

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

**CRR 2751 of 2019
With
CRR 275 of 2018
With
CRR 3901 of 2015
With
RVW 301 of 2016
With
WPA 30257 of 2014**

**Sankar Addhya @ Shankar Addya @ Daku
Vs.
State of West Bengal**

**Before: The Hon'ble Justice Arijit Banerjee
&
The Hon'ble Justice Apurba Sinha Ray**

For the Petitioner in CRR 2751 of
2019, for the Opposite Party in
CRR 275 of 2018, CRR 3901 of
2015 and WPA 30257 of 2014.

Mr. Debashis Roy, Adv.
Mr. P. Edulji, Adv.
Mr. A. Ghatak, Adv.
Mr. Sagnik Mukherjee, Adv.

For the State in CRR 3901 of
2015.

Mr. Madhusudan Sur, Learned APP
Mr. Subir Ahmed, Adv.
Mr. Dipankar Pramanick, Adv.

Judgment on

19.01.2024

Apurba Sinha Ray, J. :-

1. CRR 2751 of 2019 is taken up for hearing and disposal. This criminal revisional application is directed against an order dated September 12, 2019, passed by the learned Trial Court on an application filed by the prosecution on an application dated November 6, 2017, filed by the prosecution under Section 319 of the Code of Criminal Procedure, 1973. By the order impugned the learned Trial Court issued summons to the petitioner herein and other persons proposing to add them as accused on 12.09.2019.

2. Binapani Bairagi and Rakesh Bairagi being the grandmother and father of the murdered victim Himangshu Bairagi filed an application dated 16.09.2015 before the Court of the Learned Additional Sessions Judge, Fast Track Court, Bongaon, North 24 Parganas under Section 193 of the Code of Criminal Procedure, read with Section 228 of the said Code praying for issuance of summons upon the persons named by the said Binapani Bairagi in the course of her statement made before the Learned Judicial Magistrate, First Class, under Section 164 of Cr.P.C., read with Section 482 of Cr.P.C. The said application was rejected by the Court by order dated 08.10.2015. A criminal revisional application numbered as CRR No. 3901 of 2015 under Section 397/401 of the Cr.P.C. was filed read with Section 482 of Cr.P.C.

challenging therein the propriety of the said order dated 08.10.2015 which is still pending for adjudication before the Court.

3. Another application numbered as CRR 3958 of 2015 was also filed by the grandmother and father of the victim praying for transferring the relevant case from the Learned Court of Additional Sessions Judge, Fast Tract Court, Bongaon, North 24 Parganas to the Court of Learned City Sessions Court at Calcutta. It is further contended that while other writ petitions and revisional application being No. CRR 3958 of 2015 were disposed of by the Hon'ble High Court, the Writ Petition No. 7308(W) of 2015 and CRR No. 3901 of 2015 along with other matters are pending for adjudication before the High Court at Calcutta. The petitioners Sankar Addya along with four others were added as opposite parties in CRR No. 3901 of 2015 pursuant to an order passed by the High Court at Calcutta. The petitioner herein/proposed accused person Sankar Addya after having been added as an opposite party in the aforesaid criminal revisional application, has been duly represented by the learned advocates whenever the said criminal revisional application along with other connected and unconnected matters, that have been tagged to CRR No. 3901 of 2015, have been taken up for hearing by the High Court.

4. In course of hearing CRR No. 3901 of 2015 along with other connected matters thereto, the High Court at Calcutta vide its order dated 27.06.2016 transferred the relevant sessions case from the Court of the Learned Sessions Judge, Fast Court, Bongaon, North 24 Parganas to the Learned City Sessions Court Calcutta and also appointed a Learned Special Public Prosecutor to conduct the trial in connection with the said case. The High Court also observed that it was inclined to examine the prayer for summoning the proposed accused persons including the petitioner as accused person, only after recording of more cogent evidence like that of the grandmother of the deceased victim. Subsequent to the completion of the deposition of the said Binapani Bairagi, the High Court vide its order dated 12.06.2017 directed that further evidence of Rakesh Bairagi be recorded before the Learned Trial Court and a report be filed before the High Court on the next date of hearing.

5. The further case of the revisionist is that during the pendency of the CRR No. 3901 of 2015 before the High Court at Calcutta, the prosecution filed an application dated 06.11.2017 under Section 319 of the Code of Criminal procedure, 1973 before the Learned City Sessions Court wherein a prayer was made on the part of the prosecution to pass an order by issuing process against five persons named therein, since they were involved in the commission of the

offences alleged in the letter of complaint leading to the initiation of the aforementioned case as was purportedly deposed in the course of the deposition of the prosecution witness no. 10 and 11, being the grandmother and the father of the deceased victim in the instant case.

6. It is in the course of hearing of the aforementioned CRR No. 3901 of 2015 that the present petitioner came to know that an application under Section 319 of the Cr.P.C. had been filed by the prosecution before the Learned Trial Court praying therein for issuance of process against the petitioner along with four other proposed accused persons.

