

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 17th March, 2015

+ CRL.M.C. 926/2011
NISHA JAIN

..... Petitioner

Through: Mr.Prashant Dewan and Mr.Amit Kumar,
Advocates alongwith petitioner-in-person

versus

STATE

..... Respondent

Through: Ms.Fizani Hussain, Additional Public
Prosecutor for the State alongwith SI
M.P.Saini from Police Statio Mahendra
Park.

+ CRL.REV.P. 124/2011
NISHA JAIN

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Through: Mr.Prashant Dewan and Mr.Amit Kumar,
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CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Vide this common order, I shall dispose of the aforesaid two petitions being CrI. MC No.926/2011 and CrI. Rev. Petition No.124/2011 as both the petitions have been filed by the same petitioner. First of all I shall take up CrI. MC No.926/2011 as the fate of CrI. Rev. Petition No.124/2011 depends on the finding of this petition.

CRL.M.C. 926/2011

2. By virtue of this petition, the petitioner is impugning the order dated 10.12.2010 passed by learned Additional Sessions Judge vide which on the application under Section

319 of Code of Criminal Procedure filed by learned Additional Public Prosecutor for the State, the petitioner – Nisha Jain was arrayed as an accused.

3. The background facts are that the accused – Pankaj Mittal was charged for offence under Section 313/376/385/34 of Indian Penal Code on the allegations of the prosecutrix that the accused - Pankaj Mittal who was working with her had been continuously harassing her to marry him and had also committed rape upon her without her consent. She further alleged that accused - Pankaj Mittal had clicked her pictures from the mobile phone and made physical relations with her under the threat of showing the same in the locality. After she became pregnant, accused deceptively got her abortion done without her consent. On the basis of these allegations, investigation was conducted and thereafter accused - Pankaj Mittal was charge-sheeted. During the trial of the case, the petitioner – Dr. Nisha Jain on whose clinic the abortion was got done was examined as PW-7. Thereafter, an application under Section 319 of the Code of Criminal Procedure was filed by the Additional Public Prosecutor for the State praying for arraying the name of the petitioner – Dr. Nisha Jain as an accused in the instant case as it was pleaded that she was head of Saroj Hospital, Madhuban Chowk, Rohini, Delhi and was also running a surgical maternity and child care centre in the name of Sunisha's Panchwati Clinic, Rohini, Delhi. Initially, in her deposition before the court, she did not supported the case of the prosecution on the aspect of carrying out the abortion of prosecutrix, but during her cross examination by Additional Public Prosecutor for the State, she admitted that on 30.09.2008, the couple i.e. prosecutrix and the accused - Pankaj Mittal, whom she identified in the court, had come to her nursing home and the girl informed her that she was pregnant and that she wanted to get the abortion done and thereafter abortion was conducted. It was pleaded that there has been violation of Section 3 (2) of Sub Section (4) of the Medical Termination of Pregnancy Act, 1971 and also of the provisions of the Indian Penal Code. Vide the impugned order, the learned Additional Sessions Judge agreed with the submissions of the Additional Public Prosecutor for the State and directed the petitioner to be arrayed as an accused.

4. This order is primarily assailed by learned counsel for the petitioner on two grounds:

- (i) When the application under Section 319 Cr.PC was moved, principles of natural justice required that at least an opportunity should have been afforded to the petitioner of being heard before summoning her.
- (ii) She was protected by the proviso to Section 132 of the Indian Evidence Act and, therefore, could not have been implicated as an accused.

Reliance was placed on *Durga Datt Pradhan v CBI*, 2012 VI AD (Delhi) 391 to contend that it is not a case where the petitioner has committed any offence for which she could be tried together with the accused and for that reason Section 319 Cr.PC cannot be invoked. If her statement is eschewed, there is no other acceptable legal evidence to implicate her with any offence.

5. Learned Additional Public Prosecutor for the State initially submitted that the witness was not compelled to answer the questions as such she was not entitled to protection of Proviso to Section 132 of the Evidence Act. However, when her attention was drawn by learned counsel for the petitioner that the answers had come pursuant to the cross examination conducted by the Public Prosecutor for the State and various court questions put to her then it was fairly conceded that the witness was under compulsion to give answers and, therefore, entitled for protection of the proviso to Section 132 of the Indian Evidence Act.

