

Form No.J(1)

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION**

Present:

The Hon'ble Justice Tirthankar Ghosh

**C.R.R.307 of 2023
With
C.R.R.305 of 2023**

**Sri Rishikesh Meena
versus
The State of West Bengal and another**

For the Petitioner : Mr. Pratik Bhattacharyya,
Mr. Sanat Kumar Das,
Mr. Anirban Guha Thakurta,
Mr. Sujan Chatterjee.

For the State : Mr. Saswata Gopal Mukherjee, Ld.P.P.,
Mr. Ranabir Roy Chowdhury,
Ms. Debjani Sahu.

For the Opposite Party No.2: Mr. Sandip Kr. Bhattacharya,
Mr. Dipta Dipak Banerjee

**Heard On : 05.04.2023, 06.04.2023, 10.04.2023, 19.04.2023,
26.04.2023, 28.04.2023, 01.05.2023.**

Judgement On : 01.05.2023

Tirthankar Ghosh, J. :

Two revisional applications being CRR 305 of 2023 and CRR 307 of 2023 have been preferred at the instance of the same petitioner.

In CRR 305 of 2023 the order dated 3.1.2023 passed by the learned Chief Judge, City Sessions Court, Calcutta in connection with Sessions Case

No.02 of 2023 has been challenged, wherein the learned Judge was pleased to take cognizance of the offence under Sections 498A/336 and 307 of the Indian Penal Code and Section 4 of the Dowry Prohibition Act. The said case arose out of Ballygunge Police Station Case No.86 dated 25.07.2014 pursuant to the case being committed by the learned CMM, Calcutta by its order dated 12.12.2022.

The second revisional application being CRR 307 of 2023 has been preferred challenging the order dated 12.12.2022 by which the learned CMM, Calcutta was pleased to allow an application under Section 323 of the Code of Criminal Procedure filed at the instance of the de facto complainant/opposite party no.2 through the learned public prosecutor wherein the learned CMM, Calcutta was pleased to hold that prima facie evidence which has surfaced makes out an offence under Section 307 of the Indian Penal Code which is a sessions triable offence and committed the case arising out of Ballygunge Police Station Case No.86 dated 25.07.2014 to the court of sessions, being the learned Chief Judge, City Sessions, Calcutta.

Taking into account the subject matter involved, the two revisional applications are taken up together and disposed of by a single order.

Mr. Pratik Bhattacharyya, learned advocate appearing for the petitioner submits that the learned CMM, Calcutta has misread the order dated April 1, 2022 passed in CRR 960 of 2020 and proceeded to hold that prima facie evidence has surfaced for alleged offence under Section 307 of the Indian Penal

Code. Learned advocate has submitted written notes of arguments which mainly dealt with the rebuttal of the contentions advanced by the defacto complainant/opposite party no.2 and background of the family of the de facto complainant with the history of her service as a bureaucrat. Petitioner by his submission has tried to impress on factual circumstances which are beyond the scope of consideration in the two revisional applications. It has also been emphasised that ex parte evidence was recorded on 14.12.2021 which was brought to the notice of this Court in the earlier revisional application being CRR 960 of 2020 and learned CMM, Calcutta failed to take into account that the COVID regulations continued during the period when the said ex-parte evidence was recorded. Emphasis was laid down on the fact that under the given set of circumstances, learned CMM, Calcutta did not adhere to the order dated April 1, 2022 in CRR 960 of 2020 and relied upon the evidence adduced in examination-in-chief for holding the offence under Section 307 of the Indian Penal Code being made out and thereafter allowed the application under Section 323 of the Code of Criminal Procedure, committing the case to the learned Chief Judge, City Sessions Court, Calcutta. To substantiate his arguments, learned advocate relied upon the following judgments:

State of Uttar Pradesh –Vs. – Rajnarain reported in AIR 1975 SC 865; L.D. Healy –Vs. – State of Uttar Pradesh reported in reported in (1969) 1 SCC 149; State –Vs. – Divakar reported in AIR 2002 SC 2148; Lakmirattan Cotton Mills –Vs. – Workmen reported in AIR 1975 SC 1692; Ganesh K. Gulve etc. – Vs. – State of Maharashtra un-reported judgment decided on 21.08.2002 in

