

HIGH COURT OF TRIPURA
A_G_A_R_T_A_L_A
Crl. Petn. No. 07 of 2024

Panna Ahamed

.....*Petitioner*

-VERSUS-

The State of Tripura and Others

..... *Respondents.*

B_E_F_O_R_E
HON'BLE MR. JUSTICE T. AMARNATH GOUD

For Petitioner(s)	:	Mr. P. K. Biswas, Sr. Advocate. Mr. R. Nath, Advocate. Mr. P. Biswas, Advocate.
For Respondent(s)	:	Mr. S. Kar Bhowmik, Sr. Advocate. Mr. E. Darlong, Advocate. Mr. J. Das, Advocate. Mr. N. Debnath, Advocate.
Date of hearing and delivery of Judgment & order	:	14.03.2024
Whether fit for reporting	:	YES

JUDGMENT & ORDER [ORAL]

Heard Mr. P. K. Biswas, learned senior counsel assisted by Mr. R. Nath and Mr. P. Biswas, learned counsel appearing for the petitioner also heard Mr. S. Kar Bhowmik, learned Special P.P. assisted by Mr. E. Darlong, Mr. J. Das and Mr. N. Debnath, learned counsel appearing for the respondents.

[2] The present petition has been filed under Section-482 of the Code of Criminal Procedure, 1973 for quashing/setting aside the impugned order dated 06.02.2024 passed by the learned Addl. Sessions Judge, Court No.5, West Tripura, Agartala in connection with case No. S.T.(Type-1) 38 of 2017 rejecting the application filed by the petitioner under Section-311 Cr. P.C. for recalling PW-1 for further cross-examination in the interest of justice.

[3] The facts in brief are that PW-1 being the victim-informant of the instant case was previously examined and cross-examined. In

course of proceeding, the CDR was filed along with the charge sheet, but inadvertently, some of the disputed facts/call details between PW-1 and the petitioner was over sighted by the defence. To prove the CDR, the defence submitted an application before the learned trial Court to recall PW-1 for her further cross examination to prove the CDR. After filing of the application under Section-311 Cr. P.C., the prosecution submitted its objection. After hearing both the parties, the learned Addl. Sessions Judge, Court No.5, West Tripura, Agartala by the impugned judgment dated 06.02.2024 rejected the petition filed under Section-311 of Cr. P.C. on the ground that the said petition has been filed after lapse of 4 years.

[4] Being aggrieved by and dissatisfied with the same, the present criminal petition is filed before this Court to quash/set aside the impugned order dated 06.02.2024.

[5] Mr. P. K. Biswas, learned senior counsel appearing for the petitioner has submitted that in course of trial, 20 witnesses had been examined and cross-examined and it is further to be stated that PW-1 was first examined and cross-examined on 14.06.2019 and 10.07.2019. PW-1 was further examined by the prosecution on 08.08.2019 and 02.11.2019 and again she was cross-examined. It has been further stated that after examination and cross-examination was over, the prosecution filed an application for recalling PW-1 for further examination and the said application was rejected by the learned Court below vide order dated 02.09.2019 and against the said order prosecution preferred a criminal petition before this Court being Criminal Petition No.02 of 2019 and the said petition was allowed by this Court vide order dated 30.05.2019.

[6] In pursuance of the order passed by this Court, PW-1 was further examined by the prosecution on 08.08.2019 and 02.11.2019 and thereafter she was cross examined by the defence and in this process, examination and cross examination of 20 witnesses had been completed.

[7] It is further contended that that the petitioner was falsely implicated with the case and the allegation of forcible rape is quite false

and fabricated and it was the stand of PW-1 that on the date of alleged occurrence she was called by the petitioner over phone by the mobile of the accused being No.9436189783 to the mobile phone of PW-1 bearing No.9436740279 but, inadvertently, it escaped the notice of the defence that the CDR of both the phones have been submitted before the learned Court below along with the accused copy and that is an unintentional mistake on the part of the defence and on perusal of the CDR, it is found that it is the victim-informant who called the accused petitioner from her mobile phone to the mobile phone of the accused petitioner and the petitioner attended the said call for 34 seconds.

[8] Thereafter, the accused again called her but the said call was not attended by the informant. After the incident, PW- 1, informant had called the accused-petitioner over his phone for six times and she had conversation with the accused and in between this time, PW-1 sent series of messages from her phone and it is also revealed from the CDR that before the alleged incident she sent ten messages to the accused and after the alleged occurrence she sent 14 messages to the mobile of the accused-petitioner and as the stand of the petitioner that the alleged cohabitation took place on mutual consent and the incident was seen by her minor son and thereafter there was a conspiracy from the side of the husband and the FIR was lodged as drafted by a lawyer.

