AIR 1999 SUPREME COURT 2292 "Rajendra Prasad v. Narcotic Cell, Delhi"
= 1999 AIR SCW 2356
(From : Delhi)*
Coram : 2 K. T. THOMAS AND M. B. SHAH, JJ.
Criminal Appeal No. 621 of 1999, (arising out of Special Leave Petn. (Cri.) No. 1333 of 1999), D/- 12 -7 -1999.
Rajendra Prasad, Appellant v. Narcotic Cell through its Officer-in-charge, Delhi, Respondent.
Criminal P.C. (2 of 1974), S.311 - WITNESS - Re- examination of prosecution witnesses - Cannot be permitted merely for filling up lacuna in prosecution evidence - Mistakes or laches in conducting case by public prosecutor - Cannot be understood to mean lacuna in prosecution case.
The contention that the Court cannot exercise power of re-summoning any witness if once that power was exercised, cannot be countenaced as a legal proposition, nor can the power be whittled down merely on the ground that prosecution discovered laches only when the defence highlighted them during final arguments. The power of the Court is plenary to summon or even recall any witness at any stage of the case if the Court considers it necessary for a just decision. (Para 11)
Therefore, where there was negligence on the part of Public Prosecutor as he closed evidence twice without verifying whether cross examination of all the witnesses has been concluded or not and therefore in the interest of justice the application to the extent that prosecution witness be recalled for cross examination was allowed by trial Court and other witnesses were permitted to be re-summoned for purposes of proving certain documents for prosecution, the steps which the trial Court permitted for resummoning certain witnesses cannot therefore be spurned down nor frowned at. (Para 11)
The conventional concept is that Court should not permit lacuna in prosecution evidence to be filled up. But, then what is meant by lacuna in a prosecution case has to be understood before deciding the case. A lacuna in prosecution is not to be equated with the fall out of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are proned. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a Court cannot fill up. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be fore-closed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better. (Paras 6, 7)
Cases Referred : Chronological Paras
Mohanlal Shamji Soni v. Union of India AIR 1991 SC 1346 : 1991 Cri LJ 1521 5, 8
Ram Chander v. State of Haryana AIR 1981 SC 1036 : 1981 Cri LJ 609 10

Jamatraj Kewalji Govani v. State of Maharashtra, AIR 1968 SC 178 : (1967) 3 SCR 415 : 1968 Cri LJ 231 9
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Manoj Swarup, Ms. Lalita Kohli, Ms. Maulini Swarup Advocates, for M/s. Manoj Swarup and Co. Advocates, for Appellant.
* Cri. R. No. 64 of 1999, D/- 23-2-1999 (Delhi).
Judgement
THOMAS J. :- Leave granted.
2. Can a trial Court permit lacuna in prosecution evidence filled up ? The conventional concept is that the Court should not do so. But then, what is meant by lacuna in a prosecution case, has to be understood before deciding the said question one way or the other.
3. The present case provides an occasion to decide the said question. Appellant is now facing trial along with certain other persons before a Court of sessions for offences under Sections 21, 25 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Appellant is now on bail pursuant to an order granted by the High Court of Delhi. As the trial proceeded almost to the end when the prosecution and the defence closed their evidence on 19-9-1997, the case was posted for further steps. Nevertheless, subsequently, the case stood posted to some other days also. On 7-3-1998, at the instance of the prosecution two of the witnesses, who were already examined, were re-summoned for the purpose of proving certain documents for prosecution. They were further examined and the evidence was once again closed and the case was posted for hearing arguments. It appears that arguments were heard in piecemeal on different days. On 7-6-1998, the Public Prosecutor moved an application seeking permission to examine PW-21 (Dalip Singh-SI) and two other persons. Though the application was stoutly opposed by the accused's counsel the trial Court allowed it in exercise of its power under Section 311 of the Code of Criminal Procedure (for short 'the Code') and summons were issued to the witnesses as per its order dated 8-1-1999.
The relevant portion of that order of the trial Court is the following:
"In order to find out whether the CFSL Form accompanied the sample packet or not, it has been repeatedly held by the Hon'ble High Court that the Road Certificate should be produced to make things clear in this respect. It cannot be denied that it is an old case and directions have been issued several times to expedite the trial but at the same time when the witnesses are available the prosecution cannot be debarred by examining him. In the present case, cross examination of PW-4 was deferred by learned Additional Public Prosecutor. Cross examination of PW-21 by the Defence Counsel was deferred but thereafter he was never summoned for cross examination. There was negligence on the part of Public Prosecutor as he closed evidence twice without verifying whether cross examination of all the witnesses has been concluded or not. However, in the interest of justice, I allow the application to the extent that PW-21 Dalip Singh be recalled for cross examination. The interest of justice demands that things should be clear before the Court to assist it to meet the ends of justice."
4. Appellant challenged the said order in revision before the High Court of Delhi. As it was an interlocutory order the question whether a revision was not maintainable as per Section 397(2) of the Code was not considered by the High Court. Nevertheless, the High

