

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Revision No.245 of 2017

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Raj Kumar Yadav, S/o Late Jawahar Yadav, R/o Village- Chakri, P.S.- Darauli,
District- Siwan.

.... Petitioner/s

Versus

1. The State of Bihar
2. Central Bureau of Investigation (CBI) through its Director General, New Delhi.
3. Superintendent of Police, CBI, Special Police Establishment, Bihar at Patna.

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Amit Narayan, Adocate.
Mr. Rajiv Kumar Advocate.
Smt. Nirmala Kumari, Advocate.

For the O.P/s : Mr. Bipin Kumar Sinha, SC to CBI.

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CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR

CAV JUDGMENT

Date: 08-12-2017

Heard learned counsel for the petitioner and learned
counsel for the C.B.I.

2. Petitioner, one of the accused, facing trial in S.T. No.
901 of 2003, arising out of C.B.I. Case No. RC-1(S)/99 Pat., has
preferred revision against order dated 31.01.2017 passed by the
learned Additional District Judge-IV, Patna whereby the defence
evidence is closed.

3. A brief fact giving rise to the present case is that a
fake police encounter was done by the police personnel including the
petitioner, however, two FIR(s) were lodged in this connection one by
the police officer causing death during encounter and another by



mothers of the persons allegedly done to death in fake encounter. In the case at hand, Madhuri Devi, the informant of Danapur P.S. Case No. 151 of 1996 instituted First Information Report under Section 364/34 of I.P.C. levelling allegation that her son Ashok Kumar @Aasu and his three friends Dinesh Kumar, Rajesh Kumar @ Chunnu and Yogendra Singh, returned to the house after watching film in evening show after 9:00 P.M., thereafter suddenly at 10:00 P.M. in the night, Patna police came to her house on a Gipsy vehicle in search of her son and forcibly took away Aashu and she reported the matter to higher police officials on 12.09.1995 but no action was taken. She also stated that her son Ashok Kumar @ Aashu was never an accused in any case and was a student. She was compelled to file a criminal writ before the Patna High Court bearing Cr. W.J.C. No. 170 of 1996 and on the direction given by the Court, police registered F.I.R. being Danapur P.S. Case No. 151 of 1996. Pursuant to the Court's order in another Cr. W.J.C. No. 172 of 1996, another FIR i.e., Danapur P.S. Case No. 152 of 1996, on the information given by Reshmi Devi on 24.05.1996 was registered alleging therein that her son Dinesh Kumar was returning back home in the night on 03.09.1995, after watching movie of evening show but the police near Amrapali Cinema Hall picked him up, since then he is traceless. In another Cr.W.J.C. No. 856 of 2016, this Court directed the CBI, Patna



to investigate Danapur P.S.Case No. 151 of 1996 and Danapur P.S.Case No. 152 of 1996. Pursuant to the direction, CBI registered CBI RC-1(S)/1999-Pat. under Sections 201 and 302, 364/34 of I.P.C. and another CBI Case No. RC2(S)/1999-Pat. under Section 364/34 of I.P.C. respectively against unknown. The CBI completed investigation in four years and submitted charge sheet under Section 364/34 of I.P.C. against the petitioner and other four co-accused persons.

4. Learned counsel for the petitioner submits that defence case of the petitioner is that Rajesh Kumar @ Chunu was killed in police encounter and in that connection Kotwali P.S.Case No. 307/96 was registered and Yogendra Singh and Dilip Paswan were also killed in another police encounter on 7/8.09.1995 in Phulwarisharif for which Phulwarisharif P.S.Case No. 285/1995 was registered and the police team, headed by one Alwan Tigga, submitted final report in both cases finding encounter was genuine. During trial, CBI has produced altogether 36 witnesses and got exhibited several documents, thereafter accused persons entered into defence evidence. On 21.10.2016 and 26.10.2016, a petition under Section 233(3) of Cr.P.C. was filed by the petitioner for summoning Mr. R.S.Bhatti, the then City S.P., Patna presently posted in CBI, Smt. Sangeeta Rani the then Dy. S.P., Patna Sadar and Mr. Alwan Tigga, the then Officer-in-Charge of Phulwarisharif P.S., to examine them and the trial court, by



order dated 24.11.2016, allowed the petition and issued summons to witnesses for giving evidence on behalf of defence in trial. Reminder was also issued to the witnesses but the trial court, without getting the service report of the summons and exhausting all processes for appearance of witnesses, closed the evidence of defence by order dated 16.01.2017. Learned counsel placed reliance in the case of ***Sudhir Kumar Dutt vs. King*** reported in (1948) 51 Bom.L.R. 21F.B.

