
(1975) 03 CAL CK 0005
In the Calcutta High Court

Tribeni Prosad Misra

APPELLANT

Vs

Ram Sahay Singh and Others

RESPONDENT

Date of Decision : 07-03-1975

Acts Referred:

Constitution of India, 1950 — Article 134, 136
Penal Code, 1860 (IPC) — Section 114, 302, 34

Citation : (1975) CriLJ 1517

Hon'ble Judges : N.C. Talukdar, J;A.N. Banerjee, J

Bench : Division Bench

Judgement

N.C. Talukdar, J.—This is an Application under Article 134(1)(c) of the Constitution of India for a certificate of fitness for appeal to the Supreme Court against an order dated the 1st July, 1974, passed by this Court in Death Reference No. 3 of 1971 and Criminal Appeal No. 211 of 1971, refusing to accept the reference and allowing the appeal by setting aside the order of conviction and sentence passed on the accused-respondents on the 28th of April, 1971, by Shri N.G. Chowdhury, Additional Sessions Judge. 4th Court, Alipore in Sessions Trial No. 2, of March, 1971. The facts leading on to the application are rather chequered.

2. The prosecution case brings to light a sad and sordid case of murder of one Ramjas Missir, an employee at the Gasper Petrol Station at 240-A, Lower Circular Road, Calcutta. The unfortunate victim was murdered while lying asleep on his khatia placed near the servicing shed of the petrol station in front of the western entrance thereof. The prosecution case inter alia is that P. W. 3. Jawaharlal Srivastava hailed from Tamespur, District Sultanpur, in the State of U.P. and was employed as a driver of the motor car assigned to Srimati Ruchira Bose (P. W. 24) by James Warren and Co. She is the Manager of the Travel Department. He used to get his pay and his meals from Srimati Bose, and lived in the servant's room attached to her flat at 10 Elgin Road, Calcutta. He developed acquaintance and friendship with accused No. 2, Ram Kripal Missir, who also hailed from village Munjgaon which was within 15 miles from the village of P. W. 3. About four

months before the occurrence, the accused Ram Kripal told P. W. 3 that one Ramjas Missir was an enemy of his. writing letters to his friends and relations in his native village and those friends and relatives caused extreme inconvenience to the members of Ram Kripal's family, so much so, that it became difficult for them to live there. Therefore, if Ramjas could be taught a lesson his friends and relatives would behave properly. Jawaharlal Srivastava promised all help to Ram Kripal in the matter and they had talks thereafter on several occasions over this. Two months before the occurrence the accused Ram Kripal went home and P. W. 3 dropped him at Howrah Station in Car No. WBF 2527 which belongs to Mrs. Ruchira Bose (P. W. 24). The prosecution case further is that about 15 days before the incident, accused Ram Kripal wrote a letter to P. W. 3 informing him that he had made arrangements to murder Ramjas Missir and that the latter should arrange for a car. After tearing up Ram Kripal's letter, P. W. 3 wrote back that he would make arrangements for the car and that he might come to Calcutta on the 23rd of August, 1969. On that date P. W. 3 went to the office taking Srimati Bose in her car and returned to the Elgin Road residence at about 12-30 P. M. and was informed by the bearer, Syam Sundaram (P. W. 27) that a person came to see him when he was out and that he would be coming again. Shortly after, before he could take his food Syam Sundaram reported that the man referred to had come again and without taking his food P. W. 3 went downstairs out on the road. He found then accused No. 1, Ram Sahay Singh, waiting at the entrance of the house for him and on being questioned, he informed him that the accused Ram Kripal was waiting for him nearby and wanted him to go there. Led by accused Ram Sahay then reached near the Netaji Bhavan and found the accused Ram Kripal with a bag in his hand standing close to a tree beneath the shade of which a barber seats and serves his customers. Accused Ram Kripal told him that although he was on leave, still he returned with accused Ram Sahay whom he introduced to Srivastava as his co-villager. He was further informed that the accused Ram Sahay would fire shots at Ramjas as arrangements, for teaching Ramjas a lesson as discussed in his letter to Srivastava, were complete. P. W. 3 was told that the accused requires the car at night, P. W. 3 told him that the car would be available and after taking his meals he came to Car No. WBF 2527 which is a Mark II Ambassador of green colour. Accused Ram Kripal and Ram Sahay boarded the car and P. W. 3 dropped them near the Rabindra Sadan. P. W. 3 was asked to come back to the garage at about 9/9-30 P. M. which was known to accused Ram Kripal on that date. P. W. 3 came to the garage at the appointed time and he found both the accused there who boarded the car and were taken by P. W. 3 to Dara Singh's hotel ran under the name of Narayan Restaurant at the crossing of Lee Road and Lower Circular Road, to feed the accused as they had not taken their meals. P. W. 3 requested P. W. 28. Dara Singh, to serve the two accused with meals and assured him that the price will be paid by him. P. W. 3 returned to the residence of Srimati Bose and after taking meal returned to the aforesaid hotel at about 11-30 P. M. After paying the bill, P. W. 3 took the two accused. Ram Kripal and Ram Sahay, in his car and drove towards the Victoria Memorial. On the way the accused Ram Kripal

