

26.08.2021
 Ct No. 35
 D/L 86
 ab

C.R.R. 1546 of 2021
(Via Video Conference)

Re: An application under Section 401 read with Section 482 of the Code of Criminal Procedure, 1973.

In re : **Smt. Papiya Das,**

... Petitioner

Mr. Narayan Chandra Ghosh,
 Mr. Falguni Bandopadhyay,

... for the petitioner

Mr. Ayan Bhattacharjee,
 Mr. Ashis Kumar Mukherjee,
 Mr. S. Prasad

... for the opposite party no. 2

The petitioner is the de-facto complainant/victim in S.T. Case No. 51 of 2018, pending before the learned Additional Sessions Judge, 3rd Court at Alipore under Sections 376/417/506 of the Indian Penal Code, 1860.

While the evidence before the learned Sessions Judge was going on, the de-facto complainant/victim/petitioner filed an application before the learned Sessions Judge to allow her to submit some documents, including some photographs and hard copies of some WhatsApp messages.

In the said application, she alleged that during investigation, she provided the investigating officer with some photographs and WhatsApp messages, but upon receipt of the

charge sheet, she found that those documents were not relied upon by the prosecution. She prayed in the said application that she should be permitted to produce the said documents.

The prayer of the petitioner was opposed by the accused and the Public Prosecutor as well.

By an order dated March 4, 2021, the learned Sessions Judge dismissed the application. The learned Judge observed that if the said application filed by the de-facto complainant is allowed, the same will amount to permit the petitioner to adduce additional evidence, and since the case is at the evidence stage, the filing of such additional evidence is not permissible within the scheme of the Code of Criminal Procedure, 1973 ("the Code" for short).

The learned advocate for the petitioner submits that it was the duty of the investigating officer to rely upon those documents at the time of filing of the charge sheet since the petitioner during course of investigation made over those documents to the investigating officer. He further submits that the learned Sessions Judge should have allowed the said application filed by the de-facto complainant, inasmuch as in the absence of such documents, a fair trial cannot be conducted.

It appears that the petitioner did not raise any objection before the learned Magistrate when the charge sheet was filed in terms of Section 173 of the Code, neither she raised any objection before the learned Sessions Judge before framing of the charge with regard to the investigation or submission of charge sheet.

In the aforesaid factual backdrop, the following questions arise for consideration:

- a) Whether at the time of trial, can any document, which did not form the part of the charge sheet filed by the investigating officer, be adduced as evidence.
- b) Whether a de-facto complainant/victim can circumvent the Public Prosecutor at the time of trial to adduce any document as evidence which has not been relied upon by the prosecution.

In my opinion the learned Sessions Judge, in passing the order impugned lost sight of Section 231(1) of the Code, which provides as follows:-

“231. Evidence for prosecution.—(1) On the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution.”

The expression “all such evidence” employed in the aforesaid Section is wide enough to allow the learned Sessions Judge to receive any document as evidence for the prosecution in the course of a trial, notwithstanding the fact that in the charge sheet, the investigating agency did not rely upon such document.

The identical issue as to whether the documents which are not the part of the charge sheet could be received in evidence for prosecution after the commencement of trial, cropped up in a case reported at **2018 Cri LJ 3925 (B L Udaykumar v. The State of Karnataka)** and the Court held as follows:-

“13. Thus it is clear that sub-Section (3) of Section 242 casts a mandatory duty on the

Magistrate to take all such evidence as may be produced in support of the prosecution. The word “produced” in sub-Section (3) also cannot be given a restrictive meaning to hold that only the materials collected during investigation could be permitted to be produced in evidence. Such a construction would defeat the very purpose of trial. If the main object of criminal trial is to discover truth, necessarily all and every piece of evidence which could help the Court to arrive at a just decision should be allowed to come on record. Therefore, it is immaterial, whether the “evidence” sought to be produced during trial was either collected in the course of investigation or subsequent thereto. Section 91 Cr. P.C. no doubt empowers the Court or the officer in charge of the Police Station to ensure the production of any ‘document or other thing’ ‘necessary or desirable’ for the purpose of any investigation, enquiry or other proceedings by issuing summons or written order to the person in whose possession or power such document or thing is; but Section 242(3) Cr. P.C. requires the Court to take all such evidence which the prosecution desires to produce including the documents which are not mentioned in sub-Section (5) of Section 173 Cr. P.C. subject of course furnishing to the accused a copy thereof and providing him a reasonable opportunity to meet the same. The only safeguard or restriction that could be thought of in view of the provisions of the Evidence Act is that such evidence must relate to the matters of fact in enquiry. In other words, as long as the proposed evidence, either oral or documentary, is relevant and in support of the prosecution case, the Magistrate cannot refuse to receive it.

14. In this context, it is also relevant to note that a duty is cast on the Public Prosecutor conducting the trial to produce all evidence relevant to the determination of the guilt or innocence of the accused. Therefore, it goes without saying that even the Public Prosecutor conducting the trial owes a duty to produce before the Court all evidence in support of the prosecution. The Public Prosecutor therefore cannot withhold any relevant piece of evidence which he finds it necessary for fair trial of the case. That being the position of law and the

mandate contained in Section 242(3) of Cr. P.C., I do not have any hesitation to hold that the Criminal Court conducting the trial is bound to receive all the evidence produced by the prosecution irrespective of the fact whether the said evidence or documents were part of the charge-sheet placed before the Court or not. ”

I am in respectful agreement with the view expressed in the said judgment. The language of Section 231 (2) of the Code is in *pari materia* with the Section 242(3) and the aforesaid observations equally apply to a Court of Session.