5. Contrary to that, learned counsel appearing on behalf of the CBI submits that trial court has given indulgence and issued summons and reminders to the witnesses to be examined by the defence but witnesses are not turning up despite several adjournment, so sufficient opportunity was given to the defence to adduce evidence. Moreover, defence has already got exhibited FIR and the final report submitted by the Patna Police that petitioner killed some miscreants in encounter.

6. Having considered rival submissions and on perusal of the record, the Court finds that the petition filed under Section 233(3) of Cr.P.C. by the petitioner/accused for issuance of summons to three witnesses, namely, Mr. R.S.Bhatti, the then City S.P., Patna, Smt. Sangeeta Rani, then Dy. S.P., Patna Sadar and Alwan Tigga, then Officer-in-Charge of Phulwarisharif P.S., was allowed by the trial court by issuing summons but without service report of summons



ascertaining the fact of service of summons, defence evidence has been closed. Now let us look at the Section 233 Cr.P.C. which reads as such:

“233. Entering upon defence.-(1) Where the accused is not acquitted under section 232 he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.”

7. Under the aforesaid provisions, the accused takes assistance of the court for issuance of any process for compelling the attendance of any witness or the production of any document or things. Once, the court decides that the application is not for the purpose of vexation or causing delay or for defeating the ends of justice then issue the process.

8. In the present case, allowing the application, the court issued summons but without ascertaining service of summons to witnesses desired to be examined by the accused, has closed the defence evidence.



9. The process to compel appearance to accused or witness is enumerated in Chapter VI of the Criminal Procedure Code. Section 62 of Cr.P.C. deals how summons are required to be served. Section 62 reads as follows:-

“62. Summons how served.- (1) Every summons shall be served by a police officer, or subject to such rules as the State Government may make in this behalf, by an officer of the Court issuing it or other public servant.

(2) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

(3) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate”.

10. Section 64 deals with circumstances that when person summoned even after exercise of due diligence is not found, it may be served to any adult member of his family residing with him. Section 65 deals with procedure when service cannot be effected in view of Section 62 to 64 of the Cr.P.C. then in such situation, the serving officer affixes one of the duplicates of the summons to some conspicuous part of the house in which the person summoned ordinarily resides then in such situation also summons is said to be duly served or the court has passed to order fresh service of summons in such manner considers proper. Section 66 is relevant as in the present case, witness appear to be Government servant, so in case of a



person to be summoned is in the active service of the Government, the Court issues the summons to the head of the office of the person concerned and thereafter service is returned back to the court under the signature with endorsement and in such case it is considered evidence of due service.

11. In the present case, there is no any service report of the summons showing that summons were served to those witnesses. A reasonable opportunity is required to be given to the accused to produce witnesses in the interest of fair trial. The case would have been different if after receiving of the summons, witnesses did not turn up before the court. So in absence of that, it cannot be said that reasonable opportunity was given to the accused to produce his evidence. This principle is enumerated in the case of *Sudhir Kumar Dutt* (supra). However, it is important to observe that primarily onus to produce the witness lies to the defence in view Section 233(1) of the Cr.P.C. and in view of Section 233(3) of Cr.P.C. the court can only give necessary aid to the accused in procuring attendance of defence witnesses. So in view of this provision, the court is only required to ensure that summons issued to the defence witnesses is served. Despite service of summons, if witnesses did not turn up the evidence may be closed because reasonable opportunity by giving necessary aid to secure appearance of the witnesses has already been



taken by the court thereafter the court may close the evidence of defence, but in the present case, there is no service report of the summons issued to the witnesses, so closing of the defence evidence is not proper rather it amounts to denial of fair trial. So impugned order dated 30.01.2017, whereby defence evidence was closed, is set aside and the trial court is directed to reopen the defence evidence giving reasonable opportunity to adduce evidence by issuing afresh summons to the witnesses and ensuring its service upon them. However, it is made clear that despite the service of summons, witnesses do not turn up then closing defence evidence, trial may be expeditiously concluded in accordance with law.

(Arun Kumar, J)

Sujit/-

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