6. Section 132 of the Evidence Act enacts that a witness shall not be excused from answering any question, as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question, will criminate, or may tend directly or indirectly to criminate, such witness or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind. The proviso envisages that no answer which a witness is compelled to give, shall subject him to any arrest or prosecution or be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer.

7. The question to be considered is whether a statement made by a witness while giving evidence before the Court will come under the purview of the proviso. In this context, what is or what is not "compulsion" to answer assumes importance. Does the word "compelled" contemplate that the witness must have been forced to answer the question put by the Court and must have made his unwillingness known to the Court? Or, is the requirement satisfied even if the witness does not object to the question? To put it differently, whether the requirement of the proviso is satisfied even if the witness does not object to the question. Can he adopt the position that whenever he is summoned as a witness in the Court it would tantamount to compulsion to answer questions.

8. Similar question arose before Kerala High Court in ***M.P. Gangadharan v State S.I. of Police*** 1989 CriLJ 2455. The issue was extensively dealt with as under:

“Turner C.J. in R v. Gopal Das (1881) ILR 3 Mad 271 held thus:

...the terms of Section 132, especially when read with the rest of the Act, impel me to the conclusion that protection is afforded only to answers to which a witness has objected or has been constrained by the Court to give.... At the same time, if the witness, being entitled to the privilege, did not claim it, but voluntarily answered the question addressed to him, his answer could be used as against him in any subsequent proceeding. A witness was not bound to criminate himself; but if he thought fit to do so, his admission on oath was equally admissible in evidence against him as any other admission.

The Madras High Court held that if a witness voluntarily answered a question put to him, his answer could be used against him in subsequent proceedings, if he did not object to the question then and there. In Paddabba Reddi v. Iyyala Yarada Reddi AIR 1929 Mad 236 : 1929 (30) Cri LJ 613 the Madras High Court held thus:

“The protection offered by Section 132, Proviso, does not cover any and every answer given by a witness during the course of his trial. The compulsion contemplated in that Section 2 is something more than being put into the witness-box and being sworn to give

evidence. The compulsion in the proviso refers to compulsion by Court and not compulsion under law. The witness, of course, need not ask in so many words the protection of the Court. The compulsion may be implied or explicit, and in every case it is a question of fact whether there was or was not compulsion. But a witness who answers a question or questions put to him without seeking the protection of Section 132 by objecting to the question put, and requesting to be excused, is not entitled to that protection."

Allahabad High Court in several decisions differed from the above view. In Emperor v. Chatur Singh ILR 43 All 92 : AIR 1921 All 362 the Allahabad High Court observed that

"although a voluntary statement made by a witness may stand on a different footing, an answer given by a witness in a criminal case on oath to a question put to him either by the Court or by counsel on either side, especially when the question is on a point which is relevant to the case, is within the protection afforded by Section 132 of the Indian Evidence Act, whether or not the witness has objected to the question asked to him."

The principle behind the decision is that ordinary lay man unacquainted with the technical terms of Section 132 may think it imperative to answer questions put either by the Court or by the counsel especially when the question is relevant to the case and hence the answer given by a witness under such circumstances is protected by the proviso to Section 132. In Sheo Karan Lal v. Bandi Prasad AIR 1943 Pat 117 : 1943 (44) Cri LJ 391, Patna High Court held as follows:

"Whether a witness has been compelled to give an answer within the meaning of Section 132 is a question of fact to be determined by the tribunal in each case. Section 132 does not require that the witness before he can claim protection under the proviso, must first ask to be excused from answering the question on the ground that the answer will criminate him. What the Section 2 really means is that the witness is bound to answer all relevant questions, even though the answer may

criminate him but he will not be liable to prosecution except for perjury. Questions which are allowed by the Court in spite of objection by the pleader must be deemed to be relevant, so far as the witness is concerned, and he is bound to give answer. Answer so given is an answer which the witness is "compelled to give" within the meaning of Section 132."

