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SAYEEDA FARHANA SHAMIM

v.

STATE OF BIHAR & ANR.

(Criminal Appeal No. 928 of 2008)

MAY 16, 2008

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[A.K. MATHUR AND AFTAB ALAM, JJ.]

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Code of Criminal Procedure, 1973 – ss. 244 (2) and 246 (6) – Supplementary list of witnesses – Furnishing of by complainant – Permissibility – Held: The Magistrate has discretion to summon the witnesses, before closure of trial, if it advances the cause of justice – However, the discretion to be used in appropriate cases for reasons to be recorded.

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The question for consideration in the present appeal is whether supplementary list of witnesses u/s 244 Cr.P.C. can be furnished by the complainant, in respect of the witnesses whose names did not appear in the list as required u/s 204 (2) Cr.P.C.

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Allowing the appeal, the Court

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HELD: The Magistrate has discretion, before he closes the trial, to summon the witnesses if it advances the cause of justice. However, the discretion which has been conferred on the Magistrate under Section 244(2) and Section 246(6), Cr.P.C. should be used in appropriate cases for reasons to be recorded. The discretion should not be used fancifully and for a mala fide purpose to harass the accused, but in case it is found that in fact the application for summoning the additional witnesses is made for bona fide purpose and to substantiate the allegations made in the complaint, then the Magistrate may exercise such power in appropriate case. [Para 5] [69-G,H, 70-A-C]

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Jamuna Rani v. S.Krishna Kumar and Ors. 1993 Cr.L.J.

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32; *Nawal Kishore Shukla and Ors. v. State of U.P. and Anr.* 1992 CrI. L.J. 1554; *S.Vvivekanantham v. R. Viswanathan and Ors.* 1977 CrI..L.J. 425; *V. Ratna Shenoy v. S. A.Prabhu and Ors.* AIR 1967 Kerala 233; *State of Bombay v. Janardhan and Ors.* AIR 1960 Bombay 513; *Somasundaram v. Gopal and Anr.* AIR 1958 Madras 341 – approved. A B

Hari Pada Banerjee v. Hem Kanta Sen AIR 1969 Calcutta 429 – disapproved.

CRIMINALAPPELLATE JURISDICTION : Criminal Appeal
No. 928 of 2008 C

From the Judgment and final Order dated 13.12.2006 of the High Court of Judicature at Patna in CrI. Misc. No. 23629/2005

Anil K. Jha and Alka Jha for the Appellant. D

Gopal Singh, Kumud Shekhar, S.W.A. Qadri and Lakshmi Raman Singh for the Respondents.

The Judgment of the Court was delivered by

A.K. MATHUR, J. 1. Leave granted. E

2. This appeal is directed against the order dated 13.12.2006 passed by learned Single Judge of the Patna High Court whereby the learned single Judge of the High Court has quashed the order passed by the learned Sub-divisional Judicial Magistrate, Bhagalpur (hereinafter to be referred to as the S.D.J.M.) in Complaint Case No.1115 of 1999 by which the learned S.D.J.M. allowed prayer of the complainant by order dated 25.5.2005 to examine five witnesses named in the supplementary list filed by the complainant. A complaint was filed under Sections 323, 406, 498A of the Indian Penal Code and under Sections 3 & 4 of the Prevention of Dowry Act. Therefore, the limited question arose whether the complainant can file a supplementary list of witnesses or not. F G