Appeal (Cri) 501 of 1999 by Division Bench; State of U.P. –Vs. – Ramvir Singh and Anr. reported in (2007) 6 SCC 164; CBI –Vs. – Karimullah Osan Khan reported in (2014) 11 SCC 538; Hasanbhai Valibhai Qureshi –Vs. – State of Gujarat & Ors. reported in (2004) 5 SCC 347; Jasvinder Saini & Ors. –Vs. – State (Govt. Of NCT of Delhi) reported in (2013) 7 SCC 256; Harihar Chakravarti –Vs. – State of West Bengal reported in AIR 1954 SC 266; Thakur Shah – Vs. – The King Emperor reported in AIR 1943 PC 192; Amar Singh –Vs. – State of Haryana reported in (1974) 3 SCC 81; Bhimanna –Vs. – State of Karnataka reported in (2012) 9 SCC 650; Shiv Kumar –Vs. – Hukam Chand & Anr. reported in (1999) 7 SCC 467; Dr. Nallapareddy Sridhar Reddy –Vs. The State of Andhra Pradesh & Ors. un-reported judgment of Hon’ble Supreme Court in Criminal Appeal No. 1934 of 20196 (Arising out of SLP (Cri) No. 3884 of 2019; Anant Prakash Sinha –Vs. – State of Haryana reported in (2016) 6 SCC 105; Jasvinder Saini –Vs. – State (Govt. of NCT of Delhi) reported in (2013) 7 SCC 256; Onkar Nath Mishra –Vs. – The State reported in (2008) 2 SCC 561; Paturu Subba Reddy –Vs. – State of A.P. & Ors. un-reported judgment delivered on 14th December, 2022; Rajendra Yadav & Ors. –Vs. – State of Bihar & Anr. un-reported judgment delivered on 10th August, 2009; Madhu Limaye –Vs. – State of Maharashtra reported in AIR 1978 SC 47; Saleha Khatoon –Vs. – State of Bihar reported in 1989 Cr.L.J. 202; Emperor – Vs. – Mohammad Khan Rajakhan Pathan 1 I.C. 104 Queen Empress –Vs. – Kayemullah Mandal reported in 1 C.W.N. 414; Inspector of Police –Vs. – R. Jeeva Jothi & Ors. reported in 2007 CriLJ 3003.

Mr. Sandip Kumar Bhattacharya, learned advocate appearing for the opposite party no.2, on the other hand, relied upon the examination-in-chief of the P.W.1, i.e. the defacto complainant/opposite party no.2 and emphasized on the documents which were marked in evidence as exhibits in this case. Learned advocate strenuously argued that the evidence of P.W.1 in her examination-in-chief reflects that there was an intention on the part of the accused/petitioner to commit murder. By referring to the provisions of Sections 323 and 216 of Cr.P.C., learned advocate submitted the findings of the learned CMM, Calcutta in holding that a prima facie offence under Section 307 of the Indian Penal Code has been made out. To resist the contention of the petitioner regarding the evidence being recorded on a date when the accused was absent, learned advocate reiterated the provisions of Section 309 of the Code of Criminal Procedure and submitted that the accused/petitioner strategically was absent from the court which would be reflected from the earlier order of October, 2021 when the accused was absent and the surety was directed to produce the accused, however, neither accused was present on the date fixed i.e. 14.12.2021 nor surety furnished any information before the learned CMM, Calcutta and, as such, by adhering to the relevant provisions relating to the proviso of Section 309 of the Code of Criminal Procedure, the learned trial court recorded the evidence. Learned advocate in order to substantiate his contentions so far as the invocation of the powers relating to Section 323 of the Code of Criminal Procedure relied upon the following judgments which are quoted as follows:

Ramaswamy Gounder –Vs. – State reported in 1981 Cri.L.J. 1054 (Mad); Musa Pradhan & Anr. –Vs. – State of Orissa un-reported Judgment of the Hon’ble High Court at Cuttack dated 27.12.2017 in CRLMC No. 490 of 2005; Ratan Singh –Vs. – State of Madhya Pradesh un-reported Judgment of the Hon’ble Supreme Court of India, dated 24.04.2009 in Criminal Appeal No. 825 of 2009; State of Rajasthan –Vs. – Ashok Kumar Kashyap reported in (2022) 1 SCC (Cri) 286.

Mr. Roy Chowdhury, learned advocate appearing for the State produces the list of documents relied upon by the State in order to prove its case, alongwith the documents which were marked as exhibits by way of the same being admitted in evidence as additional evidence.