In Bai Shanta v. Umraa Amir AIR 1926 Bohi 141: 1926 (27) Cri LJ 423 (FB) the Bombay High Court held that relevant statements made on oath or solemn affirmation in a judicial proceeding are not protected by the proviso to Section 132 of the Evidence Act in cases where the witness has not objected to answering the question put to him. The above decisions would show that judicial opinions are not unanimous as to what is or is not "compulsion" to answer. The controversy has been set at rest by the recent decision of the Supreme Court in Delhi Administration v. Jagit Singly , where it has been held as follows (para 13):

"Therefore, a witness is legally bound to answer any question which is relevant to the matter in issue even if the answer to such question is likely to criminate him directly or indirectly. Proviso to Section 132 expressly provides that such answer which a witness is compelled to give shall not subject him to any arrest or prosecution nor the same can be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer. The provisions of proviso to Section 132, Evidence Act, clearly protect a witness from being prosecuted on the basis of the answers given by him in a criminal proceeding which tend to criminate him directly or indirectly."

Thomas, J. had occasion to consider these aspects in Kunhappan v. State of Kerala (1987) 2 Ker LT 222. In the above decision, it has been held that a voluntary statement made by a witness may stand on a different footing and the answers given by a witness either to questions put by the Court or by the counsel on either side cannot be said to be voluntary statements made by him and that it is immaterial whether he objects to the question or not. In a case where a party to a civil litigation gives evidence, it is possible to presume that he gives the evidence on his own

accord. Similarly, if the accused in a criminal case offers himself to be examined as a witness, a presumption may arise that the evidence given by him is voluntary. That would not be the position with regard to the evidence given by a witness summoned by the Court. The answer given by a witness in a Court, whose presence is required by the Court either by issuance of summons or by other means cannot be equated with the answer given by a party in a civil litigation or the statement of an accused as a witness, in a criminal case. The answer given by such a witness cannot be characterised as a mere voluntary statement and without any compulsion.

Petitioner has not voluntarily adduced evidence before the Court. Only on summons he appeared and testified. This is a case where he has been compelled to answer the question. Left to himself, he would not have come before the Court to depose. A situation in which a witness is placed when he is examined before a Court of law cannot be lost sight of. When a person is examined as a witness his natural feeling is that he has to answer the questions. If during the course of the testimony he gives answer criminating himself, he can really look forward to the protection under the proviso. We agree with Thomas, J. in Kunhappan v. State of Kerala (1987) 2 Ker LT 222, where it is held that answer given by a witness cannot be used against him in a subsequent criminal proceeding as he is entitled to the protection contained in the proviso to Section 132 of the Evidence Act.

In that case, the petitioner was examined as DW1 and was joined as an accused to be tried alongwith two other co-accused. It was observed that the petitioner was summoned as a witness and was examined as D.W. 1 and while being examined he has given an answer, that answer cannot be used against him in subsequent criminal proceedings. He is clearly protected under the proviso to Section 132 of the Evidence Act.

9. The Hon'ble Supreme Court had occasion to consider the scope of Section 132 of the Evidence Act in ***Laxmipat Chooraria and others v. State of Maharashtra*** AIR 1968 SC 938. In that case, the prosecution was under Section 120-B of IPC and Section 167(81) of The Sea Customs Act. One of the witnesses examined in that case was by name Ethyl Wong. The main argument before the Hon'ble Supreme court was that no oath could be administered to the said witness as she was an accused person and Section

5 of the Indian Oaths Act bars such a course. The other contention was that she should have been tried together along with the other accused and she should not have been examined as a prosecution witness. Thus, the plea before the Hon'ble Supreme Court was to eschew her evidence from consideration. The Hon'ble Supreme Court negated the said plea. The Hon'ble Supreme Court held that a person, who voluntarily answers questions from the witness box, waives the privilege which is against being compelled to be a witness against himself, because he was then not a witness against himself but against others. The Hon'ble Supreme Court further held that section 132 of the Evidence Act sufficiently protects him since his testimony does not go against himself. In para 7, the Hon'ble Supreme Court has held as follows:-

“Now there can be no doubt that Ethyl Wong was a competent witness. Under S. 118 of the Indian Evidence Act all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them for reasons indicated in that section. Under S. 132 a witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any criminal proceeding (among others) upon the ground that the answer to such question will incriminate or may tend directly or indirectly to expose him to a penalty or forfeiture of any kind. The safeguard to this compulsion is that no such answer which the witness is compelled to give exposes him to any arrest or prosecution or can it be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer. In other words, if the customs authorities treated Ethyl Wong as a witness and produced her in court, Ethyl Wong was bound to answer all questions and could not be prosecuted for her answers. Mr. Jethmalani's argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks s. 132 (proviso). In India the privilege of refusing to answer has been removed so that temptation to tell a lie may be avoided but it was necessary to give this protection. The protection is further fortified by Art. 20(3) which says 'that no person accused of any offence shall be compelled to be a witness against himself. This article protects a person who is accused of an offence and not those questioned as witnesses. A person who voluntarily answer questions from the witness box waives the privilege which is against being compelled to be a witness against himself, because he is then not a witness against himself but against others. Section 132 of the Indian Evidence Act sufficiently protects him since his testimony does not go against himself. In this respect the witness is in no worse position than the accused who volunteers to give evidence on his own behalf or on behalf of a co-accused. There too the accused waives the privilege conferred on him by the article since he is subjected to