suggested that P. W. 3 should lower the speed of the car near the Gasper Petrol Pump. As they came in front of the Gasper Petrol Pump accused Ram Kripal pointed out two Khatias placed out in front of the servicing station and told the co-accused Ram Sahay that the eastern Khatia was occupied by the victim Ramjas Missir and the western khatia by another. It was about 11-30/45 P. M. and at that time the eastern khatia was empty. They parked the car in between Victoria Memorial and the Race Course and then the accused Ram Kripal brought out a country-made pipe gun and two bullets from the bag he was carrying. The gun was handed over to Ram Sahay along with the two bullets and one bullet was put in the gun and the other bullet was kept by the accused Ram Kripal in his breast pocket. The bullet was put in the gun by the accused Ram Kripal and the loaded gun was underneath the wearing dhoti of the accused Ram Kripal. The accused Ram Kripal suggested that on the pretext of purchasing petrol P. W. 3 should drive the car inside the petrol pump and he further suggested that going near the pump on the west P. W. 3 should open the cap of the petrol tank with a view to take in petrol and keep watch on Ramjas lying on the khatia and that as soon as the accused Ram Sahay would be returning after firing, P. W. 3 should take him inside the car and drive away. To avoid detection of the number, the accused Ram Kripal suggested that some dirty grease taken from beneath the car can be applied on the last figure, viz., No. 7, to obliterate. At about 12-30 P. M. the accused Ram Kripal asked P. W. 3 to drive up to the petrol pump and as he neared the petrol pump he was advised not to go to the petrol pump but to wait till the night advance further as it was too early. The car was driven back in front of the Elgin Road Post Office where it was parked and the three accused slept inside the car. At about 3-30 A. M. Ram Kripal woke up P. W. 3 and all of them drove up to the front of the Gasper Petrol Pump. Reaching there they found Ramjas seated on his khatia and chewing tobacco with his hands. The accused Ram Kripal suggested that the car should be taken back to the Victoria Memorial and ultimately at about 4/4-30 A. M. Ram Kripal suggested that P. W. 3 should take the car to Gasper Petrol Station to purchase petrol. The car was driven accordingly to the Petrol Station and stopped in front of the Western pump. At that time the two accused were in the rear seat of the car. The petrol man beckoned P. W. 3 to drive up to the second installation of the pump on the farther east and the car was accordingly driven to that place. Stopping the car P. W. 3 came out of the car and walked up to the rear of the car to open the cap of the petrol tank and requested the petrolman to put 5 litres of petrol inside the tank. Opening the cap of the petrol tank P. W. 3 returned to the Driver's seat in the car and saw the accused Ram Sahay coming out of the car by the left door, walking up towards the khatia of Ramjas with the pipegun concealed behind his dhoti. Proceeding a few steps from the car Ram Sahay stopped a little, but the accused Ram Kripal came from behind, patted him on his shoulder and asked him to go near the tap if he wanted to drink water and the accused Ram Sahay proceeded forward near the Khatia of Ramjas held out the pipegun, fired the same and ran back towards the car. Hearing the sound of the pipegun P. W. 3 started to drive the car although petrol was still pouring into the tank and the cap was still open