In this case, learned Magistrate initially on submission of charge-sheet was pleased to take cognizance under Sections 498A/336 of the Indian Penal Code and Section 4 of the Dowry Prohibition Act. A revisional application being CRR 179 of 2016 was preferred at the instance of the de facto complainant/opposite party no.2 wherein the grievance was raised for dropping the graver charges in the charge-sheet. The said revisional application was disposed of by an order dated 05.10.2016 with the following observations:

“With regard to the grievance of the petitioner in respect of Ballygunj P.S. Case No.86, I am of the opinion that the prayer for framing charges in respect of graver offences and implication of the in-laws therein may

be addressed upon leading of evidence in accordance with law. The petitioner as victim is entitled to participate in the proceeding and may be represented by her lawyer and it shall be open to her to propose leading of additional evidence under Section 311 of Cr.P.C. and if the learned Magistrate is satisfied that such evidence is essential for a just decision of a case, he shall permit adducing of such evidence in accordance with law. Needless to mention if such evidence discloses complicity of other accused persons including the in-laws it shall be open to the Court to summon them as accused persons under Section 319 of Cr.P.C.”

The present petitioner thereafter approached this Court in CRR 960 of 2020 inter alia raising his grievance that the learned trial court without supplying the necessary documents under Section 207 of the Code of Criminal Procedure was proceeding with the trial of the case and further contended that the additional documentary evidence which are placed in evidence before the court were being accepted without copies of the same being supplied or any inspection being allowed. Issues were also raised in the said revisional application for recording evidence in absence of the accused/petitioner. The said revisional application being CRR 960 of 2020 was disposed of on April 1, 2022 with the following observations:

“Having regard to the stage of the trial and the fact that the examination-in-chief of the de facto complainant being cited as prosecution witness no.1 has already been completed and the cross-examination is to commence on the next date so fixed, I am not inclined to adjudicate with all the issues which have been canvassed in the written submissions advanced by both the parties.

The primary grievance of the petitioner relates to non-supply of documents and additional documents being placed which were not supplied to them and the case proceeded ex parte on a date so fixed by the learned trial court.

During the course of argument, Mr. Pratik Kr. Bhattacharyya, learned advocate appearing for the petitioner supplied a list of documents which were not made available to the accused when the copies under Section 207 of the Code of Criminal Procedure was supplied to him. Learned advocate also supplied a list of documents in respect of which the learned Magistrate has admitted additional evidence but the copies were not handed over to the petitioner.

Mr. Roy Chowdhury, learned advocate appearing for the State has submitted a photostat copy of the list of documents which have been enclosed along with the signature of the petitioner regarding the copies of the documents being accepted. Let the same be kept with the record.

Mr. Pratik Kr. Bhattacharyya, learned advocate appearing for the petitioner on inspection has submitted that all such documents have been received by the petitioner.

The next grievance of the petitioner relates to the material exhibits. The other apprehensions expressed by the learned advocate for the petitioner are in respect of electronic gazette which may be marked as material exhibit. In case any electronic gazette, compact disc., pen drive is brought in evidence by way of material exhibits, the learned Magistrate would exercise his option for making available contents thereof. If the same is impossible, then in the alternative learned Magistrate would give an inspection of the contents of the same in respect of the evidence which is sought to be adduced.

Mr. Pratick Kr. Bhattacharyya, learned advocate appearing for the petitioner has referred to the order dated 14th December, 2021 wherefrom it reflects that the present petitioner was unrepresented on the said date.

I find that on the said date number of documents were admitted in evidence.

In view of the petitioner being unrepresented on the said date, I direct the learned Magistrate will mark all the exhibits including the series of exhibits or material exhibits if any “as objected to on behalf of the petitioner.”

*So far as the other issues are concerned which have been addressed before this Court, the same are not being commented upon both regarding the probative value and the mode and manner in which the evidence have been brought before the court, the same would be open for consideration at the stage of final arguments of the case and would be decided by the learned Magistrate at the time of final arguments of the case, on dual considerations firstly, the learned Magistrate would express his satisfaction regarding the manner in which the documents were brought in evidence and secondly as is usually done, the learned Magistrate would consider the probative value of the evidence. Both the issues are kept open to be adjudicated by the learned trial court at the stage of final argument of the case in accordance with the judgment of the Hon’ble Supreme Court in **R.V.E Venkatachala Gounder Vs. Arulmigu Viswesaraswamy & V.P.Temple & Anr.** reported in **2003 (8) SCC 752.**”*

This Court while exercising its revisional powers and inherent powers not only scrutinize the legality, propriety or correctness of the order passed but also regularise the proceedings.

In this case, the order in CRR 960 of 2020 also reflected that the evidence was recorded in the absence of the accused or his pleader and on such a date the documents and materials exhibits were also admitted in

evidence without the same being made available to the accused. Thus, State was directed to ensure the supply of such documents during the pendency of the application and so far as the material exhibits are concerned learned trial court was also directed to make available the contents thereof or afford opportunity for inspection of the contents.