cross-examination and may be asked questions incriminating him. The evidence of Ethyl Wong cannot, therefore, be ruled out as that of an incompetent witness. Since Ethyl Wong was a self- confessed criminal, in conspiracy with others who were being tried, her evidence was accomplice evidence. The word accomplice is ordinarily used in connection with the law of evidence and rarely under the substantive law of crimes. Accomplice evidence denotes evidence of a participant in crime with others. Section 133 of the Evidence Act makes the accomplice a competent witness against an accused person. Therefore, Ethyl Wong's testimony was again that of a competent witness.

[Emphasis supplied]

10. From the above judgment of the Hon'ble Supreme Court, now the legal position is clear that in India, when the witness is asked to answer a question, if the question is relevant to the matters in issue, he has no privilege to refuse to answer. In other words, there is legal compulsion to answer. So, the proviso, fully protects him from prosecution if the answer tends to incriminate him.

11. In *Durga Datt Pradhan* (supra) also, three of the prosecution witnesses were sought to be summoned as an accused persons under Section 319 Cr.PC and the application was dismissed by the learned Trial Court. The said findings were affirmed by a Single Judge of this court relying upon *State (Delhi Admn.) v Jagjit Singh 1989 AIR (SC) 589* and *M.P. Gangadharan v State, 1989*, CrI. LJ 2455.

12. Recently, the issue again crop up before the Madras High Court in *R. Dineshkumar v State*, 2015-1-LW (CrI.) 273 and after referring to Sections 132, 146, 147, 148 and 5 of Evidence Act and the judgment of various High Courts and the judgment of Hon'ble Supreme Court in *Laxmipat Chooraria and others (supra)* and *State [Delhi Administration] v. Jagjit Sing* (supra), the legal position was summarized as under:

1. When a witness is asked to answer a question either in chief examination; or in cross examination; or in re-examination, if the said question is relevant to the matter in issue, the witness has no excuse to refuse to answer as there is statutory compulsion to answer the question as provided under Section 132 of the Indian Evidence Act and if the

answer tends to incriminate him, he shall be protected by the proviso to Section 132 of the Act.

II. When a witness is cross examined, it is lawful for the adverse party to ask any question, whether relevant to the matter in issue or not, for any one or more of the purposes enumerated in Section 146 of the Act.

III. When a witness is cross examined, the Court shall compel a witness to answer any question relevant to the matters in issue, for the purpose/purposes mentioned in Section 146 of the Act, and the answer to such question if tends to directly or indirectly incriminate him, he shall be protected by the proviso to Section 132 of the Evidence Act (see Section 147).

IV. When a witness is cross examined, a question, though not relevant to the matter in issue in the proceeding is asked, if it affects the credit of the witness by injuring his character, the Court shall compel him to answer the said question and if the answer tends to directly or indirectly incriminate him, he shall be protected by the proviso to Section 132 of the Act.

V. When a witness is under cross examination, if the question, which is not relevant to the matter in issue, is asked for the purposes: (1) to test his veracity or (2) to discover who he is and what is his position in life as dealt with in Section 146, the Court may or may not compel the witness to answer the question as detailed below:

(a) If the Court finds that the said question is a proper question as dealt with in Clause 1 of Section 148, the Court shall compel the witness to answer the question and if the answer tends to directly or indirectly incriminate him, he shall be protected by the proviso to Section 132 of the Act.

(b) If the Court finds that the question is an improper question as dealt with in Clauses 2 and 3 of Section 148 of the Act, the Court shall not compel the witness to answer the question and instead warn the witness that he is under no obligation to answer the said question.

(c) Despite the warning by the Court and without any compulsion by Court, if the witness answers voluntarily an improper question dealt with in Clauses 2 and 3 of Section 148 and if the answer tends to directly or

indirectly incriminate him, he shall not be protected by the proviso to Section 132 of the Act.

