

ORISSA HIGH COURT

Ratnakar Das

Vs

State (State)

Criminal Revn. No. 268 of 1965

(G.K. Misra, J.)

22.09.1965

ORDER

(G.K. Misra, J.)

1. This Revision arises out of G.R. Case No. 595 of 1963. It has a chequered career. Information to the police was given by the complainant on 28-3-63 about an occurrence of 27-3-63 at about 11 P.M. Police submitted a final report. On a protest being filed by the complainant, charge sheet u/ss. 147/323 I.P.C. was called for against all the accused. The trial proceeded. On 4-3-64 Sri V.S. Rao, Magistrate, 1st Class, acquitted all the accused holding that the trial was illegal and without jurisdiction. The police did not challenge this order. In Cr. Rev. 167 of 1964 filed by the complainant, this order was quashed and the learned Magistrate was directed to proceed with the trial in accordance with law. Though a Prosecuting Inspector is in charge of the case, the learned Magistrate has permitted an advocate of the complainant to conduct the case. In fact the main responsibility in the conduct of the case for the prosecution appears to be in the Advocate engaged by the complainant. On 28-4-65 the advocate for the complainant filed an application making the following allegations –

- (1) That in the above case the police having been gained over by the accused persons submitted a final report and the informant had to move the S.D.O. for calling for a charge-sheet.
- (2) That the police during their investigation had examined M/s. Tikam Parida and Satyananda Naik who have proved the informant's case and as the Police were gained over by the accused persons their names have been clearly omitted in the charge-sheet.
- (3) That the aforesaid Tikam Parida and Satyananda Naik are important witnesses for the prosecution and it is just and expedient that they should be summoned as P.Ws. or as C.Ws.

Prayer : The aforesaid Tikam Parida and Satyananda Naik be summoned as either P.Ws. or C.Ws. The petition has been labelled as one under Section 540 C.P.C.

On his application the following order was passed by the learned Magistrate on 28th April 1965 :-

"Heard both P. I. and the lawyer engaged by the injured. Heard also the lawyer for accused. Perused the case diary. But could not find out therein the name of these two persons sought to be examined. I. O. did not examine them during investigation it seems and for that it may be said that they did not witness the occurrence. So now at such a late stage it will not serve any useful purpose if the said persons are examined at the instance of the complainant. Moreover, the petition for examining the said persons is not filed by P. I. The private lawyer has not obtained the consent of the P. I. even to assist him in the matter. So on this count the petition is also incompetent. In the result I dismiss the petition and put up the case to 15th May 1965 for accused's statement."

Against this order the Criminal Revision has been filed. The grounds which were taken in the application before the Magistrate have also been taken in the revision application.

2. Mr. Misra urges that without applying his mind to the facts and circumstances of this case and the contents of the petition, the learned Magistrate passed the aforesaid order and that it should be set aside.

3. On analysis of the order of the Magistrate it would appear that the application to examine two more witnesses was rejected on 2 grounds - (1) that the advocate appearing privately for the complainant, did not obtain consent of the Prosecuting Inspector in presenting the application and (2) that the two witnesses, sought to be examined, had not been examined by the Investigating Officer during investigation and so it can be said that they did not witness the occurrence.

4. Both the grounds require careful examination. Section 493, Criminal Procedure Code reads, thus :- The public prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal, and if any private person instructs a pleader to prosecute in any court any person in any such case, the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein, under his directions. In a case prosecuted by the Police, the Prosecuting Inspector alone is competent to conduct the prosecution. If any pleader is engaged by the complainant, he shall act under the direction of the Public Prosecutor. The Advocate so engaged has no independent status of his own. He cannot conduct the prosecution unless so allowed by the Public Prosecutor. No exception can be taken to this view based on the plain language of the Section.

In AIR 1949 Allahabad 213 an exception was laid down. Their Lordships held :-

"But where the Crown is taking no interest in any particular matter the complainant can take action if not prevented by law from doing so. An illustration of a case in which a complainant is prevented from taking action may be found in the power to appeal from an order of acquittal. This power is reserved for the Crown alone and as such a complainant has no power. The Criminal Procedure Code does not, however, prevent a complainant from applying in revision.

It is necessary to examine whether in the facts and circumstances of this case it can be held that the Prosecuting Inspector was not taking any interest in the case, or at any rate, he has throughout allowed the advocate for the complainant to conduct the case. A reference to the judgment in Cr. Rev. 167 of 1964 would show that though Shri V.S. Rao Magistrate, illegally and without jurisdiction acquitted the accused, the Prosecuting Inspector did not choose to advise the filing of an appeal or revision against the order of acquittal which was set aside in revision at the instance of the complainant. It appears from the materials on record that Shri A.K. Rao, Advocate for the complainant, was throughout allowed to conduct the prosecution and the Prosecuting Inspector did not take any active part. The learned Magistrate was, therefore, wrong in saying that the private lawyer had not obtained consent from the prosecuting inspector to assist him in the case. Further, though the Prosecuting Inspector was heard on the application, there is nothing in the order-sheet to indicate that he took objection to the examination of the two witnesses, in question. The prosecuting inspector also did not challenge the statements made in the application that these two witnesses were examined during investigation. In the facts and circumstances of this case I am satisfied that the Prosecuting Inspector was not taking any interest in the prosecution of this case, or at any rate, he had permitted the private advocate to conduct the case delegating himself to the background. In the circumstances the application should not have been rejected on this ground.

5. Coming to the second reasoning, it is somewhat regrettable that the learned Magistrate never applied his mind to the facts of the case. The statement of the complainant that these two witnesses were examined during investigation, but their statements were not recorded by the investigating Officer has not been repelled by the learned Magistrate. It is this aspect of the matter on which he should have concentrated and not on the admitted position that their statements had not been recorded. The prosecuting inspector did not venture to make a statement before the Court that these two witnesses had not been examined during investigation. The reasoning of the learned Magistrate that it may be said that these witnesses did not see the occurrence as their statements were not recorded, is equally fantastic. Section 161(3), Criminal Procedure Code makes it clear that the Police Officer may reduce into writing any statement made to him in the course of an examination under this section, and if he does so he shall make a separate record of the statement of each such person whose statement he records. (See AIR 1964 SC 286). Even after the commencement of the trial the prosecution may give additional evidence in usual way provided the accused gets full opportunity to cross-examine the prosecution witnesses. Section 251-A(7), Criminal Procedure Code lays down that on the date so fixed, the Magistrate shall proceed to take all such evidence as may be produced in support of the

prosecution. In AIR 1960 Orissa 150, the expression "all evidence" in this Sub-Section was construed to include documentary evidence also. Some documents which were not available during Police investigation may become relevant and may have to be produced subsequently. There is, therefore, no bar under the law to allow the examination of the two witnesses.

6. The application has been labelled as one under Section 540 Criminal Procedure Code which enacts that 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 already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case. The learned Magistrate did not apply his mind whether the evidence of those witnesses, sought to be examined, was essential to the just decision of the case. If the complainant's version is accepted that they were eye-witnesses, their examination is essential to the just decision of the case. The learned Government Advocate fairly conceded that the learned Magistrate did not apply his mind properly and that he would have no objection to the examination of these witnesses.

7. For reasons already discussed the order of the learned Magistrate dated 28th April 1965 is hereby quashed. The revision is, allowed. The Magistrate is directed to examine those two witnesses and to dispose of the case without unnecessarily prolonging the matter.

Petition allowed.