It reflects from the record that during the pendency of the revisional application, the opposite party no.2 preferred an application under Section 323 of the Code of Criminal Procedure on 28.02.2022 and the learned trial court allowed the said application by making the following observations:

“On 30.12.2013 at the flat no.C-8 of 32 Ballygunge Govt Housing Estate at about 8.30 p.m. the accused persons put pressure upon me to meet his demands for dowry and thereafter he assaulted me and snatched my daughter from me and dropped her on the floor of kitchen in order to kill her. Before dropping her he asserted that he would kill my daughter. He continued to beat me and tried to prevent me from picking up my daughter from the floor and after quite some time of struggle I managed to pick up my daughter. I also took her to SSKM Hospital for treatment. My daughter was kept under observation for the night at the N.I.C.U of Paediatric Ward.” The injury reports have been marked as Exhibit 27 and Exhibit 27/ 1. It is to be noted that this is nothing new which the PW1 had deposed but she had only echoed the facts stated by her in her first information report. Strangely enough, in the statement of de facto complainant recorded by the police under Section 161 Cr.P.C it is mentioned that the baby had a fall from her lap during the altercation. Now in such circumstances, the pertinent question thus arises – did the investigating officer under the influence of his superior distorted the

statement of the victim as alleged by her or the victim came up before this court with exaggerated fact. After raising this question, I would deliberately refrain from going further deep into this matter or into discussion of other documentary evidence like injury report on record as that would amount to pre-judging exceeding my jurisdiction. To elucidate, I must say that the allegation which prima facie comes up from evidence attracts the penal provision of section 307 IPC which is a Session Triable offence and if that this stage, I do not commit the case discarding rather ignoring the quoted portion of the evidence of the victim (PW1) that would be something like holding an instant mini-trial into an allegation of section 307 IPC without having any jurisdiction and that is not at all permissible under the law of the land. Thus, this court has the duty rather the moral obligation to commit this case to the court of learned Sessions Judge under Section 323 Cr.P.C. as this case ought to be tried by the learned Sessions Judge for proper adjudication.”

In this case it is also observed in CRR 960 of 2020 things were regularized and it was directed that the proceedings would commence from the stage of cross-examination of PW-1 with the rider that the documentary evidence would be admitted being marked as ‘objected to’, the mode and manner of evidence as also the intrinsic value were kept open for being considered at the final stages of the arguments of the case.

The trial court while arriving at its findings of prima facie offence under Section 307 of the Indian Penal Code being made out referred to exhibit 27 and exhibit 27/1 which were injury reports marked in evidence. In Exhibit 27 at serial no. 10 short history of the case as stated by the patient reflects “*physical assault by her husband Risikesh Meena by a blunt object on the above-*

mentioned date and time. After quarreling with her, he suddenly beat her". It also reflects 'injury on the left arm and hand'. So far as the exhibit 27/1 is concerned, in serial no. 10 it refers to the child and the short history of the case as stated by the patient column reflects as follows:-

"Fall on the ground due to hit by Rishikesh Meena. After quarreling with her mother, he suddenly dragged her. By this time she suddenly fall on the ground from the mother's lap".

In exhibit 27/1 no injuries have been referred.

Mr. Sandip Bhattacharya, learned advocate appearing on behalf of the opposite party no.2 while in course of his argument has emphasized on the intention of the accused/petitioner and he argued with reference to the number of medical documents which were exhibited in the case which started from the year 2006 till the year 2013. However, the learned Magistrate exclusively dealt with Exhibit 27 and Exhibit 27/1 while arriving at its findings of a prima facie offence under Section 307 of the Indian Penal Code being made out. Exhibit 27 and Exhibit 27/1 were admitted in evidence on 14th December, 2021 when the accused was not present in court.

Now the very purpose of Section 273 of the Code of Criminal procedure or for that purpose also cross-examination is that a party to a litigation may not feel deprived of his rights in accordance with the basic principles of natural justice. It may be legally correct to say that Section 309 of the Code of Criminal Procedure provides the power to record evidence in absence of the accused. However, to be empowered under the law and exercise such power under the

law do require exceptional circumstances, until and unless customarily such power is regularly exercised in Court proceedings.

