

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRR 4419 of 2022

Gopal Santra

-Vs-

The State of West Bengal & Ors.

For the Petitioner: Mr. Ayan Bhattacharjee, Adv.,
 Mr. Soham De Dhara, Adv.,
 Mr. Sagnik Mukherjee, Adv.

For the State: Mr. Swapan Banerjee, Adv.,
 Mr. Suman Dey, Adv.,
 Mr. Saryati Dutta, Adv.

For the Opposite Party No.2 to 4:
 Mr. Debasish Roy, Adv.,
 Mr. Navanil De, Adv.,
 Mr. Rajeshwar Charkaborty, Adv.,
 Mr. Srijan Ghosh, Adv.,
 Mr. Subhrajit Dey, Adv.,
 Ms. Monami Mukherjee, Adv.

Heard on: 09 January, 2023.

Judgment on: 25 January, 2023.

BIBEK CHAUDHURI, J. : –

1. The petitioner is the defacto complainant in connection with Serampore Police Station Case No.470 of 2015 dated 7th October, 2015 under Sections 448/307/34 of the Indian Penal Code. In the said case police submitted charge-sheet against the opposite parties No.2 to 4 and they are now facing trial before the learned Additional Sessions Judge, 1st

Court at Serampur in Sessions Trial No.03 (07) of 2017. At the stage of trial a petition under Section 311 of the Criminal Procedure Code was filed before the learned Additional Sessions Judge, 1st Court at Serampore. The said petition having been rejected vide order dated 16th November, 2022, the petitioner has assailed the said order before this Court in revision.

2. The defacto complainant lodged a written complaint before the inspector-in-charge Serampore P.S stating, inter alia, that on 4th October, 2015 the father-in-law, brother-in-law and wife of the petitioner's son trespassed into the house of the petitioner and committed robbery in respect of household goods. At the time of departure they sprinkled kerosene oil over the body of the wife of the defacto complainant and set her in fire. In order to save his mother, son of the defacto complainant caught hold of her and he also received burn injury. The injured wife and the son of the defacto complainant were admitted to Paramount Health Care and the doctor opined that the wife of the defacto complainant received 60% burn injury while his son received 25% burn injury. On the basis of the said complaint, police registered Serampore P.S Case No.470 of 2015 dated 7th October, 2015 under Sections 448/307/34 of the IPC against the private opposite parties. Be it noted here that wife of the defacto complaint subsequently succumbed to her injuries and Section 302 of the IPC was added against the accused persons. Police submitted charge-sheet against the accused persons under Section 448/34 with added Section 302 of the IPC against the accused persons.

3. After filing of the charge-sheet the case was committed to the Court of Session. Trial of the case was taken up by the learned Additional Sessions Judge, 1st Court at Serampore. On 9th November, 2021, the accused persons filed a petition under Section 311 of the Cr.P.C and the said petition was allowed. The petitioner subsequently challenged the said order dated 9th November, 2021 in this Court by filing a revision under Section 482 of the Cr.P.C and a Co-ordinate Bench rejected the order dated 9th November, 2021 passed by the Additional Sessions Judge in CRR No.2410 of 2021. It is pertinent to record the relevant portion of the order passed in CRR 2410 of 2021 dated 10th December, 2021 which is reproduced below:

“Accordingly, the learned trial court is directed that in case the learned counsel appearing for the accused/defense is interested to recall any witness and the Court thinks that the same is warranted for the ends of justice, in that case specific issue/questions/omissions which will prejudice the accused must be brought to the notice of the court under Section 311 of the Code of Criminal Procedure for considering the same.

The learned trial court is directed to adhere to the principles set out in the matter of **Rajaram Prasad Yadav –vs State of Bihar and anr.** reported in **(2013) 14 Supreme Court Cases 461** and thereafter consider the application under Section 311 of the Code of Criminal Procedure.

Needless to state that I have not gone into the merits of the case and as to whether the application under Section 311 of the Code of Criminal Procedure was required for the ends of justice but this court has taken a decision in the manner

in which section 311 of the Code of Criminal Procedure was allowed against the norms as has been pronounced by the Hon'ble Supreme Court.

As in spite of service, none appears on behalf of the opposite parties, I am not inclined to grant any further adjournment. The learned advocate for the accused person would file before the learned trial court a fresh application under Section 311 of the Code of Criminal Procedure by adhering to the principles set out in the judgement of Rajaram Prasad Yadav (Supra). The learned advocate for the accused persons would be at liberty to file within a period of 4(four) weeks from date.

