
(2015) 02 CAL CK 0001
In the Calcutta High Court
Case No : C.R.R. No. 192 of 2015

Manoj Jana

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 27-02-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 401, 482
Evidence Act, 1872 — Section 118
Penal Code, 1860 (IPC) — Section 306, 498A

Citation : (2015) 02 CAL CK 0001

Hon'ble Judges : Shib Sadhan Sadhu, J.

Bench : Single Bench

Advocate : Anirban Majumdar, for the Appellant

Judgement

Shib Sadhan Sadhu, J.—This is an application under Section 401 read with Section 482 of the Code of Criminal Procedure, 1973. Seeking for a direction upon the Trial Court to send the child witness to some independent place where the witness cannot be tortured and also for her safety.

2. The factual background of the case stated in brief is that since after 2/3 years of marriage the sister of the petitioner was tortured both mentally and physically and ultimately she committed suicide on 06.07.2011. On receipt of such information, the petitioner rushed there and found the dead body of the deceased was taken by police for post mortem examination. The petitioner thereafter lodged written complaint before the Officer-in-Charge, Kolaghat P.S. on the basis of which Kolaghat P.S. Case No. 172 of 2011 was registered and investigation was taken up. On completion of investigation a chargesheet under Section 498A/306 I.P.C. was submitted against the O.P. No. 2 herein. That case was committed to the Court of the Learned Additional Sessions Judge, 3rd Court, Tamluk, Purba Medinipur who framed charge against the present O.P. No. 2 and the trial is going on. On 07.11.2014 on the date fixed for argument, the Learned Trial Judge on hearing the argument of Learned P.P. in-Charge was of the opinion

that the minor daughter of the victim Oishi Maity @ Lisa aged about 13 years be summoned as material witness and accordingly the date was adjourned to 05.12.2014 for evidence of the said minor. On 05.12.2014 that minor appeared. The de facto complainant i.e. the present petitioner filed a petition stating that the minor is in custody of the accused and the Court has to ensure that the said witness deposes without any mental stress or direction. That application was disposed of on hearing both sides and it was rejected and the case was further adjourned to 28.01.2015 for evidence of that minor Oishi Maity @ Lisa. Challenging such order the instant application has been filed.

3. I have heard Mr. Anirban Majumdar, Learned Advocate appearing for the petitioner and Mr. Atish Kumar Biswas, Learned Advocate appearing for the O.P. No. 2. I have also perused all the available materials on record including the impugned order with meticulous care.

4. Mr. Majumdar, Learned Advocate appearing on behalf of the petitioner submitted that the daughter of the deceased Oishi Maity is a child witness and she is in custody of the accused and so there is every possibility that she would be under influence of the accused and would give evidence as she would be tutored by the accused. He further submitted that while assessing the evidence of a child witness, the Court should bear in mind the guidelines of the Hon'ble Supreme Court that the witness is reliable and she is not tutored. But the Learned Trial Court did not consider such guidelines while passing the order. Therefore, according to him, the impugned order cannot be sustained and necessary direction be passed for keeping the said child witness in safe custody so that she cannot be tutored and live freely. He relied on two unreported decisions of the Hon'ble Supreme Court being judgment dated 18.03.2011 in Criminal Appeal No. 1289 of 2005 (State of M.P. V. Ramesh and Anr.) and the judgment dated 25.02.2014 passed in Criminal Appeal No. 593 of 2005 (Radheyshyam V. State of Rajasthan) in support of his submission.

5. Mr. Biswas, Learned Advocate, appearing on behalf of the O.P. No. 2, on the other hand submitted that the safe custody of a child is governed by the provisions of the Juvenile Justice (Care and Protection of Children), Act 2000. He further submitted that the Trial Court has exercised its discretionary power under Section 311 Cr.P.C. and the petitioner has no locus standi to challenge it. He submitted yet further that as per provision of Section 118 of the Evidence Act, a child is also a competent witness and it is for the Court to test his competency before taking his/her deposition. He, thus, urged for dismissal of the Revisional Application.

6. Having regard to the rival submission in the light of the decisions placed, I think it fit to clear the air of controversy centering the examination of child witness Oishi Maity by invoking provision of 311 of the Code of Criminal Procedure.

7. Section 311 of the Code reads as follows:- "311. Power to summon material

witness, or examine person present-Any Court may, at any stage of any inquiry, trial or other proceedings under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine, any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

8. The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal Court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the Court, or (c) to recall and re-examine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case.

9. The scope of exercise of powers under Section 311 of the Code of Criminal Procedure has fallen for consideration of the Hon"ble Supreme Court in the matter of Iddar and Others Vs. Aabida and Another, wherein the Hon"ble Supreme Court observed - "The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

Considering the facts and circumstances of the instant case, I am of the opinion that the Learned Trial Court was justified in calling the said child witness Oishi Maity as a witness and the exercise of power by him under Section 311 of the Code cannot be said to be arbitrary, illegal or beyond the jurisdiction warranting any interference by this Court.

10. For the aforesaid reasons, I do not find any merit in the instant Revisional Application and the same is accordingly dismissed.

11. Criminal Section is directed to deliver urgent photostat certified copy of this

judgment to the parties, if applied for, as early as possible.