

(1996) 07 CAL CK 0064
In the Calcutta High Court
Case No : Criminal Rev. No. ... of 19 (sic)

Sri Arunava Dasgupta

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 18-07-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 311, 482
Evidence Act, 1872 — Section 114
Penal Code, 1860 (IPC) — Section 306, 498A

Citation : (1996) 2 CALLT 388

Hon'ble Judges : Asish Baran Mukherjee, J

Bench : Single Bench

Advocate : D.K. Sengupta and Sudipto Gupta, for the Appellant; R.P. Bhattacharyya, for the Respondent

Final Decision : Allowed

Judgement

Asish Baran Mukherjee, J.—This Is an application u/s 401 read with Section 482 of the Cr.P.C. praying for setting aside the order dated 7.9.95 passed by the Assistant Sessions Judge 4th Court, Alipore in Sessions Trial Case No. 1(1) of 1995.

2. The case of the petitioner is that an FIR u/s 306/498A IPC was lodged against him by one Debasish Roy on 26.5.91 which was treated as FIR giving rise to Jadavpur P.S. Case No. 296 dated 27.5.91 which was investigated by the O.C., Baisnabghata P.S. at the first instance and thereafter by C1D West Bengal. The allegation contained in the FIR are of Ill-treatment by the petitioner on his wife and subsequent death of petitioner's wife due to burn injuries alleged to have been caused by bursting of a stove.

3. The investigation ended in a charge sheet being No. 32 dated 1.3.93 and after cognizance was taken by the Sub-Divisional Judicial Magistrate, Alipore, the case was committed to the Court of Sessions and ultimately transferred to the Court of Assistant Sessions Judge, 4th Court, Alipore who framed charges against the

accused petitioner u/s 306/498A IPC.

4. The allegation made in the revisional application is that the prosecution in course of trial did not examine as many as eight(8) witnesses whose names figured in the charge-sheet. Those witnesses are either neighbours or friend of the deceased and as such they are natural witnesses whose testimony is also relevant in order to come to a Just decision of the case. But they were refused to be examined by the Public Prosecutor as because their statements to the I.O. u/s 161 Cr.P.C. were not in tune with the prosecution story.

5. Accordingly, an application was made before the Trial Court allegedly u/s 306 1PC praying for the same witnesses being examined by the Court. The said prayer was rejected by the Trial Court by the impugned order dated 7.9.95 where by a date was also fixed for examination of the I.O. making it a closer of the prosecution case. It is averred in the petition that the Trial Judge were wrongly rejected the prayer of the defence to have the testimony of the left over witnesses taken in accordance with the law.

6. The learned Advocate for the petitioner relied on Section 311 Cr.P.C. as also a decision reported in *Raj Kishore Rabidas Vs. The State*, where duty of the public prosecutor in the matter of conducting trial of a Criminal Case has been laid down.

7. It has been argued on the basis of the aforesaid decision and the general principles of Section 311 Cr.P.C. that in order to arrive at a Just decision the Trial Judge ought to have examined the left over witness whose evidence are very much material in order to arrive at the truth, since they are either neighbours or friend of the deceased.

8. Section 311 Cr.P.C. has got two parts, the first part being discretionary, the second part is mandatory in nature. The second part of the said section casts a duty on the Trial Court to summon, examine, recall or reexamine of any such person if his evidence appears to be essential to the just decision of the case. The object of the section is to arrive at the truth, irrespective of the fact that the prosecution or the Defence has failed to produce some evidence which is necessary for a Just decision of the case. It is the duty of prosecution to lay all material evidence available before the Court, unless of course, some witness is gained over or terrorised by the accused. But even in such a case it is always open to the Defence to examine such witnesses and the Court can also call such witness u/s 311 Cr.P.C. In a case reported in *In Re: Vadlamudi Kutumba Rao*, the prayer of the accused for summoning as Court witness, the person who were cited as direct witness in the charge-sheet but was not examined by the prosecution was rejected by the Trial Court. It was held that it was a wrong exercise of discretion on the part of the Trial Court. In the decision relied on by the petitioner, namely *Raj Kishore Rabidas Vs. The State*, reference was made to the earlier decision reported in AIR 1938 FC 266 and AIR 1957 SC 889 where duty of the Public Prosecutor who has been described as not only an Executive

Officer but also as an officer of the Court and in the latter capacity he has been held to be bound to assist the Court with his fairly considered view in the matter of conducting prosecution of a case.

