SHAILENDRA KUMAR

v.

STATE OF BIHAR AND ORS.

NOVEMBER 28, 2001

[M.B. SHAH, B.N. AGRAWAL AND ARIJIT PASAYAT, JJ.]

Criminal Trial :

Trial of murder case—It is the duty of the Trial Judge to issue summons to the Investigating Officer, if witnesses failed to remain present during trial of a case.

Criminal Procedure Code, 1973 :

Section 311—Powers under—It empowers the Court to summon material witnesses though not summoned as witness and to examine or recall or re-examine if their evidence appears to be essential to the just decision of the case—It is of very wide amplitude—Court could examine witnesses at any stage.

Mother of the appellant was allegedly done to death by the accused armed with lethal weapons and forming unlawful assembly. FIR was lodged against the accused persons. The case was taken up for trial and charges for the offence punishable under Sections 148, 149, 323, 449 and 302 I.P.C. were framed against the accused persons.

The Sessions Judge after examining the formal witnesses closed the prosecution evidence on the ground that APP has not prayed for examining other witnesses. The prosecution filed an application for transferring the case from the Court of the said Sessions Judge, who had superannuated and the case was transferred to the Court of another Sessions Judge, who recalled the earlier order and directed the APP to produce the witnesses on the next date of hearing. The accused challenged it by filing Revision Petition. The High Court allowed it on the ground that a criminal Court cannot recall its earlier order.

State filed an application under Section 311 of the Code of Criminal

A **Procedure for examining the witnesses. The Additional Sessions Judge rejected it. However, at the hearing, APP remained absent. The appellant-informant preferred Criminal Misc. Petition which was dismissed by the High Court.**

B **In this appeal, the said Order passed by the High Court was challenged. The Officer-in-Charge of the Police Station submitted that he was never served with notice or summon by any Court of law or any other agency including APP. to bring the witness upto the trial Court.**

Allowing the appeal, the Court

C

HELD : 1.1. In a murder trial it is sordid and repulsive matter that without informing the Officer-in-Charge of the Police Station, the matters were proceeded by the Court and by the APP and tried to be disposed of as if the prosecution has not led any evidence. It appears that accused wants to

D **frustrate the prosecution by unjustified means and the Additional Sessions Judge as well as APP have not taken any interest in discharge of their duties. It was the duty of the Sessions Judge to issue Summons to the investigating Officer if he failed to remain present at the time of trial of the case. It should be well understood that prosecution cannot be frustrated by such methods and victim of the crime cannot be left in lurch. [374-G-H; 375-A-B]**

E

1.2. Section 311, Cr. P.C. empowers the Court to summon material witnesses though not summoned as witness and to examine or recall and re-examine if their evidence appears to it, be essential to the just decision or the case; that it is of very wide amplitude and if there is any negligence,

F **laches or mistakes by not examining material witnesses, the Courts function to render just decision by examining such witnesses at any stage is not, in any way, impaired. [375-C-D-F]**

Rajendra Prasad **v.** *Narcotic Cell*, **[1999] 6 SCC 110, relied on.**

G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1218 of 2001.

From the Judgment and Order dated 3.7.2000 of the Patna High Court in Crl. M. No. 16453 of 2000.

H Ms. Kamakshi S. Mehlwal, for the appellant.

B.B. Singh and Shiva Pujan Singh for the Respondents. A

The Judgment of the Court was delivered by

SHAH, J. Leave granted.

This appeal has been filed against the judgment and order dated 03.7.2000 B passed by the High Court of Patna in Crl. Misc. No.16453 of 2000 confirming the order dated 2.6.2000 passed by the Additional Sessions Judge, Gaya.

It is the contention of the appellant that his mother was done to death by the accused by forming unlawful assembly who were armed with lethal C weapons. FIR was lodged with Bodh Gaya police station on 9.10.1991 against 15 named accused and 25 to 30 unknown persons. On 27.8.1993 the case was taken up for trial by the 5th Additional Sessions Judge, Gaya in Sessions Trial No. 24 of 1993. Charges were framed against the accused persons on 27.8.1993 for the offence punishable under Sections 148, 149, 323, 449 and 302 IPC. D

After examining two or three formal witnesses, the learned Sessions Judge closed the evidence of prosecution on the ground that APP has not made any prayer either oral or written for adjournment or for examining other witnesses. The prosecution evidence was declared to have been closed and the E matter was fixed for recording the statement of accused.