Court entertained the revision and dismissed it as per the impugned order. According to the learned single Judge who dismissed the revision "there are certain circumstances which have been mentioned in the order of the sessions Judge which forced him to pass the order."

5. Learned counsel for the appellants contended that the trial Court failed to appreciate that in the garb of exercise of powers under Section 311 of the Code a Court cannot allow the prosecution to re-examine prosecution witnesses in order to fill up lacuna in the case. Lacunae, as pointed out by the learned counsel, were the following:

(a) PW-21 Dalip Singh was never tendered by the prosecution for cross examination.

(b) PW-4 Suresh Chand Sharma was also not cross examined by the State.

(c) There was no link evidence to correct the testimony of PW-28 H/C Jai Prakash. That aspect was highlighted during arguments in the trial Court, before the Court resorted to the impugned steps.

The above contention was based on the observation made by this Court in, Mohanlal Shamji Soni v. Union of India, AIR 1991 SC 1346 : (1991 Cri LJ 1521), that the Court while exercising its power under Section 311 of the Code shall not use such power 'for filling up the lacuna left by the prosecution.'

6. It is a common experience in criminal Courts that defence counsel would raise objections

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whenever Courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act by saying that the Court could not 'fill the lacuna in the prosecution case.' A lacuna in prosecution is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are proned. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as the lacuna which a Court cannot fill up.

7. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting, errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

8. The very same decision, Mohanlal Shamji Soni v. Union of India, AIR 1991 SC 1346 : 1999 Cri LJ 1521 (supra), which cautioned against filling up lacuna has also laid down the ratio thus (Para 27):

"It is therefore clear that the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.'

9. Dealing with the corresponding section in the old Code (Section 540) Hidaya-tullah, J. (as the learned Chief Justice then was) speaking for a three-Judge bench of this Court had said in, Jamatraj Kewalji Govani v. State of Maharashtra, (1967) 3 SCR 415 : (AIR 1968 SC 178 : 1968 Cri LJ 231), as follows (Para 14 of AIR and Cri LJ):

"It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in Court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the Court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the Court is right in thinking that the new evidence is necessary by it for a just decision of the case."

10. Chinnappa Reddy, J. has also observed in the same tone in, Ram Chander v. State of Haryana, AIR 1981 SC 1036 : (1981 Cri LJ 609).

11. We cannot therefore accept the contention of the appellant as a legal proposition that the Court cannot exercise power of re-summoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that prosecution discovered laches only when the defence highlighted them during final arguments. The power of the Court is plenary to summon or even recall any witness at any stage of the case if the Court considers it necessary for a just decision. The steps which the trial Court permitted in this case for re-summoning certain witnesses cannot therefore be spurned down nor frowned at.

12. The appeal is accordingly dismissed.

Appeal dismissed.