[9] On 10.11.2017, the learned Court below directed the Nodal Officer of Tripura, SSA, for LI activities and the GM (Mobile), Office of GGMT, NE-1 Circle of BSNL, Government of India, having its office at Kaman Chowmuhani, Agartala, West Tripura under Section-91 of the CPC requiring them to produce the text SMS/Messages in between aforesaid mobile phones during the period from 01.01.2016 to 26.06.2016 to the learned court below by the next date i.e. by 20.11.2017. It has been further stated that subsequently it was brought to the notice of the defence which earlier escaped due to *bona fide* mistake that though copy of the CDR is filed, but copy of the text message which are mentioned in the order dated 10.11.2017 passed by learned Court below has not yet been

supplied to the accused petitioner and the defence is still in dark whether those are at all submitted before the learned trial court, which are essential for the just decision of the case and the accused is also entitled to get the copy of those messages as mentioned in the order for effective cross-examination of the informant as well as the investigating officer and also the officer of BSNL.

[10] So, the learned court below committed serious error and illegality by rejecting the application of the accused-petitioner to recall PW-1 for further cross-examine with reference to the CDR and the text messages, as mentioned in the order dated 10.11.2017 passed by the learned court below. The above facts escaped the notice of the defence and accordingly this fact could not be proved by the victim which is essential for just decision of the case, and it is further stated that one Bikash Sarkar, AGM, BSNL, Agartala, submitted the CDR from 20.06.2016 to 27.06.2016 and unless the facts, as revealed from the CDR are not put to PW-1, that event on admission by Bikash Sarkar, as mentioned above, cannot be used by the defence to show his innocence.

[11] If the victim was not given an opportunity to say on this fact and accordingly the defence have filed an application under Section 311 Cr.P.C. to recall PW-1 to put the questions which the defence wanted to put PW-1 in cross-examination, but the learned trial court only on the ground that the petition has been filed after 4 years, the same has been rejected and as such, vide order dated 06.02.2024 the learned trial court rejected the application for recalling PW-1 for further cross examination, which is liable to be quashed.

[12] The learned court below should have considered the petition on merit where the grounds put in the petition for further cross-examination of PW-1 is essential for just decision of the case, but without deciding the same, the learned trial court had rejected the application only on the ground that the application has been filed after 4 years and that PW-1 has already been cross-examined and that the victim had already

been further re-examined on the basis of the application filed by the prosecution which is highly illegal, erroneous and as such, the same is liable to be quashed.

[13] Further, cross-examination of PW-1 is essential for just decision of the case and also in the interest of justice and as such, the same should be allowed and the order passed by the learned trial court is liable to be set aside/quashed. If the grounds sought in the petition are essential for just decision of the case, the application under Section-311 Cr.P.C. cannot be rejected on the ground that the application has been filed after lapse of 4 years and there is no record that the accused ever had tried to delay the trial and further it is settled by catena of decisions that even in the appellate forum application under Section-311 Cr.P.C. can be allowed and delay in filing application under Section-311 Cr.P.C. is no ground for rejection.

[14] Ld. Sr. Counsel Mr. P. K. Biswas submitted that the alleged victim has used mobile number bearing No.9436740279 which belongs to her husband and it has been used by the alleged victim and mobile number bearing No.9436189783 which was used by the accused person but due to inadvertent and oversight CDR was not brought on record which was essential for ends of justice and also for just decision of the case and for which further cross examination of PW.1 is required. Learned senior counsel further submitted that it escaped the notice of the defence that prosecution has submitted CDR of the accused person and informant in respect of the above stated mobile number and as such for just decision of the case defence may be allowed to put question to reveal the truth. He also placed the questions which would be put to the PW.1 in the petition.

[15] On the other hand learned senior counsel Mr. S. Kar Bhowmik, appointed as Spl. P.P. has submitted that PW-1, the victim was first examined in chief and cross examined on 14.06.2018 and subsequently, her cross examination was again done on 10.07.2018.

Thereafter, the victim was re-examined by prosecution on 08.08.2019 and she was re-cross-examined on the same date. That subsequently she was re-examined on 02.11.2019 and on the same date her cross examination was done. As such, from the above chronology it is abundantly clear that the defence got ample opportunity to cross examine the victim.

[16] In the complaint it has been uttered that on 27.06.2016 she went to the house of her neighbour i.e. the petitioner for the purpose of renting house. Her husband goes to Sonamura Court from Agartala on daily basis for professional reasons. Like every day, before going to Sonamura Court her husband asked her to talk to the petitioner regarding the renting of house. So, when she went to the house of the petitioner at around 10.30am/11.00am and entered into the room the petitioner closed the door of his room. She asked him about his wife and children. Without giving any reply he jumped upon her and lifted her and threw her on the bed and committed the crime. Thereafter, the petitioner threatened her not to disclose the incident to anyone or else he will kill her. Thereafter, she informed her husband about the incident over telephone he immediately rushed to Agartala.

[17] It is further stated that the law is trite that the power conferred under Section-311 Cr. P.C. should be invoked by the Court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should not be exercised with great caution and circumspection. The power under this provision shall not be exercised if the Court is of the view that the application has been filed as an abuse of the process of law.

