

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

Before:

The Hon'ble Justice Ananda Kumar Mukherjee

C.R.R No. 174 of 2020

With

CRAN 2 of 2020 (Old CRAN 1261 of 2020)

Uttam Saha & Anr.

Vs.

State of West Bengal.

For the Petitioner: Mr. Tapas Kumar Sinha, Advocate.

Mrs. Dipa Bhattacharya (Sarma), Advocate.

Mr. Suman De, Advocate.

For the State: Mr. Sudip Ghosh, Advocate.

Mr. Apurba Kumar Datta, Advocate.

Heard on : 21.12.2021.

Judgment on: 11.01.2022.

Ananda Kumar Mukherjee, J. :-

1. This revisional application under section 401, read with section 482 of the Code of Criminal Procedure, 1973 is directed against order dated 09.01.2020 passed by Learned Additional Sessions Judge, First Track Court-II,

Howrah, whereby the petition dated 06.01.2020 filed by the petitioners under section 311 of code of Criminal Procedure in connection with Sessions Trial No. 205 of 2012 was rejected.

2. Petitioner no. 1 is the husband of petitioner no. 2, who are facing trial in S.T. No. 205 of 2012 under section 498 A/ 306/ 302 of the Indian Penal Code.

3. In brief, the prosecution case is that Papia Saha the daughter of defacto-complainant Swapan Kumar Sen was married to Haradhan Saha in the year 1995. Initially the defacto-complainant and his family did not recognise the marriage between the Papia and Haradhan Saha as it was an outcome of a love affair. The paternal family accepted the marriage after 7 to 8 months. Papia gave birth a son and a daughter and lived in her husband's house along with petitioner no. 1 the elder brother of the husband, petitioner no. 2 the sister-in-law and Gitabala Saha, her mother-in-law. After passage of time the husband, petitioners and the mother-in-law subjected Papia to physical and mental torture on demand of dowry. On 10.12.2011 the defacto-complainant received an information from his granddaughter that Papia was set ablaze inside a room and rushed to their house. Papia was rescued and admitted at CMRI Hospital Calcutta where she breathed her last on 14.12.2011. Over this incident a police case was started against the husband and inmates of the matrimonial house deceased Papia Saha, where the petitioners are facing trial.

4. It is the case of the petitioners that after framing of charge when the defacto-complainant was being examined as PW-1 suggestion was put to him that on 10.12.2011, that is the date of occurrence, petitioners Uttam Saha and

his wife Nandini Saha were not present at the place of occurrence as both of them were attending a medical camp at 'SAAOL' under Dr. Bimal Chhajer. The same suggestion was put to PW-3, the son of the deceased. In course of trial petitioners did not adduce any evidence to establish their alibi, that on 10.12.2011 both the petitioners were not present at the place of occurrence as they had been attending a medical camp at 'SAAOL'. After closure of evidence of the prosecution witnesses, the accused person were examined under section 313 of the Cr. P.C and one witness DW-1, was examined by accused. When the case was fixed up for pronouncing of judgment, the petitioners on 06.01.2020 filed an application under section 311 of Cr. P.C before the jurisdictional court, praying for allowing them to adduce evidence and produce some documents essential for the just decision of the case.

5. After hearing both parties Learned Additional Sessions Judge, First Track Court-II, Howrah, by his order dated 09.01.2020 rejected the application filed by the petitioners on the ground that it was for the purpose of filling up of lacuna the prayer was made and it would caused serious prejudice to the prosecution, specially when the petitioner did not file the documents till the conclusion of argument and furthermore such evidence is not essential for the just decision of the case.

6. Petitioners being aggrieved with the impugned order have filed this revisional application praying for setting aside the same. Learned Advocate for the petitioner argued that petitioners claimed that they were not present at the place of occurrence and such ground was not made for the first time by way of

filling the application under section 311 of Cr. P.C. as such the plea of alibi was taken by the petitioners at the very outset during cross-examination of PW-1 and PW-3, when suggestions were given to the witnesses that on 10.12.2011 the petitioners were attending a 'Heart Care Workshop' under Dr. Bimal Chhajer. It is argued that petitioners' right to produce such important evidence before the court should not be restricted as it would caused prejudice to them. In support of his argument learned Advocate relied upon a decision in the case of **V.N. Patil V. K. Niranjana Kumar and others (2021) 3 SCC 661**, wherein the Hon'ble Supreme Court of India held that, "The object underlying section 311 Cr. P.C is that there may not be a failure of justice on account of mistake of either party in bringing valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor for exercise of power under section 311 Cr. P.C whether it is essential to the just decision of the case. The significant expression that occurs is at any stage of any inquiry or trial or other proceeding under this code". Hon'ble Supreme Court further held that it is to be borne in mind that the discretionary power conferred under section 311 of Cr. P.C was to be exercised judiciously, as it is always said "wider the power, greater is the necessity of caution while exercise of judicious discretion".

