

Criminal Revision
Present: The Hon'ble Justice Ashim Kumar Roy

Judgment On : 05-05-2010

C.R.R. No. 4215 of 2009

With
CRAN No. 256 of 2010

Raj Kumar Sharma @ Raju Sharma & Anr.
versus
State of West Bengal

Points:

RE-CROSS-EXAMINATION – Defence lawyer of own choice cross examined some of the witnesses- Defence lawyer retired from case- Court appointed defence lawyer from Govt. Panel- Thereafter again defence lawyer appointed of their own choice- Whether the new lawyer be permitted to re cross-examine the witnesses-Code of Criminal Procedure, 1973, S. 303

Facts:

The present petitioners have been facing trial of a charge under Sections 307/324/34 of the Indian Penal Code before the Learned Additional Sessions Judge, Fast Track, 1st Court, Sealdah----During the trial initially the petitioners were defended by a lawyer of their own choice and the examination of total five prosecution witnesses was concluded---- Thereafter the learned defence Counsel moved an application before the Trial Court expressing his desire to retire from the case---- he was discharged----the Learned Trial Court engaged one Mr. P. Saha, a lawyer from the State Panel to defend the accuseds in the trial----- an application was moved by the accuseds expressing their

desire to engage a new lawyer of their choice to defend them during the rest of the trial -----another application was moved on behalf of the defence renewing their prayer for time on the ground of engaging a lawyer of their choice----- on that day three witnesses, viz., three doctors were examined as P.W. 7, P.W. 8 and P.W. 9 by the prosecution -----cross-examined on behalf of the defence by the lawyer engaged by the Court----- two separate applications, both under Section 231 (2) of the Code of Criminal Procedure were moved on behalf of the accused/petitioners-----the first application a prayer was made for recalling of the P.W. 7, P.W. 8 and P.W. 9 for their cross-examination afresh by the lawyer to be engaged by the defence of their own choice----- the other application a prayer was made for recalling P.W. 2, P.W. 3, P.W. 4 and P.W. 5 for their further cross-examination on the ground they were not cross-examined effectively---- In the instant criminal revisional application, the petitioners challenged the said orders whereby their applications under Section 231 (2) of the Code of Criminal Procedure has been rejected by the Trial Court.

Held:

Undoubtedly, the right of an accused to be defended by a legal practitioner of his choice is his fundamental right guaranteed under Article 22 (1) of the Constitution. Similarly, according to the provision of Section 303 of the Code of Criminal Procedure, an accused of an offence before a criminal Court has every right to be defended by a pleader of his choice. Denial of such right is also opposed to the principle of rule of law.

Para-4

Merely because the lawyer newly engaged by the defence is of the opinion that the cross-examination of the witnesses was not done effectively and was not upto the mark that cannot be the ground for permitting re-cross-examination of those witnesses by the defence.

Para-5

A legal right even a fundamental right cannot come in aid of an accused or the accused be permitted to espouse such rights, when it is found from the facts and circumstances of the case, the object behind it is to frustrate the criminal justice delivery system. The accused is not entitled to re-cross-examine the P.W. 1, P.W. 2, P.W. 3, P.W. 4, P.W. 5 and P.W. 6, who were already cross-examined by a lawyer of their own choice, engaged by the defence. However, it would be conducive in the interest of justice the accused persons be permitted to cross-examine the P.W. 7, P.W. 8, P.W. 9 and P.W. 10 and then P.W. 11, the Investigating Officer of the case, who is yet to be examined, by a lawyer of their own choice and be defended during the rest of the trial by the said lawyer. **Para-6**

For Petitioners : **Mr. Subhasish Roy**

For State : **Mr. Sobhendu Sekhar Roy**

The Court:

The present petitioners have been facing their trial of a charge under Sections 307/324/34 of the Indian Penal Code before the Learned Additional Sessions Judge, Fast Track, 1st Court, Sealdah. During the trial initially the petitioners were defended by a lawyer of their own choice and by July 8, 2009 the examination of total five prosecution witnesses was concluded. Thereafter, on August 26, 2009 the learned defence Counsel moved an application before the Trial Court expressing his desire to retire from the case. Upon such application being moved the Trial Court allowed the prayer of the defence counsel and he was discharged. While making such order the