3. In order to appreciate the controversy involved in the H

A matter brief facts may be enumerated. A complaint was filed under Sections 323, 406, 498A of the Indian Penal Code and under Sections 3 & 4 of the Prevention of Dowry Act. The S.D.J.M. registered the complaint. Syed Abdul Shamim, the father of the complainant was examined under Section 202 of the Code of Criminal Procedure but he died on 9.1.2001. Therefore, this witness could not be tried during the trial. Out of the remaining four witnesses, only two witnesses i.e. Syed Abdul Shalim and Mohd. Sheru were examined before charge and were also examined after the charge. The rest of the two witnesses namely, Syed Abdul Fahim and Syed Obaidulla were gained over and therefore, they did not come to the witness box. Then, an application was filed by the complainant to examine further witnesses before the charge on 3.1.2003. The accused persons filed a rejoinder on 5.1.2003. However, the S.D.J.M., Bhagalpur rejected the petition filed on behalf of the complainant to examine further witnesses before charge by its order dated 1.5.2003. The S.D.J.M. framed the charge on 30.8.2004. Then again on 24.1.2005 the complainant filed a petition before the S.D.J.M., Bhagalpur and prayed for issuance of summons to the witnesses whose names appeared in the list attached with the application. That application was filed by the complainant after the charges were framed and the witnesses were cross-examined after the charge. As the rest of the witnesses were gained over and they did not support the case of the complainant, therefore, a supplementary list of witnesses was attached to the application filed by the complainant namely, (i) Md. Wajahat son of Md.Ilyas, resident of Balha Narayanpur, P.S. Bhawanipur, District Bhagalpur, (ii) Md. Zafar son of late Habib, (iii) Bibi Afsana Shamim wife of late Saiyad Abdul Shamim, (iv) Pappu alias Ram Chandra Tiwari son of Basahan Tiwari and (v) Md. Rasid son of late Md. Safi, all of Mohalla Barahapura, P.S.Ishakchak, District. Bhagalpur. A rejoinder was filed to the petition filed by the complainant. However, on 25.4.2005, learned S.D.J.M. after hearing both the parties allowed the application filed by the complainant and the complainant was directed to examine all the five witnesses

whose names appeared in the list. The S.D.J.M. found that this was a case of torturing a married woman and demanding dowry which are continuing offences, therefore, some more persons can throw light on the occurrence which may help the S.D.J.M. to arrive at a just decision and do proper justice to the parties. This order passed by the S.D.J.M. on 25.4.2005 was challenged by the respondents by filing a petition before the High Court. Meanwhile, on 16.11.2005 Md.Zafar was examined in chief and he was also cross-examined later on 23.1.2006. On 30.3.2006 Md.Razi was examined and he was also cross-examined by the defence on the same day. Therefore, out of the five witnesses two witnesses were examined and three witnesses remained to be examined. Meanwhile, on 13.12.2006 the petition filed by the respondents before the High Court was allowed and the order of the S.D.J.M. passed on 25.4.2005 in Complaint case No.1115 of 1999 was quashed. Learned Single Judge of the High Court took the view that the names of these witnesses were not given as required under Section 204(2) of the Code of Criminal Procedure (hereinafter to be referred to as Cr.P.C.). Therefore, at a later stage supplementary list of witnesses under Section 244(2) Cr.P.C. could not be furnished to be examined. Learned Single Judge accordingly, allowed the petition and quashed the order of the S.D.J.M., Bhagalpur. Hence, the present appeal.

4. We have bestowed the best of our consideration to the order passed by the learned Single Judge of the Patna High Court. The procedure as to how to proceed on a complaint filed before the Magistrate has been dealt with in Chapter XV. Under Section 200, Cr.P.C. the Magistrate taking cognizance of offence can examine on oath the complainant and the witnesses, if any, and that shall be reduced in writing and in case the Magistrate is of the opinion that cognizable offence is made out, he can issue summons under Section 204, Cr.P.C. and if he finds that no sufficient material is there, then he can dismiss the complaint under Section 203, Cr.P.c. However, in the present case, process was issued under Section 204, Cr.P.C. Thereaf-

A ter, charge was framed and the trial began in the present case. Then under Section 244, Cr.P.C. the S.D.J.M. proceeded to hear the prosecution and took all such evidence as was produced in support of the complaint. Under Section 246, Cr.P.C. if the accused is not discharged, then the Magistrate will proceed and
B take the evidence of the remaining witnesses for the prosecution. Now, the question is whether a supplementary list of witnesses can be furnished by the complainant and the Magistrate can summon those witnesses to be examined. The question is whatever witnesses who have been examined under
C Section 244, Cr.P.C. the Magistrate cannot entertain any further list of witnesses to be examined by the complainant to substantiate his allegation in the complaint. It is true that under Section 244, Cr.P.C. if the charge is framed, then the prosecution has to examine the evidence produced by it in support of its case. After
D that the accused will have the right to cross-examine and the matter will proceed to be decided under Section 246. But before the matter is decided and during the pendency of the trial can the Magistrate entertain any petition filed by the prosecution for examining additional evidence in support of its case.