7. Learned Advocate argued that there has been a delay on the part of the petitioners in producing their evidence of sterling quality before this court but the same cannot be discarded on the ground of delay simpliciter. Learned Advocate submitted that the impugned order, disallowing the petitioners from

producing such vital evidence before this court would prejudice the petitioners and prevent the court from arriving at a just decision. It is urged that the impugned order may be set aside and the petitioner be given an opportunity to adduce evidence.

8. Learned Advocate for the State argued that the petitioners wanted to rely upon some documents at a belated stage, after closure of evidence of the prosecution, examination of accused under section 313 of Cr. P.C, evidence of defence witnesses and conclusion of hearing of argument, when date was fixed for delivery of judgement. It is submitted that the documents on which the petitioners wants to rely upon were within their folds and knowledge but no attempt was made to produce them. It is not the case of the petitioners that they have discovered such documents related to attending medical camp at a later stage thereby they were prevented from producing such documents before the court on earlier occasion. Furthermore, the documents on which the petitioner proposed to rely cannot be characterised as medical documents. Therefore, the evidence which the petitioners now like to produce before the court is only to fill up lacuna which is not permissible under the law. Referring to the impugned order, learned Advocate for the State argued that the impugned order suffers from no illegality or impropriety as learned Additional Sessions Judge has passed a reasoned order rejecting the prayer for adducing evidence under section 311 of Cr. P.C- observing that it is a dilatory conduct of the petitioners adopted with an object to fill up lacuna in their case.

9. Having considered the arguments advanced by learned Advocates for the petitioners and the State as well as the application for revision and the impugned order, I find the petitioners are the elder brother and sister-in-law of the victim who died and unnatural death in her matrimonial home due to grievous burn injuries on her person. The husband, mother-in-law as well as the petitioners have been arraigned as accused person in Sessions Trial Case No. 205 of 2012. The impugned order clearly states that the petitioners have file this application under section 311 of Cr. P.C. claiming that on the fateful day, that is on 10.12.2011 and thereafter on 11.12.2011 they were attending a medical camp at 'SAAOL' arranged by Dr. Bimal Chhajer. This plea on the part of the petitioners is their alibi that at the relevant time the petitioners were not present at the place of occurrence, when the deceased was in ablaze.

10. The jurisdictional court while rejecting the application under section 311 of Cr. P.C. has referred to the decision of Hon'ble Supreme Court of India reported in **(2013) 3 CRLJ (SC) 548 Para 15**, wherein it was observed that the scope and object of the provision is to enable the court to determine the truth and render just decision after discovery of all relevant facts and obtaining proper proof for such facts, to arrive at a just decision of the case and power must be exercised judiciously and not capricious or arbitrarily as any improper or capricious exercise or such power may lead to undesirable result and that application under section 311 of Cr. P.C must not be allowed to fill up a lacuna in the case of prosecution or of the defence or to the disadvantage of the

accused or to cause serious prejudice to the defence of the accused or to give unfair advantage to the opposite party.

11. Learned Additional Sessions Judge, F.T.C, Uluberia observed in the impugned order that evidence of prosecution witness ended on 11.09.2019. Thereafter the accused person was examining under section 313 of Cr. P.C where they did not state anything regarding their medical treatment or attending any medical camp. The accused persons were permitted to adduce evidence. At the time DW-1 was examined the witness did not state that petitioners on the date of occurrence attended a medical camp at 'SAAOL'. Argument of both parties was heard and after date was fixed for delivery of judgment, the petitioners filed the application under section 311 of Cr. P.C for adducing such evidence which they were aware of but failed to produce.

12. Admittedly the petitioners have filed their application under section 311 of Cr. P.C at a belated stage after closure of evidence. The object of section 311 of Cr. P.C is laid down as follows: *"Any court may at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision of the case"*.