9. It appears from the averment of the petition, certified copy of which has been annexed made that the witnesses in question, numbering 8 are either neighbours or friend of the deceased or servant employed in the house where the petitioner and his wife used to stay at the time of occurrence. It also appears that these witnesses were all examined by the I.O. and their statements were also recorded u/s 161 Cr.P.C. As per the prayer in the revision application the numbers of these witnesses in the chargesheet are 4, 5, 6, 18, 19, 20, 21, and 22. There is no averment and no argument from the prosecution to the effect that any of the witnesses deviated from the stand taken by them during integration by the I.O. On the other hand, as per the averment of the petition made before the Trial Court and the revisions application which are not challenged by the O.P., the State, these witnesses even in course of their examination u/s 161 Cr.P.C. spoke about existence of cordial relationship between the petitioner and his wife and the subsequent incident of bursting of stove has been termed as accidental in nature. Be that as it may, this much can be said with certainty these 8 witnesses were examined by the I.O. who recorded their statements and included their names as charge-sheet witnesses. Therefore, it was natural for the Public Prosecutor to examine those witnesses. It is true, that Public Prosecutor conducts the Prosecution but that does not mean it is his duty to see that accused is convicted by hook or by crook without any regard to the guilt of the accused. On the other hand, it is his duty to assist the Court in finding out the truth and to come to a decision about the guilt or innocence of the accused. Merely because a man has been charge-sheeted for alleged commission of an offence does not make him guilty for the said offence. His guilt is to be established beyond all reasonable doubt from a scrutiny of the evidence given by PWs who are earlier examined by the I.O. to find out whether there is prima facie case against the accused. To keep some of the witnesses away from the witness-dock on the pretext that they, in course of their examination by the I.O. u/s 161 Cr.P.C. did not support the prosecution story to say the least is not at all fair. The purpose of Criminal Trial and for that matter any trial is to arrive at the truth and it is the duty of the prosecution as well as the Defence to assist the Court in arriving at the truth. Therefore, the move on the part of the P.P. to keep some witnesses away from the witness-dock on the ground that they are disclosures during Investigation are not palatable to the prosecution is not at all fair.

10. A scrutiny of the order of the Trial Judge reveals that his approach to the question is also not at all fair. The Trial Judge agreed to the P.P. that the witnesses were gained over by the Defence after a scrutiny of a statement of those witnesses u/s 161 Cr.P.C. These approach is not legal. The purpose of Investigation, as I have said earlier is to arrive at the truth and not to imprecated a person with the commission of the offence by sacrificing truth. Therefore, merely because the same material witnesses who in the facts and

circumstances of a case are most natural and probable witnesses speaks something which disfavour the prosecution case, the same cannot be the ground for coming to the conclusion that they must have been gained over by the Defence. Such an approach is not at all legal since the very purpose of Investigation shall be frustrated if it is considered from the very inception that whenever a person is accused of an offence in an FIR, it is to be taken for granted that he must have committed the said offence. The Trial Judge also find fault with the Defence as because the petition described the Public Prosecutor as overzealous, the Trial Judge is not also right in stating that the statement of those witnesses may be placed by the Defence during argument for getting the benefit u/s 114 of Evidence Act. The law does not contemplate such use of the statement u/s 161 Cr.P.C.

11. Accordingly, I come to the conclusion that the impugned order of the Trial Judge cannot stand. It is a fit case in which the learned Trial Judge should have allowed the prayer of the Defence and examined all those 8 witnesses u/s 311 Cr.P.C. The course chosen by him is bound to prejudice the accused in fair trial of the case and shall be an hindrance in arriving at the truth. The Trial Judge should have proceeded the trial in an open mind and in the event of omission on the part of the prosecution to produce relevant materials should have resorted to the power given to him u/s 311 Cr.P.C. when his attention was drawn to that effect by the Defence.

12. Accordingly, the impugned order dated 7.9.95 stands set aside. The learned Trial Judge is directed to examine all the aforesaid 8 witnesses u/s 311 Cr.P.C. Liberty must be given to the parties to crossexamine those witnesses and thereafter he shall proceed in accordance with law. The revisional application accordingly stands allowed on contest. Let copy of the order be sent to the Trial Court as early as possible.