

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 3813 of 2019

Sangita Ghosh (Sengupta)

Vs

The State of West Bengal & Ors.

For the Petitioner : Mr. Subir Banerjee,
Mr. Anupam Ghosh.

For the State : Mr. Swapan Banerjee,
Mr. Suman De.

For the Opposite parties : Mr. Debasish Roy,
Mr. Sandipan Ganguly,
Mrs. M. Mukherjee.

Heard on : 03.01.2023

Judgment on : 20.01.2023

Shampa Dutt (Paul), J.:

The present revision is against an order dated 26th September, 2019 passed by the Learned Additional Session Judge, 1st Court Islampur in Criminal Revision 04/2018 thereby affirming the order dated 29.01.2018 passed by the Learned Judicial Magistrate, Islampur, Uttar Dinajpur, in permitting the defacto complainant **to assist** the Learned APP to Conduct prosecution on a prayer under Section 302 Cr.P.C.

The petitioner's case is that she being the defacto complainant in a proceeding initiated in 2011, being G.R. Case No. 2450/2011 under Section 498A/406/34 of the Indian Penal Code against the opposite parties made an application under Section 302 of the Cr.P.C. **praying for conducting the prosecution by her own Advocate.**

It was noticed by the petitioner in the course of hearing of the said case that repeated adjournments were prayed for by the accused persons on flimsy grounds which were allowed without any opposition from the Learned Advocate for the prosecution (APP).

The copies of the petitions filed by the accused persons before the Learned Trial Court on many occasions were also not shown or supplied to the petitioner by the Learned Advocate for the prosecution.

It is also noticed that the Learned prosecutor has deflected attempts made by the petitioner to assist him with factual details in the conduct of the proceeding.

The copies of the charge sheet and the supporting documents were not supplied to the petitioner by the Learned Prosecution. As such, the petitioner remained in dark regarding the investigations that has been carried out by the state.

In such backdrop, the petitioner has lost all faith in the conduct of the proceedings by the Learned Prosecutor.

The said application was made by the petitioner on losing faith in learned Prosecutor conducting the prosecution case.

The said application was heard and wrongly rejected by the Learned Magistrate by the Judgment and order dated January 29, 2018.

In the said order of rejection of the said application under Section 302 of the code, it has been recorded that the Learned Advocate of the petitioner had consented to limit his involvement in the conduct of the trial to **rendering assistance** to the Learned Advocate for the prosecution. It was on the basis of such consent, the said order dated January 29, 2018 was passed.

However, it is submitted that such consent as expressed by the Learned Advocate of the Petitioner, was not done under the instructions of the petitioner.

The petition under Section 302 of the Cr.P.C. with the prayers as made therein refers to the lack of consent of the petitioner in relying on the Learned Prosecutor to conduct the trial of the said case.

The said order was challenged by the petitioner before the Learned Sessions Judge by an application under sections 397 read with Section 399 of the Cr.P.C.

The said revisional application has finally been dismissed by the Learned Session Judge by the impugned judgment and order dated September 29, 2019.

Hence the revision.

Mr. Subir Banerjee, Learned Advocate for the petitioner has submitted that the impugned judgment and order is bad in law and on facts.

The Learned Judge has erred in law in failing to exercise the authority vested in him in holding that the Learned Advocate appointed by the petitioner **can only permitted to assist** the Learned Public Prosecutor in the prosecution.

The Learned Judge has erred in law in failing to exercise the authority vested in him in holding that the Advocate appointed by the petitioner cannot be allowed to conduct the prosecution case and not allowing the petitioner to conduct her case through a lawyer privately appointed by her.

The Learned Judge has failed to appreciate the import of Section 302 of the Cr.P.C. and has held that the said provision only allows an advocate on behalf of the defacto complainant to assist the Public Prosecutor in the conduct of the prosecution case.

The Learned Judge has also failed to appreciate that the said provision under the Code requires an application to be made before the Learned Magistrate only in such a situation where the circumstances require substitution of the Learned Public Prosecutor by an independent Advocate of the defacto complainant to conduct the case of the petitioner.

The Learned Judge failed to appreciate that the language of the Sub-sections to Section 302 Cr.P.C. is explicit and succinct enough to suggest and vest an authority in the Learned Magistrate to allow the prosecution case to be conducted by an independent advocate appointed by the defacto complainant.

The Learned Judge erred in dismissing the said application without going into the merits of the said application and deciding upon

the necessity of allowing the prosecution case to be conducted by an Advocate appointed by the defacto complainant.

The impugned order is bad in law and thus is liable to be set aside/quashed.

Finally, it is submitted that the petitioner has made out a strong prima facie case in her favour, the petitioner should be permitted to conduct the case through an independent lawyer in the interest of justice and to prevent the Abuse of process of Court/law.

Learned Counsels for the state are present.

