Mannan Sk & Ors vs State Of West Bengal & Anr on 3 July, 2014

Equivalent citations: AIR 2014 SUPREME COURT 2950, 2014 (13) SCC 59, 2014 AIR SCW 4372, AIR 2014 SC (CRIMINAL) 1776, 2014 CALCRILR 3 655, (2014) 4 DLT(CRL) 867, (2014) 3 CAL LJ 93, (2014) 4 CALLT 13, (2014) 4 JCR 5 (SC), 2014 ALLMR(CRI) 4463, (2014) 2 UC 1497, (2014) 4 CRIMES 119, 2014 CRILR(SC MAH GUJ) 808, (2014) 4 ALLCRILR 111, (2014) 3 CRILR(RAJ) 808, (2014) 87 ALLCRIC 328, 2014 CRILR(SC&MP) 808, (2014) 4 CRIMES 241, (2014) 3 PAT LJR 494, (2014) 142 ALLINDCAS 236 (SC), (2014) 4 RECCRIR 617, 2014 (8) SCALE 187, (2014) 3 CURCRIR 354, (2014) 4 MAD LJ(CRI) 82, (2014) 58 OCR 983, (2014) 3 ALLCRIR 2582, (2014) 8 SCALE 187, (2014) 3 JLJR 394, (2014) 3 BOMCR(CRI) 399

Bench: N.V. Ramana, Ranjana Prakash Desai

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1307 OF 2014
[Arising out of Special Leave Petition (Crl.) No.8395 of 2012]

Mannan Sk & Ors. ... Appellants

Vs.

State of West Bengal & Anr. … Respondents

J U D G M E N T

(SMT.) RANJANA PRAKASH DESAI, J.

1. Leave granted.

2. In this appeal order dated 11/5/2012 passed by the High Court of Calcutta is under challenge. By the impugned order the High Court reversed the trial court's order which had rejected the application filed by the prosecution under Section 311 of the Code of Criminal Procedure, 1973 (for short, 'the code') to recall the Investigating Officer.

3 A petty altercation over a tape recorder resulted in a major incident in which bombs were hurled at Rupchand Sk – the father of PW8-Nurul Islam. Incident occurred on 13/12/1992. Rupchand Sk

suffered grievous injuries. He was taken to a local hospital. From there he was shifted to Berhampore hospital where he breathed his last. On 14/12/1992 a complaint was lodged by the son of deceased Rupchand Sk - PW8-Nurul Islam with Raghunathpur Police Station on the basis of which FIR was registered. In the FIR PW8- Nurul Islam named nine persons. Initially the case was registered under Sections 447, 326 read with Section 34 of the Penal Code and Sections 3 and 4 of the Explosives Substances Act. After the death of Rupchand Sk, Section 304 of the Penal Code was added.

4. After the charges were framed the trial began. PW15-SI Dayal Mukherjee, the Investigating Officer, was examined on 18/2/2011. He was re- examined on 17/5/2011. He stated in his evidence that he had recorded deceased Rupchand Sk's statement at the scene of offence. In the cross-examination he stated that he had recorded one page statement of deceased Rupchand Sk. This statement was not brought on record.

5. One month thereafter on 16/6/2011 the prosecution moved an application for recalling PW15-SI Dayal Mukherjee because the prosecution wanted to bring on record statement of deceased Rupchand Sk which it had inadvertently omitted to do. Needless to say that it is the prosecution case that after death of Rupchand Sk the said statement became his dying declaration.

6. The trial court vide order dated 22/6/2011 rejected the said application. The trial court observed that the case was at the stage of argument and no explanation was given by the prosecution as to why the statement of deceased Rupchand Sk was not brought on record by the Investigating Officer. The trial court noted that PW15-SI Dayal Mukherjee was examined on 18/2/2011 and re-examined on 17/5/2011. According to the trial court if the prosecution is allowed to recall PW15-SI Dayal Mukherjee that would enable the prosecution to fill-up the lacuna. The trial court relied on State of Rajasthan v. Doulat Ram[1] and Mohan Lal Shamji Soni v. Union of India[2]. The trial court observed that re-examination of PW15- SI Dayal Mukherjee is not essential for the just decision of the case.

