

30.8.2022
S.D.
241.

C.R.R. 478 of 2021
With
CRAN 2 of 2022

Bhim Chandra Halder
Vs.
The State of West Bengal & Anr.

Mr. Soumyajit Das Mahapatra
Mr. Somnath Adhikari
Mr. Biswajit Sarkar

...For the petitioner.

Mr. Ranabir Roy Chowdhury
Mr. Mainak Gupta

...For the State.

The petitioner has challenged an order dated January 29, 2021, passed by the learned Judge, 1st Special Court, Murshidabad Berhampore in Special Case No. 09 of 2010 under Sections 406/409/34/120B of the Indian Penal Code, 1860.

By the order impugned, the learned Judge, Special Court issued summons to the petitioner under Section 319 of the Code of Criminal Procedure, 1973, and directed the petitioner to appear before him.

Mr. Soumyajit Das Mahapatra, learned advocate appearing for the petitioner submits that the order impugned cannot be sustained solely on the ground that the petitioner was cited as one of the witnesses (P.W. 11) and relying upon the deposition of the petitioner, learned Magistrate issued summons under Section 319

of the Code of Criminal Procedure, 1973. Mr. Mahapatra argues that the order impugned clearly violates the mandate of Section 132 of the Evidence Act, 1872.

In support of his submission, Mr. Mahapatra relies upon a judgment reported at *AIR 1968 SC 938 (Laxmipat Choraria Vs. State of Maharashtra)*, which has been subsequently followed by the Supreme Court in the judgment reported at *1989 Supp (2) SCC 770 (State (Delhi Administration) vs. Jagjit Singh)*.

It appears that the present criminal case arises out of an FIR dated October 16, 2008, lodged by the then District Controller of the Food and Supplies, Murshidabad, Berhampore. It was alleged in the said FIR that one Shri Paresh Chandra Sarkar who was a leader of an audit team found that an amount of Rs.9,50,000/- was siphoned from the Government account at the instance of one Saikat Roy who was a Lower Division Clerk of the said office at that relevant point of time, with the help of another person namely, Abhijit Roy.

Following the said FIR, Berhampore Police Station Case No. 505 of 2008 dated October 16, 2008, under Sections 406/409/34/120B of the Indian Penal Code, 1860, was initiated against Saikat Roy and Abhijit Roy. Upon conclusion of the investigation, the police filed a charge sheet dated June 30, 2010, under Sections 406/409/34 of the Indian Penal Code, 1860, against the said accused persons. In the charge sheet, the petitioner was cited as one of the

witnesses. After taking cognizance of the case, the case was transferred to the Court of 1st Special Court, Murshidabad, Berhampore and ultimately charges were framed against the said accused persons under Sections 420/403/409/120B of the Indian Penal Code, 1860. After commencement of the trial, the petitioner deposed as prosecution witness no.11 before the learned Special Judge on March 23, 2017. After the evidence of the petitioner was closed, the next date was fixed for evidence of prosecution witness no.12. On the said date the learned Public Prosecutor submitted before the learned Judge that from the evidence of the petitioner and one Tanmoy Chitto Dutta who was also a witness in the case, the involvement of the petitioner in the alleged offences was apparent, and as such summons should be issued against them and charges should be framed afresh.

By the order impugned dated January 29, 2021, learned Judge, 1st Special Court, Murshidabad allowed the said prayer and issued summons against the petitioner and also against Tanmoy Chitto Dutta under Section 319 of the Code of Criminal Procedure, 1973.

I am of the view that Mr. Mahapatra is right in submitting that when the petitioner was cited as a prosecution witness in the case, summoning him under Section 319 of the Code of Criminal Procedure, 1973 was clearly hit by Section 132 of the Evidence Act, 1872.

While dealing with the question as to whether a witness can be proceeded in a trial as an accused, it has been held by the Supreme Court in a judgment reported at **AIR 1968 SC 938** (*Laxmipat Choraria v. State of Maharashtra*) as follows:-

“7. 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 coaccused. 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. It has been subjected to scrutiny and the usual checks for corroboration and was, therefore, received with due caution. The short question that remains is whether she could be administered an oath in view of the prohibition in s. 5 of the Indian Oaths Act."

The said judgment was subsequently relied upon by the Supreme Court in **Jagjit Singh** (supra). The Supreme Court held as follows:-

"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 of the Indian Evidence Act clearly protect a witness from being prosecute on the basis of the answers given by him in a criminal proceeding which tend to criminate him directly or indirectly. In view of this provision, the apprehension of the respondent that his evidence as approver will be used against him in the order four criminal cases where he figures as an accused is without any basis. On the other hand, he is absolutely protected from criminal prosecution on the basis of the

evidence to be given by him when examined by the prosecution as an approver in the said case. The submission of the respondent is, therefore, not tenable.”

There cannot be any doubt that the answer which a witness is compelled to give cannot subject him to any criminal prosecution and his evidence cannot be used against him except in a prosecution for giving false evidence. The safeguard provided under Section 132 of the Evidence Act, 1872, is aimed at not compelling or exposing a witness to any arrest or prosecution and not to prosecute such witness on the basis of the evidence adduced by him.

In my view, the learned Judge has failed to take into consideration the fact that the petitioner was cited as a witness in the case and, therefore, relying upon the evidence adduced by him in the course of the trial, he cannot be prosecuted in that case as an accused.

In that view of the matter, the order impugned insofar as relates to summoning the petitioner under Section 319 of the Code of Criminal Procedure, 1973 cannot be sustained.

Accordingly, the same is set aside.

Learned Judge in the trial Court shall proceed with the trial in accordance with law.

The revisional application being C.R.R. 478 of 2021 is allowed.

The application being CRAN 2 of 2022 is also disposed of.

Parties shall act upon the server copy of this order duly downloaded from the official website of this Court.

(Kausik Chanda, J.)