SUPREME COURT OF INDIA

Hanuman Ram

Vs.

State of Rajasthan

S.L.P.(Crl.) No.7382 of 2007

(Dr. Arijit Pasayat and J.M. Panchal JJ.)

13.10.2008

JUDGMENT

Dr.Arijit Pasayat, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment of the learned Single Judge of the Rajasthan High Court, allowing the application filed by respondent nos.2 and 3. The said respondents had questioned the correctness of the order dated 14.8.2007 passed by the learned Additional Sessions Judge, (Fast Track), Parbatsar, rejecting the application made by the accused in terms of Section 311 of the *Code of Criminal Procedure, 1973* (in short `Code').

3. A brief reference to the factual aspects would suffice: The respondent nos.2 and 3 are facing trial for the commission of offences punishable under Sections 147, 452, 364, 302/149 and 201/149 of the *Indian Penal Code, 1860* (in short `IPC'). Various witnesses were examined from time to time including Nandaram (PW-5) and Bhopalaram (PW-3). Nandaram was examined and cross-examined on 21st November, and Bhopalaram was examined and cross-examined on 7th June, 2006. One of the accused Shrikant was claimed to be a minor and because of that he was tried before the Children's Court. In that case also Bhopalaram was examined as a witness on 9th January, 2007. In his evidence Bhopalaram did not support the prosecution version. Similarly, Nandaram was examined before the Children's Court sometime in November, 2006. An application was filed by the accused persons before the Trial Court in terms of Section 311 of the Code with the prayer that Nandaram and Bhopalaram may be re-summoned for cross- examination with reference to their statements before the Children's Court. The trial Court found the prayer to be not acceptable and rejected the same. An application under Section 397 read with Section 401 of the Code was filed before the High Court questioning the correctness of the order dated 14.8.2007 rejecting the application made. The High Court by its impugned judgment allowed the petition and directed the court below to recall and re-examine Bhopalaram and

Nandaram. The High Court for the purpose of accepting the prayer recorded as follows:

> "In the present case, it is not in dispute that Bhopalaram and Nandaram were examined as prosecution witnesses before the Children Court, Ajmer and their testimony in that case is certainly relevant in the case relating to the petitioners. The reliability of the witnesses is required to be examined by the Court after hearing the arguments and at this stage it shall not be appropriate to apprehend that witnesses Bhopalaram and Nandaram would have been won over. In the peculiar facts and circumstances of the case I am of considered opinion that the court below erred while rejecting the application preferred by the petitioners under Section 311 Cr.P.C. The court should have recalled Bhopalaram and Nandaram for cross examination afresh by invoking powers under Section 311 Cr.P.C."

4. Learned counsel for the appellant submitted that the High Court ought to have accepted the prayer as made because the parameters governing Section 311 of the Code had no application to the facts of the case. Learned counsel for the State supported the stand of the appellant. Learned counsel for the respondent nos. 2 and 3 submitted that ultimately the best evidence has to be brought on record for doing justice and the High Court's order, therefore, does not suffer from any infirmity.

5. Reference may be made to Section 311 of the Code which reads as follows:

> "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 if his evidence appears to it to be essential to the just decision of the case."

6. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequences, the first part gives purely discretionary authority to a Criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon any one as a witness, or (b) to examine any person present in Court, or (c) to recall and re- examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a supplementary provision enabling, and in certain circumstances imposing on the Court by duty of examining a material witness who would not be brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is

the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts.

7. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquires and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wide the power the greater is the necessity for application of judicial mind.

8. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the *Indian Evidence Act, 1872* (in short `Evidence Act'), are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.

9. The object of Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross-examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross-examine a witness who is not his own witness. Since a witness summoned

by the Court could not be termed a witness of any particular party, the Court should give the right of cross-examination to the complainant. These aspects were highlighted in *Jagat Ravi v. State of Maharashtra*[1], *Rama Paswan and Ors. v. Stateof Jharkhand*[2] *and Iddar and Ors. v. Aabida and Anr.*[3].

10. In *Mishralal and Ors. v. State of M.P. & Ors.*[4], this Court observed inter alia as follows:

> "5. The learned counsel for the appellants seriously attacked the evidence of PW 2 Mokam Singh. This witness was examined by the Sessions Judge on 6.2.1991 and cross-examined on the same day by the defence counsel. Thereafter, it seems, that on behalf of the accused persons an application was filed and PW-2 Mokam Singh was recalled. PW-2 was again examined and cross- examined on 31.7.1991. It may be noted that some of the persons who were allegedly involved in this incident were minors and their case was tried by the Juvenile Court. PW 2 Mokam Singh was also examined as a witness in the case before the Juvenile Court. In the Juvenile Court, he gave evidence to the effect that he was not aware of the persons who had attacked him and on hearing the voice of the assailants, he assumed that they were some Banjaras. Upon recalling, PW-2 Mokam Singh was confronted with the evidence he had given later before the Juvenile Court on the basis of which the accused persons were acquitted of the charge under Section 307 IPC for having made an attempt on the life of this witness."
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> 6. In our opinion, the procedure adopted by the Sessions Judge was not strictly in accordance with law. Once the witness was examined in-chief and cross-examined fully, such witness should not have been recalled and re-examined to deny the evidence he had already given before the court, even though that witness had given an inconsistent statement before any other court or forum subsequently. A witness could be confronted only with a previous statement made by him. At the time of examination of PW-2 Mokam Singh on 6.2.1991, there was no such previous statement and the defence counsel did not confront him with any statement alleged to have been made previously. This witness must have given some other version before the Juvenile Court for extraneous reasons and he should not have been given a further opportunity at a later stage to completely efface the evidence already given by him under oath. The courts have to follow the procedures strictly and cannot allow a witness to escape the legal action for giving false evidence before the court on mere explanation that he had given it under the pressure of the police or some other reason. Whenever the witness speaks falsehood in the court, and it is proved satisfactorily, the court should take a serious action against such witnesses."

11. The factual scenario in Mishri Lal's case (supra) has great imilarity with the facts of the present case. The High Court's view for accepting the prayer in terms of Section 311 of the Code does not have any legal foundation. In the facts of the case, the High Court ought not to have accepted the prayer made by the accused persons in terms of Section 311 of the Code. Above being the position, we set aside the impugned order of the High Court.

12. The appeal is allowed accordingly.

[1] *(AIR 1968 SC 178)*
[2] *(2007 (11) SCC 191)*
[3] *(2007 (11) SCC 211)*
[4] *(2005 (10) SCC 701)*