It may also be noticed that the prosecution is not precluded from tendering a person as a witness who had not been examined by the police during the investigation. The said view gets support from the judgment reported at **AIR 1968 AP 236 (J.B. Roy v. The State of A.P.)**.

Therefore, the learned Sessions Judge was not justified in rejecting the application filed by the de-facto complainant/victim on the ground that the same would amount to allow her to adduce additional evidence going beyond the scope of the Code.

To answer the second question, it is necessary to take note of some of the provisions of the Code relating to the conduct of a trial by the Public Prosecutor.

Section 225 of the Code provides that in every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor.

The proviso to Section 24(8) of the Code allows the victim to engage an advocate of his choice to assist the prosecution.

Section 301 (2) provides that the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the advocate of the victim shall act under the directions of the Public Prosecutor and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

The aforesaid provisions make it clear that a victim does not have any independent right to participate in the trial. The victim's counsel should act under the Public Prosecutor to assist him in the trial.

Mr. Ayan Bhattacharjee, learned advocate for the opposite party no 2, has rightly pointed out before this Court that the interplay of the aforesaid Sections has been elucidated by the Supreme Court in the case reported at **(2020) 2 SCC 474 (Rekha Murarka Vs. State of West Bengal)**. The relevant paragraphs of the said judgment are quoted below:-

“11.2. In some instances, such a wide array of functions may also have adverse consequences on the fairness of a trial. For instance, there may be a case where the Public Prosecutor may make a strategic call to examine some witnesses and leave out others. If the victim's counsel insists upon examining any of the left-out witnesses, it is possible that the evidence so brought forth may weaken the prosecution case. If given a free hand, in some instances, the trial may even end up becoming a vindictive battle between the victim's counsel and the accused, which may further impact the safeguards put in place for the accused in criminal trials. These lapses may be aggravated by a lack of advocacy experience on the part of the victim's counsel. In contrast, such dangers would not arise in the case of a Public Prosecutor, who is required to have

considerable experience in the practice of law, and act as an independent officer of the court. Thus, it is important to appreciate why the role of a victim's counsel is made subject to the instructions of the Public Prosecutor, who occupies a prime position by virtue of the increased responsibilities shouldered by him with respect to the conduct of a criminal trial.

11.3. At the same time, the realities of criminal prosecutions, as they are conducted today, cannot be ignored. There is no denying that Public Prosecutors are often overworked. In certain places, there may be a single Public Prosecutor conducting trials in over two-three courts. Thus, the possibility of them missing out on certain aspects of the case cannot be ignored or discounted. A victim-centric approach that allows for greater participation of the victim in the conduct of the trial can go a long way in plugging such gaps. To this extent, we agree with the submission made by the learned Senior Counsel for the appellant that the introduction of the proviso to Section 24(8) acts as a safety valve, inasmuch as the victim's counsel can make up for any oversights or deficiencies in the prosecution case. Further, to ensure that the right of appeal accorded to a victim under the proviso to Section 372 CrPC is not rendered meaningless due to the errors of the Public Prosecutor at the trial stage itself, we find that some significant role should be given to the victim's counsel while assisting the prosecution. However, while doing so, the balance inherent in the scheme of CrPC should not be tampered with, and the prime role accorded to the Public Prosecutor should not be diluted.

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11.5. However, even if there is a situation where the Public Prosecutor fails to highlight some issue of importance despite it having been suggested by the victim's counsel, the victim's counsel may still not be given the unbridled mantle of making oral arguments or examining witnesses. This is because in such cases, he still has a recourse by channelling his questions or arguments through the Judge first. For instance, if the victim's counsel finds that the Public Prosecutor has not examined a witness properly and not incorporated his

suggestions either, he may bring certain questions to the notice of the court. If the Judge finds merit in them, he may take action accordingly by invoking his powers under Section 311 CrPC or Section 165 of the Evidence Act, 1872. In this regard, we agree with the observations made by the Tripura High Court in *Uma Saha v. State of Tripura* that the victim's counsel has a limited right of assisting the prosecution, which may extend to suggesting questions to the court or the prosecution, but not putting them by himself.”

Therefore, it will be open for the petitioner to approach the concerned Public Prosecutor for adducing the said photographs and hard copies of the WhatsApp images as evidence in the trial. In the event, the learned Public Prosecutor declines to take steps to adduce those documents as evidence, the petitioner will be at liberty to bring it to the notice of the Court. If the learned Judge finds merit in the prayer, he shall take steps in aid of Section 311 of the Code or Section 165 of the Indian Evidence Act, 1872.

With the aforesaid observations, the revisional application being CRR No. 1546 of 2021 is allowed by setting aside the order dated March 4, 2021, passed by the learned Sessions Judge in the Court below.

Urgent photostat certified copy of this order, if applied for, be given to the petitioner upon compliance with all necessary formalities.

(Kausik Chanda, J.)