. The raiding party in the afternoon arranged a trap, it was however unsuccessful.

6. The factual context depicts that on 24.1.1989 at about 8.30 a.m., PW 1 Sangamlal and Panch PW 3 Manapure went to the accused No.1 in the Police Station and the later directed Sangamlal to go with the accused No.2 for the purpose of exchange of notes. Certain other factual details though available on record but can be avoided as irrelevant for the present purpose, suffice it to note that eventually the tainted currency notes in possession with the complainant reached P.W.6 Raman Wadekar and the raiding party headed by PW 9 Sub-Inspector Saraf reached the spot and seized the tainted currency notes from PW 6 Wadekar in the petrol pump. The seizure thus took place at a spot which was 2 kilometers away from the Police Station. The second Panchnama was accordingly drawn up and after necessary investigation, chargesheet was filed upon obtaining sanction from the Commissioner of Police for the launch of prosecution. The defence of the accused No.1 was of total denial and according to him, it is by reason of annoyance and vendetta that has brought the complaint into light and has no factual support therefor.

7. Incidentally, be it noted that P.W.7 Tijare, a neighbour of Sangam Lal (P.W.1) was throughout in the company of Sangamlal. Coming back to the defence once again, the Appellant No.2 also denied such an involvement and according to him, since the vehicle of one relation of P.W.7 Tijare was questioned on the road, P.W.7 has given false version against him.

8. Records depict that learned Special Judge, however, recorded a finding of acquittal on the ground that the sanction as accorded is bad in law since the Commissioner of Police, though was the appointing authority but no evidence has been laid that he was also the disciplinary authority and as such the Commissioner is not otherwise competent to accord sanction to prosecute. The High court negatived it and we do not see any reason for a different conclusion in the matter. Significantly, even the defence counsel, as has been recorded in the judgment, could not support such a reasoning. As regards the merit, the learned Special Judge held that the demand and acceptance by the Appellant No.1 have not been proved. The learned Special Judge in his judgment did mention the instance of demand on 22nd January and reached a conclusion that the same has not been proved but there has been a total omission as regards the demand on 23rd January. This aspect of the matter has been elaborately dealt with by the High Court and the High Court upon consideration of all relevant evidence came to a conclusion that taking into account the version of Sangamlal, the complainant and that of Tijare (P.W.7), there cannot be any manner of doubt that the

prosecution has fully established the demand by Appellant No.1 on 23rd January, 1989. As regards the demand and acceptance on 24th January, 1989, the High Court also negatived the finding of the learned Special Judge who reached a conclusion that the demand on 24th January, 1989 is completely untrustworthy. It is on this score, it was argued before the High Court that the factum of payment on 24th January as per the version of P.W.1 Sangamlal was not put to the accused persons in their examination under Section 313 of the Code of Criminal Procedure and as such circumstances cannot be used against the accused. It is on this count, the High Court conducted additional examination of both the accused persons in the High Court so as to rectify the irregularity as cropped up and pointed out by the defence. Before the High Court strenuous submissions made pertaining to the effect of acceptance of uncorroborated testimony, and the High Court dealt with the issue in the manner following:

> "7. There cannot be any debate on a broad proposition. Judicial prudence ordinarily look for a corroboration from an independent witness, to the version of the complainant. Undisputedly the Panch does not render corroboration to the version of the complainant on the aspect of demand on 24.1.1989. However, as discussed the circumstances and the facts of the case are peculiar. In the instant case, the demand and acceptance did not take place then and there. After the demand, as claimed, the seizure took place at a distance of 2 kilometers from the Police Station from PW 6. Between demand and seizure, the peculiarity of the case is that there were intervening events. Moreover, the prosecution does not claim direct acceptance by the accused No.1. We, therefore, propose to examine whether the circumstances which have been brought on record, render corroboration to the demand and acceptance.
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> 8. We may mention at this stage that the accused No.2 only in his statement under Section 313 of the Code of Criminal Procedure, tried to suggest that owing to his venture of kicking PW 1 Sangamlal, he lo dged a false complaint. However, during the entire cross-examination no such allegation was made to PW 1 Sangamlal. The motive as tried to be attributed, is imaginary and by way of an afterthought.
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> 9. During the course of arguments or even otherwise in the cross-examination it is not explained as to how the PW 1 complainant Sangamlal approached the accused No.2 for getting the notes changed. No suggestion was made to PW 1 Sangamlal in cross-examination on behalf of accused No.2. There was no even formal inquiry as to why and what for the complainant needed the change of the notes. It was also not suggested that the complainant in any manner was in need of the notes of smaller denominations. As such the entire claim as put forth by the accused No.2 is completely infirm. It goes to suggest that he took the mission of getting the notes changed as decided earlier. His defence that he happened to be in Shere Punjab Hotel and incidentally the complainant came there, is patently false. Taking into account the evidence of PW 1 Sangamlal, PW 3 Manapure, PW 4 Dongre, PW 5 Hadke, PW 6 Wadekar and PW 7 Tijare it is fully established that it is the accused No.2 who took the complainant for getting the notes exchanged. Even otherwise the defence has not seriously challenged the testimony of PW 4 Dongre, PW 5 Hadke and PW 6 Wadekar in this behalf."

9. Mr. Verma, the learned Senior Advocate very strognly contended that High Court had no authority or jurisdiction to examine the accused persons in the High Court to rectify the defect and the lacuna in the prosecution. The High Court records it to be a mere irregularity and on the complexities of issue, we do not see any reason as to why such a course ought not to be permitted to be taken recourse to, in the fact-situation of the matter under consideration. The omission cannot but be ascribed to be a mere irregularity. The High Court on the basis of relevant evidence on record held that the prosecution has fully established the demand by the accused No.1 on 23rd January, 1989. It is the demand of 24th January which was said to have not been put to the accused but the factum of demand on an earlier day stands proved and concluded together with the seizure of the tainted notes on 24th January, completes the offence, as such omission to put to the accused, the demand on 24th cannot be said to be of such a nature which would go to the root of the matter. It is not a defect incurable in nature but a mere irregularity which the High Court thought it fit to cure, as such we do not find any material objection to such a method as stands adopted by the High Court. The irregularity has been cured. The prosecution has clearly established that the Appellant No.1 is a public servant and in discharge of his official duties made a demand of Rs.1300/- from PW 1 Sangamlal as an illegal gratification and taking into account the evidence as is available on record, the accused No.2 also has played a very significant role in negotiating on the figure of the amount and further having the notes exchanged at the dictate of the Appellant No.1, it cannot thus but be said that the Appellant No.2 substantially abetted the crime and thus we record our agreement in the finding of the High Court that the accused persons are guilty of the offence for which they were charged and question of recording a finding of acquittal in the matter cannot by any stretch be sustained. In that view of the matter, this Appeal fails and is dismissed.

[1]*AIR 1965 SC 1887*
[2]*AIR 1966 SC 529*