Thereafter, the prosecution filed an application for transferring the case from the Court of 5th Addl. Sessions Judge. However, the 5th Addl. Sessions Judge was superannuated and the case was transferred to 2nd Addl. Sessions Judge, Gaya, who by his order dated 20.9.1995 was pleased to recall order F dated 3.9.1994 passed by the 5th Addl. Sessions Judge, Gaya by which the prosecution evidence was directed to be closed. He also directed the APP to produce the witnesses on the next date of hearing.

That order was challenged by the accused by filing Criminal Revision G No. 530 of 1995 before the High Court of Patna. The High Court vide its order dated 1.2.2000 allowed the revision application on the ground that "it is well settled that criminal court can not recall his earlier order".

Again on 12.5.2000 the State filed an application under Section 311 of H

A Code of Criminal Procedure before the Addl. Sessions Judge, Gaya for examining the witnesses. That application was rejected by order 2.6.2000 on the ground that application by the State has no meaning in view of the order passed by the High Court in revision application. At the time of hearing of that application, APP remained absent. Thereafter, the appellant-informant pre-
B ferred Criminal Misc. No.16453 of 2000 before the High Court. That application was also dismissed by impugned judgment on the ground that it was not proper for the High Court to interfere with the order passed by the Sessions Judge. That order is challenged by filing this appeal, wherein it has been contended that the previous order passed by the High Court on dated 1.2.2000
C is on the face of it illegal, erroneous and against the provisions of Cr.P.C.

In counter filed by officer-in-charge of Bodh Gaya Police Station, District Gaya, it has been pointed out that the concerned Investigating Officers, at present, are not posted at Bodh Gaya Police Station and even in other police stations within the District of Gaya. He specifically states, "it is submitted that
D he was never served with notice or summon or in no way communicated by the Court of law or any other agency including APP. to bring the witness up to the trial court." He also stated that after perusing the entire relevant record and registers at the office of Bodh Gaya police station, Gaya he has not found any summon or any sort of notice concerning the case under reference received
E by his office. In paragraph no.9, he has clarified that after investigation it was found that summons were issued against witnesses no.1 to 3 through Nazir of Civil Court, Gaya but surprisingly enough the said summons were never moved to the police station Bodh Gaya. It is his further say that if opportunity is given, the witnesses named in the charge-sheet could be brought before the
F court either by issue of notices or summons and he will make his best efforts to produce the witnesses before the concerned court within reasonable time.

In our view, in a murder trial it is sordid and repulsive matter that without informing the police station officer-in-charge, the matters are proceeded by the
G Court and by the APP and tried to be disposed of as if the prosecution has not led any evidence. From the facts stated above, it appears that accused wants to frustrate the prosecution by unjustified means and it appears that by one way or the other the Addl. Sessions Judge as well as the APP have not taken any interest in discharge of their duties. It was the duty of the Sessions Judge to
H issue summons to the investigating officer if he failed to remain present at the

A Cr.P.C. is allowed. The Sessions Judge is directed to proceed with the matter on day to day basis by strictly adhering to Section 309 Cr.P.C, and directing the officer-in-charge of police station Bodh Gaya to keep witnesses present in the court for their examination.

S.K.S. Appeal allowed.

time of trial of the case. The presence of investigating officer at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on part of any witness to remain present, it is the duty of the Court to take appropriate action including issuance of bailable/non-bailable warrants as the case may be. It should be well understood that prosecution cannot be frustrated by such methods and victims of the crime cannot be left in lurch.

Learned counsel for the respondent-accused however submitted that in this case there is no question of referring to Section 311 Cr.P.C., in view of earlier order dated 1.2.2000 passed by the High Court setting aside the order dated 20.9.1995 passed by the Additional Sessions Judge recalling the order dated 3.9.1994 by which the prosecution evidence was declared to have been closed. This submission is without any substance. Section 311 empowers the Court to summon material witnesses though not summoned as witness and to examine or recall and re-examine if their evidence appears to it to be essential to the just decision of the case. It reads thus:-

> *"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 already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.*"

Bare reading of the aforesaid section reveals that it is of very wide amplitude and if there is any negligence, laches or mistakes by not examining material witnesses, the Courts function to render just decision by examining such witnesses at any stage is not, in any way, impaired. This Court in *Rajendra Prasad* v. *Narcotic Cell,* [1999] 6 SCC 110 observed, "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".

In this view of the matter, appeal is allowed. Impugned order passed by the High Court confirming the order dated 2.6.2000 of Additional Sessions Judge, Gaya is set aside. Application filed by the State under Section 311