and the price of petrol was not yet paid. The accused Ram Kripal came running and entered into the car while it was moving. Thereafter, P. W. 3 sped along Lower Circular Road and then Camact Street. Inside the car the accused Ram Sahay returned the pipegun to the accused Ram Kripal who put it inside the bag he was carrying. Ram Sahay wanted P.W. 3 to reach him to the Howrah Station while Ram wanted him to drive up to the Sealdah Station to enable him to get the Pathankot Express. As the day had dawned and P. W. 3 had his difficulties he requested the two accused to get down from the car near the statue of Gandhiji at Park Street junction and to make their own arrangements for further transport. They got down there and P. W. 3 drove along Red Road, Harish Mukherjee Road and ultimately reached his garage. He took the car inside the garage and thereafter rubbed with a duster the grease applied on the last figure on the number plates on the two sides, locked the gate of the garage from outside and went to his residence. It was about 5 a. m. then. He woke up Shyam Sundar, the bearer, took out his bed, and slept thereafter up till 11 a. m. When Shyam Sundar questioned him, he told Shyam Sundar that he had gone out to witness a Jatra performance. P. W. 18 an employee of the petrol pump at the place of occurrence saw Ramjas to be shot and later on stagger in his khatia, shouted for help. Thereafter he, the said witness, along with P. W. 19 Ganga Prosad Konar, who was also on duty went near Ramjas and saw that he was bleeding profusely from the chest and was unable to sit up. A police van, thereafter, arrived and Ramjas was taken to the hospital in that police van. Later on, at about 6 a. m. Ramjas died.

3. A first information report was lodged (Exhibit 8/1) at about 5.35 p. m. on 24-8-1969 by Head Constable, Dharendra Nath Dutt. An investigation started and ultimately the police submitted charge-sheet against all the three, viz., the accused Ram Kripal, Ram Sahay and Jawaharlal Srivastava (P. W. 3) on 2-2-1970. After completing the enquiry the learned Magistrate on the 17th of June, 1970, framed charges u/s 302 of the Indian Penal Code against the accused Ram Sahay; charges u/s 302 read with Section 114 of the Indian Penal Code against accused Ram Kripal and Jawaharlal Srivastava. The plea of Jawaharlal Srivastava was also taken and he pleaded not guilty notwithstanding the fact that in the meanwhile Jawaharlal Srivastava was tendered pardon and was examined as P. W. 3 in the Committing Court as an approver. At the commencement of the trial, the learned Additional Sessions Judge felt that the charge against Jawaharlal Srivastava was untenable in view of the fact that pardon was granted to him and he became an approver and he accordingly made a reference to the High Court- The High Court accepted the Reference, being Criminal Reference No. 65 of 1970 and by its order dated 13th January, 1971, quashed the order of commitment of Jawaharlal Srivastava and Ram Sahay, A trial, thereafter, started against the said two accused persons in the Court of Session. At the commencement of the trial, on the submission of the learned Public Prosecutor, the original charges were re-cast and a charge u/s 302 read with Section 34 of the Indian Penal Code was framed against both the accused,

4. Both the accused pleaded not guilty to the charges framed against them, and the defence case inter alia is that the accused appellants have no connection with the murder of Ramjas Missir and that a false and concocted case was framed against them out of grudge and ill-feeling.

5. The prosecution in this case examined 41 witnesses and exhibited a number of documents to connect the accused-appellants with the crime. Of the witnesses, P. W. 3 is the approver, P. Ws. 10 and 11 are the two sons of the victim; P. Ws. 18 and 19 are the eye-witnesses; P. Ws. 12, 13, 16 and 23 are the search witnesses. P. W. 20 is the learned Magistrate before whom the test identification parade was held; P. W. 21 is the arms expert; P. W. 25 is the Doctor who held the post-mortem examination; P. W. 38, S. I-Krishna Prosad Goswami, who held the inquest, drew up the F. I. R. on the information of head constable, Dharendra Nath Dutta, and held the investigation in part before he made over the charge to P. W. 39 and P. W. 39, S. I. Runu Guha Neogi completed the investigation and submitted the charge-sheet.

6. As a result of the trial in the Court of Session the two accused persons were found guilty of the offence u/s 302/34 of the Indian Penal Code and they were ordered to be hanged by their necks till they are dead, by the learned Additional Sessions Judge, Fourth Court, Alipore. on the 28th of April, 1971. On a reference along with the appeal, as referred to above, the reference was accepted and the appeal was allowed and the accused persons were directed to be set at liberty. The present application is for a certificate of fitness for appeal to the Supreme Court under Article 134(1)(c) of the Constitution against the aforesaid order dated the 1st of July, 1974.