[18] It is asserted that 19 witnesses have been examined and after more than four years a belated petition filed under Section-311 of Cr.P.C. praying to ask 94 questions would only frustrate the trial in general and victim in particular who is waiting to get justice for last more than 7 years and four times has already been appeared before the Court.

[19] It is seen from the records that the call data which the petitioner herein placed reliance are the documents which have been placed on record before the Court and the prosecution opposed only to the question No.94 i.e. “*Is it a fact that the accused did not have cohabitation with you by force, but due to some dispute and anger you have brought the allegation of rape against the accused?*” The Court has also considered Section-311 and further referred the judgment of the Hon’ble Apex Court ***Mohanlal Shamji Soni v. Union of India and another*** [AIR 1991 SC 1346] and contended that the learned Court below observed, this is only the delay tactic, this Court has no hesitation hold that that the learned Court below has not appreciated issue with regard to the contents of the call data and the pleadings made in the petition.

[20] Whether witness is required to be recalled or not, is dependent upon the prevalent facts and circumstances, emanating from the record, but what is important are that power must be exercised in view of the expression ‘shall’ if it is essential for just decision of the case. Indeed, such power which is wide must be exercised with circumspection for wider the power, greater the responsibility upon the Court. it cannot and should not be allowed to prejudice the accused or only fill up the lacunae and as has been held in ***Manan Shheikh v. State of West Bengal***, reported in (2014) 133 SCC 59, such power can be exercised in relation to a particular case with regard to a particular witness on more than one occasion.

[21] From a conspectus of the facts and circumstances stated supra, it is apparent that it is a case where the complaint is made by the wife of an advocate against a judicial officer and it is seen from the call data, this Court *prima facie* comes to an opinion that there is a relation between the accused as well as with the husband of the complainant to victim and they are neighbours and even as per the evidence of PW-1 complainant it clearly indicates that this is an improved version of contents of the complainant and also in PW-1’s evidence “*whenever I entered in his*

room he was wearing a lungi (casual garment of lower portion of a man) only.”

[22] Furthermore, he has submitted that in the case of ***State of Haryana v. Bhajan Lal***, the Apex Court held that in extraordinary power under Article-226 of the Constitution or the inherent powers under Section-482 of the Cr. P.C., can be exercised to quash a criminal proceeding. It has been further held that when a criminal proceeding is manifestly attended with *mala-fide* and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused with a view to spite him due to private and personal grudge, powers Article-226 of the Constitution or the inherent powers under Section-482 of Cr. P.C. can be exercised to quash a criminal proceeding.

[23] In ***Anand Kumar Mohatta v. State (Govt. of NCT of Delhi)*** Department of Home and Another the Hon’ble Apex Court has held that “482. *Saving of inherent power of the High Court- nothing in this code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.*”

[24] In ***Mina Lalita Baruwa***, the Court observed that it is the duty of the criminal court to allow the prosecution to correct an error in interest of justice and held that:

“Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.” (emphasis supplied) In the present case, the importance of the decoding registers was raised in the examination of PW-41. Accordingly, the decoding registers merely being additional documents required to be able to appreciate the existing evidence in form of the call details which are already on record but use codes to signify the location of accused, a crucial detail, which can be decoded only through the decoding registers, the right of the accused to a fair trial is not prejudiced. The

production of the decoding registers fits into the requirement of being relevant material which was not brought on record due to inadvertence.”

[25] 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 of 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 the 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 any 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.

[26] It is well settled that the power conferred under Section-311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has wide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

[27] In view of the above, this Court feels in order to meet the ends of justice, ample opportunity to be given to the accused in a criminal case and fair trial to be conducted. Accordingly, an opportunity is given to the accused person to the questions that would be raised before the Court below. However, it is always open for the Public Prosecutor to raise his objection and the Court would consider the same on merits and at its discretion.

[28] Since the matter is of in the year 2017, the Court below shall fix a date for examining the witness as required under Section-311 by the petitioner. On such date, it is made clear that both parties to cooperate with the Court proceedings and complete the same without any further delay. In any event, if the Court feels that the petitioner is not cooperating and trying to play delay tactics, it is open for the Court to proceed in accordance with law.

[29] In view of above, the present petition stands allowed and disposed of directing the learned Court below to give an opportunity to proceed with the matter by examining the call data and learned Spl. P.P. also at liberty to raise all his objections pertaining to the questions at the call data. Accordingly, the petition is allowed. It is needless to observe that both the parties shall cooperate with the matter for speedy trial since the matter pertains to 2016 and the trial has also commenced way back in the year 2018.

[30] In view of above discussions and observations, the present petition stands allowed by setting aside the order dated 06.02.2024 passed by the learned Addl. Sessions Judge, Court No.5, West Tripura, Agartala in S.T.(Type-1) 38 of 2017. As a sequel, miscellaneous applications pending, if any, shall stand closed.

T. AMARNATH GOUD, J

A.Ghosh

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