The learned trial court, after granting opportunity to the Public Prosecutor, would dispose of the same by 20th January 2022.

Having regard to the fact that only 3 witnesses are left, the trial court must take steps so that the trial of the case is concluded by June, 2022.

With the aforesaid observations, the revisional application being CRR 2410 of 2021 is disposed of."

4. Thereafter on 22nd March, 2022 the accused persons/opposite parties filed fresh application under Section 311 of the Cr.P.C praying for recalling of PW1, i.e the petitioner herein. The said petition was allowed and on 26th April, 2022. The petitioner was cross-examined. Thereafter on 10th May, 2022 the accused persons preferred another application under Section 311 of the Cr.P.C for recalling witnesses namely Ritam Santra and Goutam Mallick. The said application also was allowed by the learned Additional Sessions Judge and the abovenamed two witnesses were

further cross-examined on 13th July, 2022. Subsequently the investigating officer were examined, cross-examined and discharged on 16th November, 2022. Thereafter, two petitions were filed on behalf of the prosecution under Section 311 of the Cr.P.C. In respect of the first petition, the prosecution wanted to examine one Dr. Debasish Saha of Forensic Science Laboratory, and by filing another petition, prosecution wanted to bring compact disc containing dying declaration of the victim following the statutory provision contained in Section 65B of the Indian Evidence Act. Unfortunately enough, both the applications filed on behalf of the prosecution was turned down by the learned Additional Sessions Judge vide order date 16th November, 2022 on the ground that the said applications were filed by the prosecution only to drag the proceeding. Forensic Science Laboratory report has been already marked exhibit during examination of other witnesses and the compact disc containing the alleged dying declaration of the victim does not bear requisite certificate under Section 65B of the Indian Evidence Act. The learned Trial Judge further recorded that the Forensic Science Laboratory report has been marked exhibit with objection. It is also recorded by him that previously prosecution filed application under Section 311 of the Cr.P.C praying for examination of two witnesses, but the names of the witnesses who were intended to be examined by filing petition dated 16th November, 2022 were not cited in the said petition.

5. Learned Advocate for the petitioner submits that Section 311 of the Cr.P.C was introduced in the statute book to enable the court to determine

the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. When it is the duty of the court to see that the litigating parties could not take recourse to Section 311 of the Cr.P.C only to fill up lacuna in the case of the prosecution or of the defence of the accused, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused to give an unfair advantage to opposite party, the power conferred under Section 311 of the Cr.P.C must be invoked by Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection.

6. It is needless to say that Section 311 of the Cr.P.C contains two distinct parts. First part of the Section is discretionary in nature which provides that any court may at any stage of any inquiry, trial or other proceeding under this Code, summons any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any such person already examined. The second part consists of a mandatory provisions requiring the court to issue summons and examine or recall and re-examine any such person if his evidence appears to be essential to the just decision in the case.

7. The learned Advocate for the petitioner in support of his contention refers to a decision of the Hon'ble Supreme Court in **Natasha Singh vs Central Bureau of Investigation** reported in **(2013) 5 SCC 741**. It is pointed out by the learned Advocate for the petitioner that the FSL report in connection with the case under trial was marked as exhibit with

objection by the defence. If the said document was marked without objection, there might not have been any occasion to examine the Forensic Scientist. As the accused raised objection while the document were marked exhibit, it is necessary for the prosecution to examine the forensic expert, failing which the trial court will not be in a position to rely on such document.

8. It is further submitted by the learned Advocate for the petitioner that the learned trial judge rightly refused to mark the compact disc containing dying declaration of the victim as exhibit as there was no certificate required under Section 65B of the Evidence Act. However the learned trial judge fails to consider that the compact disc containing dying declaration of the victim was made the part of the document which was decided to be relied upon by the prosecution and the copy of the said compact disc was supplied to the defence. As the prosecution relied upon the compact disc and produced the same during evidence, the learned trial judge marked the same as exhibit for identification. Section 65B of the Evidence Act laid down detailed provision stating the circumstances regarding admissibility of the electronic records. For proper adjudication of the dispute, Section 65B of the Evidence Act is reproduced below:

“65B. Admissibility of electronic records.—(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are

satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period;

or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,—

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.—For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.”