13. The provisions of section 311 of Cr. P.C. is therefore to meet exigency situation. It vests a court of law with the power to examine witnesses at any stage of inquiry, trial or proceeding for reaching to a just decision. In the case

under consideration, during cross-examination of PW-1 and PW-3, clear suggestions were given on behalf of the petitioners that Uttam Saha and his wife were not present at the spot on 10.12.2011 and both of them were attending a medical camp at 'SAAOL' medical camp under Dr. Bimal Chhajjer. The witnesses answered in the negative, therefore the burden of prove shifted upon the petitioners to establish their alibi by adducing evidence. In course of examination under section 313 of the Cr. P.C the accused persons did not plead their alibi, consistent with the suggestions to PW-1 and PW-3, during their cross-examination. It is also true that DW-1 did not come up with the present claim of the petitioners. The petitioners have aggrandized their claim of being absent at the place of occurrence on 10.12.2011, on a plea that they were attending a medical camp at 'SAAOL', organised by Dr. Bimal Chhajjer. Whatever the outcome of the case may be, on consideration of the totality of the evidence together with its trustworthiness, I am of the view that the petitioners who raised a question of being away at the time the incident of fire, should get an opportunity to examine relevant witness and prove the documents they are relying upon. End of justice would be served if the petitioner witness proving such documents for the purpose of admission, stands the test of cross-examination for which prosecution will not suffer any prejudice.

14. In the case of **V. N. Patil vs K. Niranjan Kumar and others (2021) 3 SCC 661**, Hon'ble Supreme Court of India observe that, "The aim of every court is to discover the truth. *Section 311 Cr. P.C* is one of many such provisions

which strengthen the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under section 311 Cr. P.C. has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice". The principal object of section 311 Cr. P.C is to meet ends of justice and to ensure that no hardship and prejudice is caused to the accused or to the prosecution. In the aforesaid decision cited on behalf of the petitioners, the jurisdictional court had allowed the application under section 311 of Cr. P.C filed by prosecution for admitting a second post-mortem report and to examine the doctor who conducted the post-mortem. The order was challenged before the High Court under section 482 of Cr. P.C. where the impugned order was set aside since trial was pending for almost 16 years and directed that the trial may be concluded expeditiously. The said order of the High Court was challenged before the Hon'ble Supreme Court of India where the order passed by the High Court was quashed and Learned Trial Judge was directed to proceed in accordance with law and conclude the pending trial at the earliest.

15. In the present case persecution evidence was closed on 11.09.2019 and after opportunity was given to the accused persons to adduce defence evidence, hearing of argument was concluded fixing 20.01.2020 for delivery of judgment. One cannot be oblivious of the fact that when a substantial legal right is claimed by the litigants, the court has to consider its implication and to exercise its jurisdiction judiciously for meeting the ends of justice. The petitioners who during the cross-examination of PW-1 and PW-3 disclosed their

defence case of being at some other place at the time of occurrence, their plea of alibi needs to be admitted in evidence if they are in a position to adduce substantive evidence on that count and stand the test of cross-examination. Denial of such right would lead to miscarriage of justice. However, the evidentiary value of such evidence and its credibility are different aspects which shall have to be considered at the time of final adjudication by weighing the totality of evidence. Therefore, it is appropriate to permit the present petitioners to adduce evidence under section 311 of the Code of Criminal Procedure in respect of the document they would like to rely upon and for this purpose the author of the document should stand the test of cross-examination.

16. In view of my above discussion I find and hold that impugned order suffers from illegality and impropriety so far as the exercise of discretionary power by the jurisdictional court is concerned while dealing with such a vital question which had been earlier disclose by the petitioners during cross-examination of PW-1 and PW-3. Learned Jurisdictional court after providing opportunity to the petitioners to adduce necessary evidence under section 311 of Cr. P.C within a reasonable time shall dispose of the case as early as possible.

17. The revisional application is accordingly allowed on contest. The impugned order dated 09.01.2020 passed by Learned Additional Sessions Judge First Track Court-II, Howrah in S.T. No 205 of 2012 is set aside. Interlocutory application, being CRAN 2 of 2020 (old CRAN 1261 of 2020) for

extension of interim order stands disposed of. Criminal Section is directed to send a copy of the Judgment to Learned Additional Sessions Judge First Track Court-II, Howrah for information and necessary action.

18. Urgent Photostat certified copy of this judgment, be supplied to the parties, if applied for maintaining all formalities.

(Ananda Kumar Mukherjee, J.)