Learned Trial Court engaged one Mr. P. Saha, a lawyer from the State Panel to defend the accuseds in the trial. However, on the very next day, i.e., on August 27, 2009 on behalf of the accused persons an application was moved expressing their desire to engage a new lawyer of their choice to defend them during the rest of the trial and for time for taking necessary steps in that regard. But no order was passed on such application. Thereafter, on the next date fixed for trial on September 11, 2009 another application was moved on behalf of the defence renewing their prayer for time on the ground of engaging a lawyer of their choice, but no order was passed as regards to the same and on that day three witnesses, viz., three doctors were examined as P.W. 7, P.W. 8 and P.W. 9 by the prosecution and they were also cross-examined on behalf of the defence by the lawyer engaged by the Court and November 7, 2009 two separate applications, both under Section 231 (2) of the Code of Criminal Procedure were moved on behalf of the accused/petitioners simultaneously. While in the first application a prayer was made for recalling of the P.W. 7, P.W. 8 and P.W. 9 for their cross-examination afresh by the lawyer to be engaged by the defence of their own choice, in the other application a prayer was made for recalling P.W. 2, P.W. 3, P.W. 4 and P.W. 5 for their further cross-examination on the ground they were not cross-examined effectively. However, on that day the victim Prem Kumar Tewari was examined by the prosecution as P.W. 10 and was discharged after his cross-examination by the lawyer engaged by the Court and next date fixed for examination of the Investigating Officer of the case and on the self-same day the Court rejected the petitioners' application under Section 231 of the Code of Criminal Procedure. In the instant criminal revisional application, the petitioners challenged the said orders whereby their applications under Section 231 (2) of the Code of Criminal Procedure has been rejected by the Trial Court.

2. The Learned Counsel appearing on behalf of the petitioners vehemently urged before this Court that the accuseds have every right to engage a lawyer of their own choice to

defend them in a criminal trial. He further submitted denial of such right would not only cause serious prejudice to the accused same would result in complete failure of justice. According to the learned advocate of the petitioners on his appreciation the cross-examination of P.W. 2, P.W. 3, P.W. 4, P.W. 5, P.W. 7, P.W. 8 and P.W. 9, was never done effectively. Accordingly, the learned advocate of the petitioners prayed for permitting the defence to further cross-examine P.W. 2, P.W. 3, P.W. 4 and P.W. 5 and for cross-examining afresh P.W. 7, P.W. 8 and P.W. 9 including the P.W. 10, the victim by the lawyer to be engaged by the defence of their choice.

3. Heard the learned Counsels appearing on behalf of the parties. Perused the impugned order and other materials on record.

4. Undoubtedly, the right of an accused to be defended by a legal practitioner of his choice is his fundamental right guaranteed under Article 22 (1) of the Constitution. Similarly, according to the provision of Section 303 of the Code of Criminal Procedure, an accused of an offence before a criminal Court has every right to be defended by a pleader of his choice. Denial of such right is also opposed to the principle of rule of law.

5. Now, coming to the case at hand, I find the first six witnesses of the prosecution, viz., P.W. 1, P.W. 2, P.W. 3, P.W. 4, P.W. 5 and P.W. 6 were cross-examined by the lawyer engaged by the defence of their choice. Therefore, upto that stage there was no question of denying the accused persons their right to defend them by the lawyer of their choice. Merely because the lawyer newly engaged by the defence is of the opinion that the cross-examination of the witnesses was not done effectively and was not upto the mark that cannot be the ground for permitting re-cross-examination of those witnesses by the defence. In this case, after the retirement of the defence counsel who was a counsel of the accuseds own choice, the Learned Trial Court engaged a

lawyer from the State Panel to defend them and he cross-examined the P.W. 7, P.W. 8, P.W. 9 as well as the P.W. 10.

6. In my opinion, a legal right even a fundamental right cannot come in aid of an accused or the accused be permitted to espouse such rights, when it is found from the facts and circumstances of the case, the object behind it is to frustrate the criminal justice delivery system. In my opinion, the accused is not entitled to re-cross-examine the P.W. 1, P.W. 2, P.W. 3, P.W. 4, P.W. 5 and P.W. 6, who were already cross-examined by a lawyer of their own choice, engaged by the defence. However, in my opinion, it would be conducive in the interest of justice the accused persons be permitted to cross-examine the P.W. 7, P.W. 8, P.W. 9 and P.W. 10 and then P.W. 11, the Investigating Officer of the case, who is yet to be examined, by a lawyer of their own choice and be defended during the rest of the trial by the said lawyer.

7. For the reasons stated above, the order impugned is set aside. So far as the evidence of the P.W. 7, P.W. 8, P.W. 9 and P.W. 10 recorded during their cross-examination stands expunged from the records and the defence shall be permitted to cross-examine those witnesses afresh as well as to cross-examine the Investigating Officer of the case, after his examination, by the lawyer to be engaged by the defence of their choice. The petitioners are directed to appear in the Court below within six weeks from the date and after their appearance with notice to the prosecution the Trial Court shall fix the date for examination of those witnesses. The Trial Court is further directed to proceed with the trial strictly in terms of Section 309 of the Code of Criminal Procedure and not to grant any unnecessary adjournment to either of the parties unless Court feels the same is necessary for ends of justice.

8. This application thus stands allowed.

9. The application for extension of interim order being CRAN No. 256 of 2010 stands disposed of in terms of disposal of the main criminal revisional application.

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.)