9. In **Arjun Panditrao Khotkar vs. Kailash Kushanarao Gorantyal & Ors.** reported in **(2020) 7 SCC 1** the Hon’ble Supreme Court had the occasion to discuss about the duty of the Court while admitting evidence under Section 65B of the Indian Evidence Act. Paragraph 52 of the aforesaid report runs thus :

“**52.** We may hasten to add that Section 65-B does not speak of the *stage* at which such certificate must be furnished to the Court. In *Anwar P.V.*, this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the person concerned, the Judge conducting the trial must summon the person/persons

referred to in Section 65-B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the CrPC.”

Again paragraph 56 of the Hon’ble Supreme Court held as follows:

“56. Therefore, in terms of general procedure, the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before commencement of the trial. Thus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in respect of the rights of parties has to be carried out by the court, in examining any application by the prosecution under Sections 91 or 311 CrPC or Section 165 of the Evidence Act. Depending on the facts of each case, and the court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, the court may in appropriate cases allow the prosecution to produce such certificate at a later point in time. If it is the accused who desires to produce the requisite certificate as part of his

defence, this again will depend upon the justice of the case — discretion to be exercised by the court in accordance with law.”

10. Bare perusal of the above observations clearly suggests that it is the duty of the Judge conducting trial to summon the person or persons referred to in Section 65B (4) of the Evidence Act where either defective certificate is given or no such certificate was issued and require that such certificate be given by such person or persons.

11. In order to come to a conclusive decision in the instant case, the learned P.P-in-charge was requested to produce the case diary. It is found from the case diary that one SI Srimanta Singha recorded dying declaration of the victim in a compact disc. The said compact disc was not certified under Section 65B of the Evidence Act. Under such circumstances the trial judge ought to have obtained the requisite certificate from appropriate person/persons for including the electronic device (compact disc) in evidence.

12. Mr. Debasish Roy, learned Advocate for the private opposite parties, on the other hand submits that the victim was admitted to Serampore Walsh Hospital after receiving burn injury on 4th October, 2015. On that date itself she was shifted to Paramount Health Care. She was discharged from Paramount Nursing Home on 29th October, 2015 and went back to her home. She was again hospitalized on 6th November, 2015 at Imambara Hosptial Chinsurah thereafter she was shifted to Calcutta Medical College on 7th November, 2015. The victim lady expired on 10th

November, 2015. Thus it is submitted by Mr. Roy that the statement of the victim cannot be said to be a dying declaration within the meaning of Section 32 of the Evidence Act. Therefore the learned trial judge rightly rejected the application filed by the prosecution for bringing the compact disc in evidence. The statement of the victim at best be taken under Section 161 of the Cr.P.C but not a dying declaration.

13. Having heard the learned Counsels for the contesting parties and on careful perusal of the entire materials on record, this Court is of the opinion that the learned trial judge should take serious endeavor to unearth the truth for which the trial is being proceeded with against the accused persons. Undoubtedly when a document which has been exhibited with objection put forward by the defence, learned trial judge cannot rely upon such evidence unless the objection is waived. Objection can only waived by examining the scientific expert who submitted forensic report in respect of the seized articles.

14. Similarly the learned trial judge ought to have given a chance to the prosecution to prove the compact disc containing statement of the deceased in accordance with law. This Court has already referred to the legal provision enunciated by the Hon'ble Supreme Court with regard to the duty of the Court before admitting an electronic evidence.

15. In view of the above discussion this Court finds that the impugned order dated 16th November, 2022 is liable to be set aside. Accordingly the order dated 16th November, 2022 is set aside.

16. The instant revision is allowed on contest. The learned trial judge shall give opportunity to the prosecution to examine the forensic science expert.

17. Learned trial judge shall also permit the prosecution to include the compact disc containing statement of the victim recorded by the investigating officer following the provision of Section 65B of the Evidence Act.

18. Before I part with I must record the learned Advocate for the petitioner has prayed for transfer of trial of the case from the 1st Court of the learned Additional Sessions Judge at Serampore to any other Court making out a case of bias.

19. I do not find any reason to transfer the case for conclusion of trial from the court of the learned Additional Sessions Judge, 1st Court at Serampur. This Court earnestly believes in impartiality of the learned trial judge. Only because prosecutions applications were rejected, a judicial officer cannot be said to be bias.

20. The learned Additional Sessions Judge, 1st Court at Serampore is therefore directed to proceed with the trial of the case impartially without showing any bias to either of the parties.

(Bibek Chaudhuri, J.)