7. In support of the present application for a certificate for fitness Mr. Jyotish Chandra Bose, Advocate, with Mr. Kunja Mohan Sinha, Advocate, appearing on behalf of Tribeni Prasad Misra, a son of the deceased, Ramjas Missir, and a witness in the case, urged the same points as submitted earlier at the time of hearing of the appeal. Mr. Nalin Chandra Banerjee, Advocate, appearing on behalf of the accused persons, joined issue and contended that the application is not maintainable because, it involves ultimately a consideration of the facts and also because it is at the instance of a private person, a witness to the trial, and not by the State. Mr. Banerjee further submitted that the application under Article 134(1)(c) of the Constitution is also incompetent because it is against an order of acquittal, passed on setting aside the conviction in appeal, and as such is not maintainable. Mr. Sobhendu Sekhar Boy, Advocate, appearing on behalf of the State also opposed the application and he submitted that no notice was given to the State before filing this application for leave to appeal to the Supreme Court and as such the application is not maintainable.

8. On a consideration of the facts and circumstances, we find that the case ultimately involves a consideration of facts and as such it is not a fit case for granting the certificate under Article 134(1)(c) of the Constitution of India. The case also does not bring to light any proper ground for consideration in

connection with granting of the certificate of fitness for appeal to the Supreme Court. Besides merits, the application also appears to be not in order. In the first instance it has not been preferred by the State but by a witness for the prosecution who happens to be a son of the deceased and that also without giving any notice to the State. Mr. Bose appearing on behalf of the applicant submitted that the principles laid down in the case reported in *Thakur Ram Vs. The State of Bihar*, have since been modified by the observations of the Supreme Court in *Ram Kishan Singh Vs. Harmit Kaur and Another*, . Mr. Bose further submitted that the terms of Article 134(1)(c) of the Constitution of India do not rule out such an application at the instance of a witness. Mr. Sobhendra Sekhar Roy, Advocate, appearing on behalf of the State, referred to a recent decision of the Supreme Court in the case of *State of U.P. Vs. Ram Swarup and Another*, wherein Chandrachud, J., delivering the judgment of the Court, observed in paragraph 35:

If in an appeal against a conviction the High Court acquits an accused or if in an appeal by the State Government against an order of acquittal the High Court confirms the order of acquittal, it is the State Government which, if at all, would be aggrieved by the order of acquittal and it would therefore be entitled to challenge the order in a further appeal if any such appeal is provided by law.

9. Mr. Roy accordingly submitted that under Article 134(1)(c) of the Constitution leave to appeal to the Supreme should not be given as under Article 136(1) the Supreme Court has wider discretion. Mr. Nalin Chandra Banerjee, Advocate, with Mr. Chittaranjan Das, Advocate, appearing on behalf of the accused-respondents besides supporting the above-mentioned submissions of Mr. Roy referred to the decision in *Supdt. and Remembrancer of Legal Affairs to the Govt. of West Bengal Vs. Anwar Ali Sarkar and Others*, , wherein Chief Justice Chakravarti delivering the judgment of the court held that in the case of an application by the State Government under Article 134(1)(c) of the Constitution for leave to appeal to the Supreme Court against certain orders of acquittal passed by the High Court in appeal, such an application must be held to be not maintainable on the construction put by the Supreme Court itself on Article 134(1)(c) of the Constitution of India. It was observed;

It may be said that the terms of Sub-clause (c) of Article 134 are perfectly general, not less general than those of Article 136, and that therefore there is no apparent reason why appeals against acquittals should be regarded as excluded from its purview.

10. Mr. Banerjee further referred to an unreported decision in *Criminal Revn. Case No. 93 of 1958* decided on 23-9-1959 (Cal) by K.C. Das Gupta, C.J., sitting with Bose, J., (as his Lordship then was), wherein it was held that no leave to appeal to the Supreme Court should be granted on the application of a private party where the State had not appealed. Mr. Banerjee further submitted that failure on the part of the applicant to give notice to the State before filing the present application is also fatal. There is considerable force behind the objections

raised on behalf of the State and also the accused respondents and on an anxious consideration of the same we_ hold that the application is not maintainable apart from the further fact that it involves a question of fact only.

11. In the circumstances, we do not consider that the points raised by Mr. Bose require further consideration by the Supreme Court and we hold that there is no substantial or important question of law of outstanding difficulty in this case which should be referred to the Supreme Court for settlement. In any event the application is not maintainable at the instance of the son of the deceased, witness in the trial and that also in the absence of any notice given to the State which appeared at the time of hearing and opposed the application.

12. In the result, the application is rejected.

13. Let the certified copy of the judgment of this Court filed along with the application be returned to the learned Advocate for the applicant.

A.N. Banerjee, J.

14. I agree.