Mr. Debasis Roy, Learned Counsel for the opposite parties no. 2 to 4 has submitted that CRAN 1/2022, against an order **dated 08.08.2022** cannot be heard by this court as the determination for the said period is with another court.

The said submission of the Learned Counsel is correct. Accordingly CRAN 1/2022 is disposed of, being “not pressed”.

A list of dates has been filed to assist the court. It is the stand of the Learned counsel for the private opposite parties that the orders of the Learned Magistrate and the Leaned Session Court are in accordance with law and the revision is thus liable to be dismissed.

The relevant provision in this case is Section 302 of the Code of Criminal Procedure.

Section 302 Cr.P.C. lays down:-

“302. Permission to conduct prosecution.

(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector, but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader.”

The Supreme Court in **Criminal Appeal No. 632 of 2022, Jagjeet Singh & Ors. Vs Ashish Mishra @ Monu & Anr., on 18.04.2022 held:-**

“A. Victim’s right to be heard:

16. *Until recently, criminal law had been viewed on a dimensional plane wherein the Courts were required to adjudicate between the accused and the State. The ‘victim’ — the de facto sufferer of a crime had no participation in the adjudicatory process and was made to sit outside the Court as a mute spectator. However, with the recognition that the ethos of criminal justice dispensation to prevent and punish ‘crime’ had surreptitiously turned its back on the ‘victim’, the jurisprudence with respect to the rights of victims to be heard and to participate in criminal proceedings began to positively evolve.*

17. *Internationally, the UN Declaration of Basic Principles of Justice for the Victims of Crime and Abuse of Power, 1985, which was adopted vide the United Nations General Assembly Resolution 40/34, was a landmark in boosting the provictim movement. The Declaration defined a 'victim' as someone who has suffered harm, physical or mental injury, emotional suffering, economic loss, impairment of fundamental rights through acts or omissions that are in violation of criminal laws operative within a State, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted, and regardless of the familial relationship between the perpetrator and the 'victim'. Other international bodies, such as the European Union, also took great strides in granting and protecting the rights of 'victims' through various Covenants.*

18. *Amongst other nations, the United States of America had also made two enactments on the subject i.e. (i) The Victims of Crime Act, 1984 under which legal assistance is granted to the crimevictims; and (ii) The Victims' Rights and Restitution Act of 1990. This was followed by meaningful amendments, repeal and insertion of new provisions in both the Statutes through an Act passed by the House of Representatives as well as the Senate. In Australia, the Legislature has enacted South Australia Victims of Crime Act, 2001. While in Canada there is the Canadian Victims Bill of Rights. Most of these legislations have defined the 'victim' of a crime liberally and have conferred varied rights on such victims.*

19. *On the domestic front, recent amendments to the Cr.P.C. have recognised a victim's rights in the Indian criminal justice system. The genesis of such rights lies in the 154th Report of the Law Commission of India, wherein, radical recommendations on the aspect of compensatory justice to a victim under a compensation scheme were made. Thereafter, a Committee on the Reforms of Criminal Justice System in its Report in 2003, suggested ways and means to develop a cohesive system in which all parts are to work in coordination to achieve the common goal of restoring the lost confidence of the people in the criminal justice system. The Committee recommended rights of the victim or his/her legal representative **"to be impleaded as a party in every***

criminal proceeding where the charges punishable with seven years' imprisonment or more".

20. It was further recommended that the victim be armed with a right to be represented by an advocate of his/her choice, and if he/she is not in a position to afford the same, to provide an advocate at the State's expense. The victim's right to participate in criminal trial and his/her right to know the status of investigation, and take necessary steps, or to be heard at every crucial stage of the criminal proceedings, including at the time of grant or cancellation of bail, were also duly recognised by the Committee. Repeated judicial intervention, coupled with the recommendations made from time to time as briefly noticed above, prompted the Parliament to bring into force the Code of Criminal Procedure (Amendment) Act, 2008, which not only inserted the definition of a 'victim' under Section 2 (wa) but also statutorily recognised various rights of such victims at different stages of trial.

21. It is pertinent to mention that the legislature has thoughtfully given a wide and expansive meaning to the expression 'victim' which **"means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir"**

22. This Court, in **Mallikarjun Kodagali (Dead) v. State of Karnataka & Ors., (2019) 2 SCC 752**, while dealing with questions regarding a victim's right to file an appeal under section 372 of Cr.P.C, observed that there was need to give adequate representation to victims in criminal proceedings. The Court therein affirmed the victim's right to file an appeal against an order of acquittal. In **Mallikarjun Kodagali**, though the Court was primarily concerned with a different legal issue, it will be fruitful in the present context to take note of some of the observations made therein:

"3. What follows in a trial is often secondary victimisation through repeated appearances in court in a hostile or a semi hostile environment in the courtroom. Till sometime back, secondary victimisation was in the form of aggressive and

intimidating crossexamination, but a more humane interpretation of the provisions of the Evidence Act, 1872 has made the trial a little less uncomfortable for the victim of an offence, particularly the victim of a sexual crime. In this regard, the judiciary has been proactive in ensuring that the rights of victims are addressed, but a lot more needs to be done. Today, the rights of an accused far outweigh the rights of the victim of an offence in many respects. There needs to be some balancing of the concerns and equalising their rights so that the criminal proceedings are fair to both. [Girish Kumar Suneja v. CBI, (2017) 14 SCC 809 : (2018) 1 SCC (Cri) 202].....

