

C. R. R. No.1076 of 2017
with
CRAN No.3600 of 2017

01.09.2017
 Sl. No.37
 Jb. &
 PA to Justice
 J. Bagchi, J.

OM PRAKASH VERMA

... PETITIONER

VERSUS

STATE OF WEST BENGAL AND OTHERS

... OPPOSITE PARTIES

In Re:- An application under Section 482 of the Code of Criminal Procedure;

Mr. Suman De, Adv.

...For The Petitioner

Mr. Ayan Basu, Adv.

...For The State

Mr. Achin Jana, Adv.

Mr. Suman Chakraborty, Adv.

...For the O.P. Nos.2 to 5

Order dated 7th March, 2017 passed by the Additional Sessions Judge, Fast Track Court – III, Howrah in connection with Sessions Trial no. 158 /15 refusing to summon one S. Maity as court witness in order to prove sale receipt of one Nokia Lumia mobile phone and fixing the date for examination of the opposite parties-accused persons under Section 313 of the Code of Criminal Procedure has been assailed before this Court by the petitioner-defacto complainant.

The prosecution case as alleged against the opposite party nos. 2 to 5 herein is to the effect that they had committed dacoity on 1st January, 2016 at 6.30 p.m. at the place of business of the petitioner and had stolen a sum of Rs.22,000/- and other articles including one Nokia mobile phone. It is also the prosecution case that in course of investigation on the leading statement of the opposite party no. 4 a mobile

phone had been recovered under seizure list being Exhibit 2/3. Such seizure was duly reported to the learned Magistrate and on the prayer of the petitioner the mobile phone was returned to him on executing a bond. In course of trial the petitioner was examined as P.W. 1 wherein he deposed that the miscreants had stolen a Nokia Lumia mobile phone and he produced a mobile phone of similar make before the trial Court. The defence objected to the identity of the mobile phone so produced. It was their specific defence that the Nokia Lumia phone produced during trial was not the phone which had been seized during investigation. During his chief, P.W. 1 also produced a sale receipt in support of the purchase of the phone so exhibited which was marked as 'X' for identification. During the examination of the Investigating Officer (P.W. 9), the latter deposed that he had collected the purchase receipt of the mobile phone from P.W. 1 during investigation. In cross-examination he, however, admitted that he did not mention the model number of the mobile phone in the seizure list. He also did not collect IMEI number and CDR of the seized mobile. After the prosecution evidence had been closed, the petitioner as well as the prosecution preferred applications for examining one S.K. Maity to prove the purchase receipt of the mobile phone. In view of the dichotomy of evidence of P.W. 1 and the seizure list, the trial Court did not accede to such prayer and proceeded to the next stage of trial. At that stage, the petitioner has approached this Court praying for examination of the said witness to prove the alleged purchase receipt of the mobile phone.

Learned counsel for the petitioner submits that the application for examining the said witness had not been disposed of on merits but was kept on record. It has also been argued that the Nokia Lumia mobile phone was produced before the Court

during trial and had been exhibited as a material exhibit. Hence, prayer to prove the purchase receipt of such phone was in aid of the prosecution case and not an exercise to fill up the lacuna in the said case.

Learned counsel for the State supported the contention of the petitioner.

On the other hand, learned counsel for the opposite party nos. 2 to 5 accused persons submitted that neither IMEI number nor the brand name of the mobile phone was recorded in the seizure list in the course of investigation. Nor had such particulars been noted prior to handing over interim custody of the phone to P.W. 1. It is the specific defence of the accused persons that the mobile phone produced during trial was not the same which had been seized and they had objected at the time of production of the mobile phone during trial. It has further been argued that the purported receipt, though claimed to be collected during investigation, had not been relied upon by the Investigating Agency and not supplied to the accused persons under Section 173(5) of the Code of Criminal Procedure. Hence, such document has been subsequently procured to justify the ownership of the phone produced during trial and not the one which was seized during investigation. Such belated and devious effort should not be permitted lest it would amount to filling up of lacuna in the prosecution case.