(d) When an improper question is asked as dealt with in Clauses 2 and 3 of Section 148 of the Act, and after warning by the Court, if the witness refuses to answer the question, the Court may draw adverse inference that the answer if given would be unfavorable.

(e) While under cross examination, when an improper question is asked as dealt with in Clauses 2 and 3 of Section 148 of the Act, if the Court, inadvertently fails to warn the witness and the witness answers the question and if the said answer tends to incriminate him, he shall be protected by the proviso to Section 132 of the Act.

13. Applying the above tests to the facts of the present case, if we look into the evidence of the petitioner, it is crystal clear that she is entitled for the protection under the proviso to Section 132 of the Evidence Act because most of the answers were elicited pursuant to the cross examination conducted by Additional Public Prosecutor for the State or the court questions. As such, she was under legal compulsion to answer the questions as it was relevant to the matter in issue in the case. The compulsion has emanated from Section 132 of the Indian Evidence Act.

14. In view of the same, the evidence of the petitioner, as a prosecution witness before the learned Trial Court, and the incriminating answers given by her amounts to compelled testimony falling within the sweep of Section 132 of the Evidence Act and thus, she is protected by the proviso to Section 132 of the Evidence Act. In such view of the matter, solely on the basis of her evidence as P.W.7 before the trial court, she cannot be prosecuted by summoning her as an additional accused in the present case.

15. Moreover, S. 319 of Cr.PC cannot be invoked as except for her own testimony, no other evidence is forthcoming to hold that the petitioner has committed any offence for which she could be tried together with the main accused – Pankaj Mittal in FIR No.65/2010. A reading of the Section 2 would abundantly make it clear that only in a case where it appears to the Court that persons who are not already arrayed as accused in

the case appear to have committed the crime, the Court can proceed under this Section. In other words, if from the evidence on record it appears to the Court that the petitioner has also committed a crime and can be tried together with the other accused, then only the Court can proceed against him. As the answer given by the petitioner is protected under the proviso the Section 132 of the Evidence Act, it cannot be used as an item of evidence against the petitioner. When the evidence of the petitioner as PW7 1 is eschewed there is no other acceptable legal evidence to take action against her. The impugned order does not show that the petitioner had committed any crime alongwith the main accused. The petitioner only stated that she was head of Saroj Hospital, Madhuban Chowk, Rohini, Delhi and was also running a surgical maternity and child care centre in the name of Sunisha's Panchwati Clinic, Rohini, Delhi. Initially, in her deposition before the court, she did not support the case of the prosecution on the aspect of carrying out the abortion of prosecutrix, but during her cross examination by Additional Public Prosecutor for the State, she admitted that on 30.09.2008, the couple i.e. prosecutrix and the accused - Pankaj Mittal, whom she identified in the court, had come to her nursing home and the girl informed her she was pregnant and that she wanted to get the abortion done and thereafter abortion was conducted.

16. In view of foregoing discussion, the impugned order dated 10.12.2010 passed by learned Trial Court in case FIR No.65/2010 under Sections 313/376/385/34 summoning the petitioner as an accused cannot be sustained and is accordingly set aside.

The petition (Crl. MC No.926/2011) is allowed.

CRL.REV.P. 124/2011

17. By this petition, the petitioner challenges the order dated 01.03.2011 passed by the learned Additional Sessions Judge vide which charge under Section 313/34 IPC was framed against her after she was summoned as an accused in case FIR No.65/2010 under Sections 313/385/34 IPC registered at Police Station Mahendra Park, Delhi pursuant to an application under Section 319 Cr.PC moved by Additional Public Prosecutor for the State.

18. Keeping in view the fact that order of summoning the petitioner as an accused has been set aside, consequently, the proceedings of framing of charge vide order dated 01.03.2011 cannot survive.

19. Resultantly, this petition is also allowed and the order dated 01.03.2011 passed by the learned Additional Sessions Judge charging the petitioner – Dr. Nisha Jain is set aside.

Both the petitions stand disposed of accordingly.

Trial Court record, alongwith a copy of this order, be sent back forthwith through a special messenger for proceeding against the accused – Pankaj Mittal in accordance with law.

(SUNITA GUPTA)
JUDGE

MARCH 17, 2015/*rd*