The learned court on the earlier date of October 2021 directed the surety to produce the accused. There is nothing on record to satisfy that such notice was received at least by the surety and a satisfaction to that effect recorded, that in spite of the notice being received by the surety, the accused ignored his appearance knowing fully well that a date has been fixed. However, having considered that the learned Chief Metropolitan Magistrate, Calcutta while arriving at his finding for coming to a conclusion that an offence has been made out relied upon the medical documents, this Court considered the contents of the same, taking inspiration from the observations made by a co-ordinate Bench in CRR 3869 of 2015 (**Sri Subrata Mukherjee & Others Vs. The State of West Bengal & Another** reported in **2016 SCC OnLine Cal 10538**) wherein it was observed as follows :

“9. I have considered the materials in the light of the aforesaid submissions. I have also seen the materials collected in the case diary including the medical opinion dated 24.4.2013. A perusal of the medical report dated 24.4.2013 would show that no conclusive opinion as to forcible or induced abortion was given by the doctor. However, some statements have been recorded wherein the opposite party no. 2 has alleged that medicines were administered to her. As of now there is no material on record to show what was the nature of the medicine administered and the impact thereof on the pregnancy of the opposite party no. 2.

10. Hence, I am of the opinion that it was premature on the part of the learned Magistrate to come to a finding that there is sufficient material on record to

add Section 313 IPC to the array of charges and refer the matter for trial before the Court of Sessions.

11. *Accordingly, I set aside the impugned order dated 8.9.2015 passed by learned Metropolitan Magistrate, 15th Court, Calcutta.”*

The following circumstances arise in this case which are set out as follows :

- I. Charges were framed under Sections 498A/336 of the Indian Penal Code and Section 4 of the Dowry Prohibition Act.
- II. Thereafter PW-1/*de facto* complainant was being examined in-chief.
- III. PW-1 while being examined in-chief, adduced additional evidence relying on the directions passed in CRR 179 of 2016.
- IV. Such additional evidence was adduced on a date when the accused/petitioner was unrepresented.
- V. In CRR 960 of 2020, the said documents were supplied and necessary directions were passed to regularise the proceedings, so that there is no repetition of the same set of events before the learned trial court.
- VI. Exhibit-27 and Exhibit-27/1 do not reflect nature of any grievous injury which would inspire for coming to a conclusion regarding Section 307 of the Indian Penal Code except the oral deposition and statement under Section 161 of the Code of Criminal Procedure which were available in the records.

VII. When the medical evidence and the injury report *prima facie* do not support a case of grievous injury, a charge of attempt to murder is to be inferred from the oral allegation or deposition and such deposition was on a date when the accused was unrepresented, then in that case a *prima facie* finding ought to be arrived at least after the accused had the opportunity of impeaching the credit of such witness.

On an overall assessment of the order dated 21.12.2022, I am of the opinion that in the facts and circumstances of the present case, the exercise of power under Section 323 of the Code of Criminal Procedure by arriving at a *prima facie* finding of offence under Section 307 of the Indian Penal Code being made out by the learned Chief Metropolitan Magistrate, Calcutta is premature and as such, the same calls for interference. Consequently, the order dated 21.12.2022 passed by the learned Chief Metropolitan Magistrate, Calcutta in CRR 307 of 2023 is set aside and the revisional application is allowed.

As the order dated 21.12.2022 has been set aside, the subsequent action of commitment to the learned Chief Judge, City Sessions Court, Calcutta also requires interference. Accordingly, the order dated 03.01.2023 passed by the learned Chief Judge, City Sessions Court, Calcutta taking cognizance of the offence is hereby set aside. The revisional application being CRR 305 of 2023 is also allowed.

The learned Chief Judge, City Sessions Court, Calcutta is directed to transmit the records to the learned Chief Metropolitan Magistrate, Calcutta who would commence the cross-examination of PW-1 as earlier directed in CRR 960 of 2020. As has been observed earlier that the application under Section 323 of the Code of Criminal Procedure is premature, I direct that the learned trial court will not treat such application under Section 323 of the Code of Criminal Procedure as disposed of. After the cross-examination of PW-1 is over, learned Chief Metropolitan Magistrate, Calcutta would consider afresh the application under Section 323 of the Code of Criminal Procedure.

The proceedings commenced in the year 2014 and only examination-in-chief of PW-1 till date has been completed although for a substantial period of time the pandemic intervened. Having considered that almost more than eight years have expired, I direct that the cross-examination of PW1 should commence from the first week of June 2023 and would take place once in a week till the same is concluded. Effort should be there on the part of the learned advocates appearing for the petitioner, State and the victim to conclude the cross-examination by 31.07.2023. Learned Magistrate would thereafter consider the application under Section 323 of the Code of Criminal Procedure on the first week of August 2023.

With the aforesaid observations, the revisional applications being CRR 305 of 2023 and CRR 307 of 2023 are disposed of.

Pending connected application, if any, is consequently disposed of.

All parties shall act on the server copy of this order duly downloaded from the official *website* of this Court.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Tirthankar Ghosh, J.)