

CRIMINAL REVISION

Present: The Hon'ble Justice Ashim Kumar Roy

Judgement on 26.04.2010

CRR No- 4260 of 2009

Santunu Kundu

Versus

The State of West Bengal & Ors

Points-

Expunging of Evidence- Witness failed to be cross examined-**Whether** court has right to expunge the evidence from the record - Code of Criminal Procedure, 1973 S.309

Facts-

The trial of a warrant case relating to the offences punishable under Section 420/341/201/120B of the Indian Penal Code before a magistrate instituted on a police report, the Trial Court expunged the entire evidence of defacto-complainant, who was examined as P.W 1 on his failure to appear for further cross- examination. Hence this application.

Held-

In course of trial when any prosecution witness after being examined-in-chief and after his cross-examination is held in part, the said witness did not turn up for his further cross-examination in spite of repeated opportunities being given by the Court, the Trial Court is not obliged to go on granting adjournment to the witness for indefinite period and in such case it would be just and proper for the Trial Court to close the evidence of the said witness and to proceed to the next stage of trial. But in the case at hand, the approach of the Trial Court is wholly erroneous and not in accordance with

law. Under the scheme of the Code of Criminal Procedure and according to the provision of the Evidence Act, there is no provision for expunging of evidence of any witness from the records, the question of expunging of evidence only arise when there is any order of a superior Court for de-novo trial from the stage of framing of charge. In other words, once evidence is recorded the Court recorded such evidence has no right to expunge the same from the records.

Para 3

Cases followed---

AIR 2002 Calcutta 281 ----- Dever Park Builders Ptd Ltd & Smt Madhuri Jalan & ors. Para---10

For Petitioner --- Mr Siladitya Sanyal

For State ----- Mr Alok Roy Chowdhury

For Opposite Parties -- Mr Sudipta Moitra

The Court-

In connection with a trial of a warrant case relating to the offences punishable under Sections 420/341/201/120B of the Indian Penal Code before aMagistrate instituted on a police report the Trial Court expunged the entire evidence of defacto-complainant, who was examined as P.W. 1 on his failure to appear for further cross-examination, the said order is under challenge in the instant criminal revision.

2. Heard the Learned Advocates appearing on behalf of the parties.
Perused the impugned order as well as other materials on record.
3. In course of trial when any prosecution witness after being

examined-in-chief and after his cross-examination is held in part, the said witness did not turn up for his further cross-examination in spite of repeated opportunities being given by the Court, the Trial Court is not obliged to go on granting adjournment to the witness for indefinite period and in such case it would be just and proper for the Trial Court to close the evidence of the said

witness and to proceed to the next stage of trial. But in the case at hand, the approach of the Trial Court is wholly erroneous and not in accordance with law. Under the scheme of the Code of Criminal Procedure and according to the provision of the Evidence Act, there is no provision for expunging of evidence of any witness from the records, the question of expunging of evidence only arise

when there is any order of a superior Court for de-novo trial from the stage of framing of charge. In other words, once evidence is recorded the Court recorded such evidence has no right to expunge the same from the records. In this connection it would be more apposite to refer the observation of this Hon'ble High

Court in the case of Dever Park Builders Pvt. Ltd. & Ors. Vs. Smt. Madhuri Jalan & Ors., reported in AIR 2002 Calcutta 281. In the said decision at paragraph 10 of this Hon'ble High Court observed as follows;

“In this case there is one and singular stage in the proceedings. Therefore, Section 33 of the Evidence Act will not at all be helpful nor it is applicable here. The issue is whether the testimony of the deceased defendant with unfinished cross examination will be admissible or be considered at the time of hearing or rendering judgment in this case or not. Under the provisions of Section 138 of the Evidence Act order of examination of witness is provided. It appears therefrom the witness shall be first examined-in-chief by the party who has called him and then if the adverse party so desires may crossexamine and thereafter if the party calling so desires may reexamine. Upon careful reading of the said Section it would be

apparent that the cross-examination is not a must nor as a matter course, or without the same the evidence given in examination-in-chief cannot be rejected nor expunged.

However, if the adverse party opts, for, certainly, the crossexamination is a must. There is substance in submission of

Mr. Bimal Chatterjee that there is no provision under law if the witness is not cross-examined either in full or part his evidence would be absolutely rendered inadmissible. In

absence of this provision, problem of this nature can be addressed by the help the judicial pronouncements that will certainly be guiding factor.” (para 10)

4. For the reasons stated above, the order impugned is set aside and this criminal revision stands allowed.

5. The evidence of P.W. 1, Sanatan Kundu recorded in connection with the G.R. Case No. 3990 of 2001, now pending before the Learned Judicial Magistrate, 1st Court, Sealdah is restored to the original records.

6. Lastly, in my opinion, it would be expedient in the interest of justice to give the P.W. 1, Sanatan Kundu another opportunity for tendering him for further cross-examination by the defence. Accordingly, the parties are directed to be present before the Trial Court with notice to each other on any particular day

within three weeks from this date and the Learned Trial Court is directed in their presence to fix another date for further cross-examination of the P.W. 1 as a last chance. If on that day the P.W. 1 is again found to be absent in Court then in that case no further opportunity be given to him and the Trial Court shall close

his evidence and proceed to the next stage of the trial.

7. It is further directed the Trial Court shall take all endeavours to conclude the trial as expeditiously as possible preferably within a year from the next date to be fixed for recording of evidence. The Trial Court is directed to proceed with the case strictly in terms of Section 309 of the Code of Criminal Procedure.

8. The Office is directed to communicate this order to the Court below and to send down the Lower Court Records at once.

Criminal Section is directed to deliver urgent Photostat certified copy of this Judgement to the parties, if applied for, as early as possible.

(*Ashim Kumar Roy, J.*)