7. Being aggrieved by this order the complainant filed an application under Section 401 read with Section 482 of the Code in the High Court. The High Court reversed the trial court's order. The High Court observed that non-exhibiting of the statement of deceased Rupchand Sk was mistake of the prosecution and no advantage can flow from the said mistake to the accused. The High Court further observed that existence of the statement was known to the accused and, hence, no prejudice would be caused to them. The said order is challenged in this appeal by the appellants-accused.

8. We have heard learned counsel for the parties at some length. We have perused their written submissions. Mr. Pijush K. Roy, learned counsel for the appellants submitted that the incident took place 22 years back. The statements of witnesses were recorded under Section 161 of the Code within a week from the date of incident. The Investigating Officer was examined and cross-examined. The case is set for final arguments and, therefore, it would be unjust and unfair to recall the Investigating Officer. His recall would cause serious prejudice to the appellants. This is clearly an attempt to fill-up the lacuna which should not be allowed. Counsel further submitted that PW15-SI Dayal Mukherjee has retired from the service in the year 2010 and he is presently about 68 years of

age. He might have forgotten the entire episode. It will be easy for the complainant to tutor him. Counsel submitted that Section 311 of the Code is not meant for putting the accused in a disadvantageous position. This would lead to miscarriage of justice. In support of his submissions counsel relied on Chandran v. State of Kerala[3], State of Rajasthan v. Daulat Ram, Mohan Lal Shamji Soni v. Union of India & Ors, Mishrilal and ors. v. State of M.P. and ors[4], Mir Mohammad Omar and ors. v. State of West Bengal[5].

9. Mr. Anip Sachthey, learned counsel appearing for the State of West Bengal on the other hand submitted that the application was made just one month after the re-examination of the Investigating Officer. Therefore, there is no delay in recalling him. Statement of deceased Rupchand Sk was not exhibited due to inadvertence and hence for just decision of the case it is essential to recall the Investigating Officer. Counsel submitted that this would not amount to filling-up the lacuna. In support of his submissions counsel relied on P. Sanjeeva Rao v. State of Andhra Pradesh[6], Hanuman Ram v. State of Rajasthan & Ors[7]., Rajendra Prasad v. Narcotic Cell[8] and Mohanlal Shamji Soni

10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammeled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine.

11. Rather than referring to all the judgments which are cited before us, we would concentrate on Mohanlal Soni which takes into consideration relevant judgments on the scope of Section 311 and lays down the principles. Mohanlal Soni is followed in all subsequent judgments. In Mohanlal Soni this Court was considered the scope of Section 540 of the Code of Criminal Procedure, 1898 (the old code) which is similar to Section 311 of the Code. This Court observed that it is a cardinal rule in the law of evidence that the best available evidence should be brought before the court to prove a fact or the points in issue. The relevant observations of this Court are as under:

> "... ... ...In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated." This Court further observed as under:
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> "... ... ... Though Section 540 (Section 311 of the new Code) is, 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 they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that due care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties."

12. While dealing with Section 311 of the Code in Rajendra Prasad this Court explained what is lacuna in the prosecution as under:

> "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 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."

13. Reference must also be made to the observations of this Court in Zahira Habibulla H. Sheikh and anr. v. State of Gujarat and ors[9] where this Court described the scope of Section 311 of the Code as under:

> "Object of the Section is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth."

14. If we view the present case in light of the above judgments, we will have to sustain the High Court's order. PW15-SI Dayal Mukherjee stated in the court that he had recorded the statement of deceased Rupchand Sk. Thus, this fact was known to the defence. He was cross-examined by the defence. Inadvertently, the said statement was not brought on record through PW15-SI Dayal Mukherjee. Rupchand Sk died after the said statement was recorded. The said statement, therefore, became very vital to the prosecution. It is obvious that the prosecution wants to treat it as a dying declaration. Undoubtedly, therefore, it is an essential material to the just decision of the case. Though, the fact of the recording of this statement is deposed to by PW15-SI Dayal Mukherjee, since due to oversight it was not brought on record, application was made under Section 311 of the Code praying for recall of PW15-SI Dayal Mukherjee. This cannot be termed as an inherent weakness or a latent wedge in the matrix of the prosecution case. No material is tried to be brought on record surreptitiously to fill-up the lacuna. Since the accused knew that such a statement was recorded by PW15-SI Dayal Mukherjee, no prejudice can be said to have been caused to the accused, who will undoubtedly get a chance to cross-examine PW15-SI Dayal Mukherjee.