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8. The rights of victims, and indeed victimology, is an evolving jurisprudence and it is more than appropriate to move forward in a positive direction, rather than stand still or worse, take a step backward. A voice has been given to victims of crime by Parliament and the judiciary and that voice needs to be heard, and if not already heard, it needs to be raised to a higher decibel so that it is clearly heard.”

(Emphasis Supplied)

23. *It cannot be gainsaid that the right of a victim under the amended Cr.P.C. are substantive, enforceable, and are another facet of human rights. The victim’s right, therefore, cannot be termed or construed restrictively like a brutum fulmen. We reiterate that these rights are totally independent, incomparable, and are not accessory or auxiliary to those of the State under the Cr.P.C. The presence of ‘State’ in the proceedings, therefore, does not tantamount to according a hearing to a ‘victim’ of the crime.*

24. A 'victim' within the meaning of Cr.P.C. cannot be asked to await the commencement of trial for asserting his/her right to participate in the proceedings. He/She has a legally vested right to be heard at every step post the occurrence of an offence. Such a 'victim' has unbridled participatory rights from the stage of investigation till the culmination of the proceedings in an appeal or revision. We may hasten to clarify that 'victim' and 'complainant/informant' are two distinct connotations in criminal jurisprudence. It is not always necessary that the complainant/informant is also a 'victim', for even a stranger to the act of crime can be an 'informant', and similarly, a 'victim' need not be the complainant or informant of a felony.

25. The above stated enunciations are not to be conflated with certain statutory provisions, such as those present in Special Acts like the Scheduled Cast and Scheduled Tribes (Prevention of Atrocities) Act, 1989, where there is a legal obligation to hear the victim at the time of granting bail. Instead, what must be taken note of is that; First, the Indian jurisprudence is constantly evolving, whereby, the right of victims to be heard, especially in cases involving heinous crimes, is increasingly being acknowledged; Second, where the victims themselves have come forward to participate in a criminal proceeding, they must be accorded with an opportunity of a fair and effective hearing. If the right to file an appeal against acquittal, is not accompanied with the right to be heard at the time of deciding a bail application, the same may result in grave miscarriage of justice. Victims certainly cannot be expected to be sitting on the fence and watching the proceedings from afar, especially when they may have legitimate grievances. It is the solemn duty of a court to deliver justice before the memory of an injustice eclipses.

44. Needless to say that the bail application shall be decided on merits and after giving adequate opportunity of hearing to the victims as well. If the victims are unable to engage the services of a private counsel, it shall be obligatory upon the High Court to provide them a legal aid counsel with adequate experience in criminal law, at the State's expense."

Though the Court was deciding the right of a victim to be heard at the stage of adjudication of bail application of an accused the said view also applies to cases where the victim wants to be heard either in person or through his/her lawyer/or legal aid where entitled (para 44) in **Jagjeet Singh & Ors. vs. Ashish Mishra @ Monu & Anr. (Supra)**.

Thus keeping with the view of the Supreme Court in Jagjeet Singh & Ors. vs. Ashish Mishra @ Monu & Anr. (Supra) the order dated of 26th September, 2019 of the Learned Additional Session Judge in Criminal Revision 04/2018 and Learned Magistrate's order dated 29.01.2018 in G.R. 2450 of 2011 not being in accordance with law are set aside.

The Petitioner is the defacto complainant as well as the victim in **G. R. 2450 of 2011**, pending before the Learned Judicial Magistrate, Islampur filed for offence punishable under Section 498A/406/34 IPC.

The FIR is of the year 2011. The case is still pending. A distressed woman is continuing to pray for justice, even after 10 (ten) long years.

The Learned Magistrate will permit the defacto complainant/victim to participate in the Criminal Proceeding in G.R. 2450 of 2011 giving an opportunity to the defacto complainant/her Advocate a fair and an effective hearing, as the victim /complainants rights are totally independent, in comparable

and are not accessory or auxiliary to those of the State under the Cr.P.C. (As in the words of Supreme Court in **Jagjeet Singh & Ors. vs. Ashish Mishra @ Monu & Anr. (Supra)**).

CRR 3813 of 2019 stands allowed.

There will be no order as to costs.

All connected application stand disposed of.

Interim order if any stands vacated.

Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)