P.Sanjeeva Rao vs State Of A.P on 2 July, 2012

Equivalent citations: AIR 2012 SUPREME COURT 2242, 2012 (7) SCC 56, 2013 AIR SCW 492, 2012 (3) ALL LJ 73, (2013) 1 BOMCR(CRI) 235, 2012 (3) CALCRILR 10, (2012) 95 ALL LR 25, 2012 (6) SCALE 9, 2012 (3) SCC(CRI) 1, (2012) 116 ALLINDCAS 123 (SC), (2012) 4 MH LJ (CRI) 442, 2012 CALCRILR 3 10, (2012) 3 CRIMES 64, (2012) 3 RECCRIR 653, (2012) 2 UC 1473, (2012) 3 DLT(CRL) 1, (2012) 2 ORISSA LR 477, (2012) 3 RAJ LW 2635, (2012) 3 CHANDCRIC 91, (2012) 3 CURCRIR 77, (2012) 4 MAD LJ(CRI) 311, (2012) 52 OCR 738, (2012) 6 SCALE 9, (2012) 78 ALLCRIC 741, (2012) 3 ALLCRILR 487, (2013) 1 ALD(CRL) 593

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Bench: Gyan Sudha Misra, T.S. Thakur

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 874-875 OF 2012
(Arising out of S.L.P (Crl.) Nos.4286-87 OF 2011)

P. Sanjeeva Rao …Appellant

Versus

The State of A.P. …Respondent

J U D G M E N T

T.S. THAKUR, J.

1. Leave granted.

2. These appeals arise out of an order dated 29th March, 2011, passed by the High Court of Judicature for Andhra Pradesh whereby Criminal Revision Petitions No.534 and 710 of 2011 filed by the appellant have been dismissed and order dated 22nd January, 2011 passed by the Special Judge for CBI cases at Hyderabad in Crl. M.P. Nos.18 and 19 of 2011 upheld.

3. The appellant is being prosecuted for offences punishable under Sections 7 & 13 (1) read with Section 13(1)(D) of Prevention of Corruption Act, 1988, before the Special Judge for CBI cases at Hyderabad. Around the time the prosecution concluded its evidence, the appellant filed Crl. Misc. Petitions No.18 and 19 of 2011 under Sections 242 and 311 Cr.P.C. for recall of prosecution witnesses No.1 and 2 for cross-examination. The appellant's case in the said Criminal Misc. Petition No.18 of 2011 was that cross-examination of PWs 1 and 2 had been deferred till such time the Trap Laying Officer (PW 11) was examined by the prosecution and since the said officer had been examined, PWs 1 and 2 need be recalled for cross- examination by counsel for the accused-appellant. In Crl. Misc. Petition No.19 of 2011 the petitioner made a prayer for deferring the cross- examination of Investigating Officer (PW12) in the case till such time PWs 1 and 2 were cross-examined.

4. Both the applications mentioned above were opposed by the prosecution resulting in the dismissal of the said applications by the Trial Court in terms of its order dated 22nd January, 2011. The Trial Court observed:

> "For what ever be the reasons the cross-examination of PWs 1 and 2 has been recorded as "nil". There is nothing to show on the record that the petitioner had reserved his right to cross examine the witnesses at a later point of time. The dockets of the Court do not reflect any such intention of the petitioner."

5. The Trial Court also held that recall of PWs 1 and 2 for cross- examination more than 3 and ½ years after they had been examined in relation to an incident that had taken place 7 years back, was bound to cause prejudice to the prosecution. The Trial Court was of the view that the appellant had adopted a casual and easy approach towards the trial procedure and that he could not ask for the recall of any witness without cogent reasons.

6. Aggrieved by the order passed by the Trial Court the appellant filed two revision petitions before the High Court which, as noticed earlier, have been dismissed by the High Court in terms of the order impugned in these appeals. The High Court took the view that PWs 1 and 2 had been examined on 13th June, 2008 and 31st July, 2008 respectively followed by examination of nearly one dozen prosecution witnesses. The High Court held that since this was an old case of the year 2005 and the matter was now coming up for examination of the appellant-accused under Section 313 Cr.P.C., there was no justification for recall of the prosecution witnesses No.1 and 2. The revision petitions were accordingly dismissed.