I have considered the rival submissions in the light of the materials on record. Firstly the contention of the petitioner that his application had not been dealt with merits but kept on record cannot be accepted. Perusal of the impugned order would show that the trial Court had applied its mind to the prayer of the prosecution to lead additional evidence under Section 311 of the Code of Criminal Procedure and was of

the view that in the light of the divergence between the entries in the seizure list and deposition of P.W. 1, it would not be proper to accede to such prayer of the prosecution and the application was kept on record. Such expression, in my opinion, is a euphemism to rejection of the prayer of the prosecution to examine the proposed witness under Section 311 of the Code of Criminal Procedure at that stage. With regard to the merits of such plea, I find that neither at the time of seizure of the mobile phone nor in course of investigation any effort was made to collect the International Mobile Equipment Identity (for short 'IMEI') number or the brand name of the said phone. Moreover, without ascertaining the said number, the phone had been handed over to the custody of the petitioner resulting in a snap in the live link between the electronic gadget seized and the item which was produced during trial. Hence, when the mobile phone was exhibited by the P.W. 1 during trial, the opposite party nos. 2 to 5 raised objection that the phone produced during trial was not the one whose interim custody had been handed over to the petitioner. It is also pertinent to note although the Investigating Officer P.W. 9 had claimed that he had collected the purchase receipt from P.W. 1 in course of investigation, no seizure list of the said purchase receipt nor the receipt itself had been relied upon by the Investigating Agency in the police report under section 173 (5) of the Code of Criminal Procedure. It is, therefore, clear that the handing over of interim custody of the mobile phone to P.W. 1 without determining its IMEI number had caused a blot on the identity of the said article giving rise to a possibility of substitution of the article at a subsequent stage of trial. In this backdrop, to permit the examination of the proposed witness would amount to repairing a lacuna in the prosecution case which has been exposed by the defence

during the cross-examination of the prosecution witnesses. Therefore, I am of the opinion that summoning of the witness to prove the purported purchase receipt which was never relied upon by the prosecution enure would not to the ends of justice. It has been argued that the aforesaid defect arises out of remissness on the part of the investigating agency and is not an inherent wedge in the prosecution case. Failure of the investigating agency to ascertain the IMEI number of the seized mobile phone during investigation or that of the Court to ascertain such number prior to handing over custody of the seized phone to P.W. 1 is not a mere irregularity of procedure but strikes at the root of the prosecution case by extinguishing the 'best evidence' available for ascertainment of identity of the mobile phone. Such a state of affairs creates an inherent flaw in the prosecution case and in my considered opinion, the said lacuna in the prosecution case cannot be permitted to be filled up by relying on a purported purchase receipt of the said mobile phone which never saw the light till the defence had exposed the hollowness of the prosecution case in that regard.

In the light of the above factual discussion, I am of the opinion that the impugned order does not call for any interference. The revisional application is rejected.

The trial Court is directed to proceed with the trial in accordance with law and conclude the same at an early date.

The aforesaid fiasco had come into being due to the ineptness of the investigating agency as well as the presiding officer in the court in failing to ascertain the IMEI number of the mobile phone before handing over custody of the said article which is alleged to be stolen property to the defacto complainant. Their conduct exposes serious deficiency in knowledge and experience in handling cases involving electronic

gadgets. It must be borne in mind when electronic gadgets like mobile phone, tablet, laptop, etc. are subject-matters of theft and are required to be produced during trial as material exhibits of the case, necessary precautions must be taken to ascertain the IMEI number or other unique identification numbers of such equipments including its brand/product name, manufacturing date and other particulars prior to handing over interim custody of such electronic devices to a third party pending enquiry or trial. Handing over a mobile phone or any other electronic devices to a third party by way of interim custody pending investigation, enquiry or trial without ascertaining its IMEI or any other unique identification number is virtually equivalent to handing over interim custody of a motor vehicle to a third party without ascertaining its registration mark and other particulars. Courts dealing with such cases, therefore, must be most careful at the time of handing over interim custody of electronic devices and must bear in mind the following facts while dealing with applications for return of such articles:-

In the event electronic devices like mobile phone, laptop, tablet, etc. are seized as stolen property and are required to be produced and identified during trial, any prayer for return interim custody of such devices pending investigation, enquiry or trial shall not be granted till the IMEI number or other unique identification number, as applicable to the concerned device including its brand/product number and manufacturing details are ascertained and noted in the case records for identification of such device during trial. Till such ascertainment is made the concerned devices shall be retained in safe custody of the Court in accordance with law.

Registrar General of this Court is directed to circulate a copy of this order to all judicial officers of the State for awareness and due compliance of the safeguards, as aforesaid.

Accordingly, the revision petition alongwith CRAN 3600 of 2017 is also disposed of.

(Joymalya Bagchi, J.)