E 5. Learned counsel for the appellant invited our attention to the following decisions of various High Courts.

i. 1993 Cr.L.J. 32

Jamuna Rani v. S.Krishna Kumar & Ors.

F ii. 1992 Cr.L.J. 1554

Nawal Kishore Shukla & Ors. v.

State of U.P. & Anr.

G iii. 1977 Cr.L.J. 425

S.Vvivekanantham v.

R.Viswanathan & Ors.

iv. AIR 1967 Kerala 233

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V.Ratna Shenoy v.

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S.A.Prabhu & Ors.

v. AIR 1960 Bombay 513

State of Bombay v. Janardhan & Ors.

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vi. AIR 1958 Madras 341

K.Somasundaram v. Gopal & Anr.

Before, we refer to decisions of various High Court, it may be mentioned here that the discretion of the Magistrate is no where fettered by any of the provisions contained in Cr.P.C. Section 244, Cr.P.C. reads as under :

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“ **244. Evidence for prosecution.-** (1) When, in any warrant-case instituted otherwise than on a police report the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.

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(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing.”

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The expression, used as ‘the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution’. Similarly, sub-section (6) of Section 246, Cr.P.C. reads as under :

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“ (6) The evidence of any remaining witnesses for the prosecution shall next be taken and after cross-examination and re-examination (if any); they shall also be discharged.”

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The expression used as, ‘ the evidence of any remaining witnesses for the prosecution shall next be taken,’. Therefore, the Magistrate has discretion, before he closes the trial, to summon the witnesses if it advances the cause

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A of justice. Here we want to say a word of caution that the
discretion which has been conferred on the Magistrate
under Section 244(2) and Section 246(6), Cr.P.C. should
be used in appropriate cases for reasons to be recorded.
B The discretion should not be used fancifully and for a mala
fide purpose to harass the accused. It is quite possible
that sometimes when the complainant fails to substantiate
the allegation, he may resort to dilatory tactics and thereby
harass the accused by giving supplementary list to prolong
the continuance of the case. This should be checked but
C in case it is found that in fact the application for summoning
the additional witnesses is made for bona fide purpose
and to substantiate the allegations made in the complaint,
then the Magistrate may exercise such power in
appropriate case.

D 6. Learned counsel for the appellant invited our attention
to the decision of the Andhra Pradesh High Court in *Jamuna
Rani* (supra) wherein learned Single Judge has referred to vari-
ous decisions of different High Courts i.e. Madras, Bombay and
Allahabad High Courts and held that the Court has discretion
E and it is not confined to the witnesses mentioned in the list ap-
pended to the complaint but it refers to any other witness men-
tioned in a subsequent application filed before the discharge
order is passed by the Magistrate. It was held by the Andhra
Pradesh High Court in the case of *Jamuna Rani* (Supra) as
F under:

"Taking into account the views expressed by the Madras,
Bombay and Allahabad High Court and on interpreting 'all such
evidence' in S. 244(1), I feel that it does not limit
to the witnesses mentioned in the list appended to the
G complaint but it refers to any other witness mentioned in
a subsequent application filed before the discharge order
is passed by the Magistrate."

Similarly, the Allahabad High Court in *Nawal Kishore
Shukla & Ors* (supra) has taken an identical view. Learned Single
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Judge of the High Court held as follows :

“ As regards the order permitting the complainant to examine a witness, not named in the list of witnesses, the learned Magistrate could have done so in the circumstances of the case. It was not necessary that all the witnesses named in the list of witnesses should have been examined before such a permission could have been granted. The witness was in attendance and the prosecution evidence was being recorded under Section 244, Cr.P.C. The order by the learned Magistrate permitting the complainant to examine the witness cannot be said to be illegal or unjust.”