7. Appearing for the appellant Mr. A.T.M Ranga Ramanujan, learned senior counsel, contended that the Trial Court as also the High Court had taken a hyper technical view of the matter without appreciating that grave prejudice will be caused to the appellant if the prayer for cross- examination of PWs. 1 and 2 was not granted and the recall of the witnesses for that purpose declined. He

submitted that counsel for the appellant before the Trial Court was under a bona fide belief that the cross- examination of the prosecution witnesses PWs. 1 and 2, who happened to be the star witnesses, one of them being the complainant and the other a witness who allegedly heard the conversation and observed the passing of the bribe to the accused could be conducted after PW-11 had been examined. It was contended that the lawyer appearing before the Trial Court had also filed a personal affidavit stating that PWs. 1 and 2 had not been cross-examined by him under a bona fide impression that he could do so after the evidence of the Trap Laying Officer (PW-11) had been recorded. Mr. Ramanujan urged that while the lawyer may have committed a mistake in presuming that the prosecution witnesses No. 1 and 2 could be recalled for cross-examination at a later stage without the Trial Court granting to the accused the liberty to do so, such a mistake should not vitiate the trial by denying to the appellant a fair opportunity to cross-examine the said witnesses. Heavy reliance was placed by learned counsel on the decision of this Court in Rajendra Prasad Vs. Narcotic Cell [1999 SCC (Cri) 1062], in support of his submission that no party to a trial can be denied the opportunity to correct errors if any committed by it. If proper evidence was not adduced or the relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such a mistake to be rectified.

8. Appearing for the respondent Mr. H.P. Rawal, learned Additional Solicitor General, contended that while cross-examination of PWs. 1 and 2 could be deferred at the option of the accused to a later stage, the Court record does not show any such request having been made or any liberty being reserved to the accused. It was, according to Mr. Rawal, a case where an opportunity to cross-examine had been given to the accused and his counsel but they had chosen not to avail of the same, in which case a belated request for recall of the witnesses to exercise the right to cross-examine could and has been rightly rejected by the Trial Court and that rejection affirmed by the High Court. It was also submitted that the recall of the prosecution witnesses, who have gone without cross-examination at an earlier stage, is likely to prejudice the prosecution inasmuch as the incident in question is as old as of the year 2005, while the request for recall was made only in the year 2011, nearly four years after the framing of the charges against the appellant.

9. The appellant who was working as Sub Divisional Officer in the B.S.N.L., Karimnagar, is accused of having demanded and received a bribe of Rs.3,000/- from the complainant who was examined as PW1 at the trial. The trap led by the CBI in which PW2 was associated as an independent witness is said to have succeeded in catching the petitioner red-handed with the bribe money eventually leading to the filing of a charge-sheet against him before the Court of Special Judge for CBI cases at Hyderabad in March, 2005. Charges were framed against the petitioner on 7th December, 2006. While PW1, the complainant in the case, was examined on two different dates i.e. 3rd March, 2008 and 13th June, 2008, prosecution witness No.2 was similarly examined on 18th July, 2008 and 31st July, 2008. It is common ground that both the witnesses have stood by the prosecution case for they have not been declared hostile by the prosecution. This implies that the depositions of the two witnesses are incriminating against the appellant and in the absence of any cross-examination their version may be taken to have remained unchallenged. It is also common ground that PWs. 3 to 11 were examined during the period 31st July, 2008 and 28th December, 2011. The Trap Laying Officer (PW 11) was examined on 18th February, 2010 and on 1st April, 2010. The two applications referred to earlier were filed before the Trial Court at that stage, one asking for recall of PWs. 1 & 2 for

cross-examination and the other asking for a deferring that the cross- examination of PW 12 till PWs. 1 and 2 are recalled and cross-examined.