15. It is true that PW15-SI Dayal Mukherjee was once recalled but that does not matter. It does not prevent his further recall. Section 311 of the Code does not put any such limitation on the court. He can still be recalled if his evidence appears to the court to be essential to the just decision of the case. In this connection we must revisit Rajendra Prasad where this Court has clarified that the court can exercise power of re- summoning any witness even if it has exercised the said power earlier. Relevant observations of this Court run as under:

> "We cannot therefore accept the contention of the appellant as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that the 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 resummoning certain witnesses cannot therefore be spurned down or frowned at."

16. It was strenuously contended that the incident had taken place on 13/12/1992 and, therefore, the application made after a gap of 22 years must be rejected. This submission must be rejected because PW15-SI Dayal Mukherjee was re-examined on 17/5/2011 and application for his recall was made just one month thereafter. It is true that the incident is dated 13/12/1992 and the trial commenced in 2001. These are systemic delays which are indeed distressing. But once the trial began and the

Investigating Officer was re-examined on 17/5/2011, the prosecution made an application for recall just one month thereafter. There was no delay at that stage. The submissions that PW15-SI Dayal Mukherjee has grown old; that his memory must not be serving him right; that he can be tutored are conjectural in nature. In any case, the accused have a right to cross- examine PW15-SI Dayal Mukherjee. The accused are, therefore, not placed in a disadvantageous position.

17. We must now turn to the judgments cited by the appellants. In State of Rajasthan v. Daulat Ram this Court was dealing with an appeal from an order of acquittal. The prosecution had not proved beyond reasonable doubt that the opium seized was the opium which was sent to the public analyst. At the trial the prosecution had made an application under Section 540 of the old Code (Section 311 of the Code) for summoning three persons under whose custody the seized samples were kept. It was rejected by the trial court. An application was made before the High Court for additional evidence which was later withdrawn. This Court commented on the vacillating approach of the State and observed that the prosecution should not be allowed to fill-up the lacunae left at the trial, at the appellate or revisional stage. This case turns on its own facts and has no application to the present case.

18. Mishrilal, on which reliance is placed by the appellants, has also no application to this case. In Mishrilal a witness was examined and cross- examined in a murder trial on the same day. In Juvenile Court where some of the juveniles were tried, he gave evidence subsequently. He stated that he was not aware as to who attacked him. He was recalled by the Sessions Court and confronted with the statement given by him before the Juvenile Court on the basis of which the accused were acquitted. This Court did not approve of the procedure adopted by the Sessions Court. This Court observed that a witness could be confronted only with a previous statement made by him. The day on which he was first examined in the Sessions Court, there was no such previous statement. This Court observed that the witness must have given some other version before Juvenile Court for some extraneous reasons. He should not have been given an opportunity at a later stage to completely efface the evidence already given by him under oath. It is the wrong procedure and attempt to efface evidence which persuaded this Court to observe that 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 which he had already given in the court even though he had given an inconsistent statement before any other court subsequently. It is pertinent to note that this Court did not discuss Section 311 of the Code.

19. Mir Mohd. Omar has no application to this case as it deals with a totally different fact situation. In that case this Court has not considered Section 311 at all.

20. In the ultimate analysis we must record that the impugned order merits no interference. We must, however, clarify that oversight of the prosecution is not appreciated by us. But cause of justice must not be allowed to suffer because of the oversight of the prosecution. We also make it clear that whether deceased Rupchand Sk's statement recorded by PW15-SI Dayal Mukherjee is a dying declaration or not, what is its evidentiary value are questions on which we have not expressed any opinion. If any observation of ours directly or indirectly touches upon this aspect, we make it clear that it is not our final opinion. The trial court seized of the case shall deal with it independently.

21. In the result the appeal is dismissed. Needless to say that the interim orders passed by this Court on 15/10/2012, 03/05/2013 and 27/01/2014 staying the impugned order dated 11/05/2012 passed by the Calcutta High Court in CRR No. 2385 of 2011 are vacated. The trial court shall proceed with the case and ensure that it is concluded at the earliest.

.....J. [Ranjana Prakash Desai] .....J. [N.V. Ramana] New Delhi July 3, 2014

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[1] AIR 1980 SC 1314
[2] AIR 1991 SC 1346
[3] (1985) Cr L.J. 1288
[4] 2005(10) SCC 701
[5] 1989 (4) SCC 436
[6] 2012(7) SCC 56
[7] 2008(15) SCC 652
[8] 1999(6) SCC 110
[9] (2004) 4 SCC 158