Similar view was taken by the Madras High Court in S.Vivekanantham (supra). In this case learned Single Judge observed as follows:

“Section 244 is wide enough to give power to a Court to accept a supplemental or additional list of witnesses given by a complainant and to issue summons to them and record their evidence. Nowhere the section lays down that the complainant will not be entitled to file a supplemental list of witnesses nor the Court empowered to entertain such a list and examine one or more of the witnesses cited therein. Though Section 204(2) of the new Code prescribes that no summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed, that cannot be taken to mean that a complainant is irretrievably chained to the first list of witnesses filed by him and he cannot seek the permission of the court to examine additional witnesses even where circumstances or interests of justice warrant such examination. To hold otherwise would actually lead to grave injustice and hardships to complainants.”

Learned Single Judge has followed the decision of the Division Bench of the Madras High Court in K.Somasundaram (supra) which reads as under :

A "The list filed under S.204(1-A) can be added to by
supplemental lists accompanied by applications to the
Court to summon those new witnesses. Such supplemental
lists can be in addition to all the witnesses in the primary
list filed by the private complainant under S.204(1) Crl.
B P.C., or in addition only to such of the witnesses in the
primary list whom he decides to examine. The phrase "
take all such evidence as may be produced in support of
the prosecution" in S.244(1), and S.244(2) and S.252(2)
C Cr.P.C. shows the ample powers of the Court in this
respect."

Similar view has been taken by the learned Single Judge
of the Bombay High Court in *State of Bombay v. Janardhan &
Ors.* (supra) wherein it has been held as follows:

D "After the insertion of S.204(1A), S.256 has to be read
along with S.252 also with section 204(1A). Therefore, in
cases instituted otherwise on a police report the
complainant is restricted to the examination of witnesses
whose names are given in the list under section 204(1A).
E At the same time in a proper case the list can be added
to with the permission of the Court. The Court should not,
however, give permission to add names to the list if it is
going to prejudice the case of the accused or if it is not in
the interests of justice."

F Similar view has been taken by learned Single Judge of
the Kerala High Court in *V.Ratna Shenoy* (supra). Relying on
the decision of Madras High Court in *K.Somasundaram* (su-
pra), the learned Single Judge of the Kerala High Court ob-
served as follows:

G "I cannot agree with the view that the word 'remaining
witnesses' involves only those that are left out from the first
list. It would be open to the learned Magistrate to examine
witnesses and to admit any essential documents which
the prosecution wishes to produce."
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The Learned Single Judge observed that the expression appearing in 'remaining witnesses' should be given wide interpretation.

7. As against this, our attention was invited to a decision of the Calcutta High Court in *Hari Pada Banerjee v. Hem Kanta Sen* (AIR 1969 Calcutta 429). Learned Single Judge of the Calcutta High Court has held as follows:

"The expression 'remaining witnesses' in Section 256 should not be given an unnecessarily wide interpretation and it means witnesses originally included in the list submitted under Section 252(2) but not subsequently examined."

But as against this, the consensus opinion of the High Courts of Andhra Pradesh, Kerala, Madras, Bombay and Allahabad appears to be more sound.

8. In view of the consensus of the opinion which has emerged from various decisions of the High Courts appears to be that the power of the Magistrate should not be fettered either under Section 244 or under sub-section (6) of Section 246 of the Cr.P.C. and full latitude should be given to the Magistrate to exercise the discretion to entertain a supplementary list. But as we have already added a word of caution that while accepting the supplementary list the Magistrate shall exercise its discretion judiciously for the advancement of the cause of justice and not to give a handle to the complainant to harass the accused.

9. As a result of our above discussion, the view taken by learned Single Judge of the Patna High Court cannot be sustained and consequently, the appeal is allowed and the order passed by the learned Single Judge dated 13.12.2006 is set aside and it is for the Sub-Divisional Judicial Magistrate, Bhagalpur to examine the remaining witnesses from the supplementary list given by the complainant and then to proceed according to law.

K.K.T.

Appeal allowed.