10. The only question that arises in the above backdrop is whether the decision not to cross-examine PWs 1 and 2 was for the reasons stated by the petitioner or for any other reason. There is no dispute that no formal application was filed by the petitioner nor even an oral prayer made before the Trial Court to the effect that the exercise of the right to cross- examine the two witnesses was being reserved till such time the Trap Laying Officer was examined. This is precisely where counsel for the appellant has stepped in and filed a personal affidavit in which he has stated that even though there is no formal prayer made to that effect he intended to cross-examine the two witnesses only after the deposition of the Trap Laying Officer was recorded. In the peculiar circumstances of the case, we feel that the version given by the counsel may indeed be the true reason why two witnesses were not cross-examined on the conclusion of their examination-in-chief. We say so primarily because no lawyer worth his salt especially one who had sufficient experience at the Bar like the one appearing for the appellant would have let the opportunity to cross-examine go unavailed in a case where the witnesses had supported the prosecution version not only in regard to the demand of bribe but also its payment and the success of the trap laid for that purpose. There is no gainsaying that every prosecution witness need not be cross-examined by the defence. It all depends upon the nature of the deposition and whether the defence disputes the fact sought to be established thereby. Formal witnesses are not at times cross-examined if the defence does not dispute what is sought to be established by reference to his/her deposition. The decision to cross- examine is generally guided by the nature of the depositions and whether it incriminates the accused. In a case like the one at hand where the complainant examined as PW1 and the shadow witness examined as PW2 had clearly indicted the appellant and supported the prosecution version not only regarding demand of the bribe but also its receipt by the appellant there was no question of the defence not cross-examining them. The two witnesses doubtless provided the very basis of the case against the appellant and should their testimony have remained unchallenged, there was nothing much for the appellant to argue at the hearing. The depositions would then be taken to have been accepted as true hence relied upon. We may, in this connection, refer to the following passage from the decision of this Court in Sarwan Singh v. State of Punjab (2003) 1 SCC 240:

> "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted."

11. We are, therefore, inclined to believe that the two prosecution witnesses were not cross-examined by the counsel for the appellant not because there was nothing incriminating in their testimony against the appellant but because counsel for the appellant had indeed intended to cross-examine them after the Trap Laying Officer had been examined. The fact that the appellant did not make a formal application to this effect nor even an oral prayer to the Court to that effect at the time the cross- examination was deferred may be a mistake which could be avoided and which may have saved the appellant a lot of trouble in getting the witnesses recalled. But merely because a mistake was committed, should not result in the accused suffering a penalty totally disproportionate to the gravity of the error committed by his lawyer. Denial of an opportunity to recall the witnesses

for cross-examination would amount to condemning the appellant without giving him the opportunity to challenge the correctness of the version and the credibility of the witnesses. It is trite that the credibility of witnesses whether in a civil or criminal case can be tested only when the testimony is put through the fire of cross-examination. Denial of an opportunity to do so will result in a serious miscarriage of justice in the present case keeping in view the serious consequences that will follow any such denial.

12. The nature and extent of the power vested in the Courts under Section 311 Cr.P.C. to recall witnesses was examined by this Court in Hanuman Ram v. The State of Rajasthan & Ors. (2008) 15 SCC 652. This Court held that the object underlying Section 311 was to prevent failure of justice on account of a mistake of either party to bring on record valuable evidence or leaving an ambiguity in the statements of the witnesses. This Court observed:

> "This is a supplementary provision enabling, and in certain circumstances imposing on the Court, the duty of examining a material witness who would not be otherwise 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.
>
> 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 of 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 the 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 wider the power the greater is the necessity for application of judicial mind." (emphasis supplied)

13. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs, Amritsar (2000) 10 SCC 430. The following passage is in this regard apposite:

"In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible." (emphasis supplied)

14. The extent and the scope of the power of the Court to recall witnesses was examined by this Court in Mohanlal Shamji Soni v. Union of India & Anr. 1991 Supp (1) 271, where this Court observed:

"The principle of law that emerges from the views expressed by this Court in the above decisions is 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 and examination of any person which would depend on the facts and circumstances of each case." (emphasis supplied)

15. Discovery of the truth is the essential purpose of any trial or enquiry, observed a three-Judge Bench of this Court in Maria Margarida Sequeria Fernandes v. Erasmo Jack de Sequeria through LRs. 2012 (3) SCALE

550. A timely reminder of that solemn duty was given, in the following words:

"What people expect is that the Court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice."

16. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself.

17. In the result, we allow these appeals, set aside the orders passed by the Trial Court as also the High Court and direct that the prosecution witnesses No.1 and 2 shall be recalled by the Trial Court and an opportunity to cross-examine the said witnesses afforded to the appellant.

In fairness to the counsel for the appellant, we must record that he assured us that given an opportunity to examine the witnesses the needful shall be done on two dates of hearing, one each for each witness without causing any un-necessary delay or procrastination. The Trial Court shall endeavour to conclude the examination of the two witnesses expeditiously and without unnecessary delay. The parties shall appear before the Trial Court on 6th August, 2012.

.....J. (T.S. THAKUR) .....J. (GYAN SUDHA MISRA)
New Delhi July 2, 2012