7. The petitioner filed an application dated 15.07.2019 praying for a notice to be issued to him and that he be heard before the Learned City Sessions Court passes any order pertaining to the petition dated 06.11.2017 under Section 319 of the Code of 1973. The said application dated 15.07.2019 along with application dated 06.11.2017 filed by the prosecution was taken up for hearing by the Learned Judge, First Bench cum Special Judge, City Sessions Court, N.D.P.S. at Calcutta on 06.03.2019 along with other applications filed by the prosecution on 06.03.2019 and 15.07.2019, copies of which were never served upon the proposed accused person including the petitioner in this appeal. The Learned Trial Court allowed the

applications filed by the prosecution on 06.11.2017 and issued summons against the proposed accused persons including the present petitioner by order dated 12.09.2019. As far as the application dated 15.07.2019 filed herein by the revisionist is concerned it is submitted that even though the Learned City Sessions Court referred to the submissions made on behalf of the petitioner/revisionist and his aforementioned petition including one of the judgments cited at the time of hearing, the learned Trial Court did not pass any order in connection with the same. A bare perusal of the said impugned order would make it clear that the aforementioned application dated 15.07.2019 of the petitioner/revisionist was effectively rejected although this was not expressed in so many words. By not giving adequate opportunity of hearing to the petitioner/revisionist, the Learned City Sessions Court violated the principles of natural justice. Moreover, the court did not consider the following decisions:-

“i. Jogendra Yadav & Ors. v. State of Bihar & Anr., reported in (2015) 9 SCC 244, Para 9

ii. Labhuji Amratji Thakor v. State of Gujarat, reported in 2018 SCC Online SC 2547, Para 2.2

iii. Smt. Asha & Ors. v. The State of Karnataka by Electronic City Police, Criminal Revision Petition no. 231 of 2016, Paras 5, 8, 15 and 16

iv. M. Basappa & Ors. v State by Birur Police Station. Criminal Petition no. 380 of 2017, Paras 4 and 5.”

8. It was submitted that on a bare perusal of the impugned order dated 12.09.2019, it would be evident that there was complete lack of application of judicial mind on the part of the Learned Trial Judge at the time of passing of the impugned order.

9. It was also contended on the part of the revisionist that the impugned order dated 12.09.2019 has been passed by the Learned Trial Court in complete violation of the principle of audi alterem partem.

10. Learned Counsel appearing on behalf of the revisionist Mr. Debasish Roy submitted that even the criminal investigation department did not file any materials against the proposed accused persons. None except Binapani Bairagi named the appellant and four others in her statement recorded under Section 164 Cr.P.C. The principle of law has already been settled in Hardeep Singh’s case and also in Jogendra Yadav’s case. It is now binding law that only prima facie type of evidence is not sufficient to issue summons upon the additional accused persons but more than prima facie evidence is required. It was further contended that Hardeep Singh’s case supports

the case of the appellant. The father of the victim namely Rakesh Bairagi did not state the names of the revisionist and others at the time of recording his statement under Section 164 Cr.P.C. Therefore, Binapani Bairagi's evidence could not be relied upon by the Learned Single Judge. It was further submitted that Yashodhan Singh's case, *infra*, is not binding since the question decided therein was not referred to a larger bench whereas according to the said learned counsel Jogendra Yadav's decision is applicable and binding and as such the petitioner is required to be heard before adding him as accused.

11. The Learned Senior Advocate Mr. Bikash Ranjan Bhattacharyya appearing on behalf of the respondents submitted that Writ Petition No. 11792 (W) of 2014 has already been disposed of. Binapani Bairagi was examined under Section 164 Cr.P.C. within two months from the date of occurrence. Moreover, there is no pre-condition laid down in Section 319 Cr. P.C. that a prior hearing is pre-requisite for issuance of summons upon the persons to be added as accused during the course of the trial. The Learned Counsel has referred to the case laws reported at **(2023) SCC OnLine 890 (Yashodhan Singh & Ors. Vs. State of Uttar Pradesh and Anr.)**, **(2023) 7 SCC 344 (Jitendra Nath Mishra Vs. State of Uttar Pradesh and Anr.)**.

Court's view

12. The short point which is required to be decided whether it is a pre-requisite for the concerned court which is dealing with a sessions case to give the proposed accused an opportunity of hearing before issuing summons upon him for adding him as accused in the proceedings.

13. Learned counsel for the appellant/revisionist has submitted that as per ratio decidendi in case of **Hardeep Singh Vs. State of Punjab & Ors.** reported at **(2014) 3 SCC 92** and **Jogendra Yadav & Ors. (supra)** it is a bounden duty of the concerned court to give an opportunity of hearing to the proposed accused persons. In support of his contention he has further submitted judicial decisions reported at **(2009) 16 SCC 46 (Sarabjit Singh and Another Vs. State of Punjab and Another)**, **(2019) 4 SCC 556 (Sunil Kumar Gupta and Others Vs. State of Uttar Pradesh and Others)**, **(2019) 7 SCC 806 (Sri Prakash Mishra Vs. State of Uttar Pradesh and Another)**, **(2023) 5 SCC 406 (Juhru and Others Vs. Karim and Another)**, **(2018) SCC OnLine SC 2547 (Labhuji Amarthji Thakor and Other Vs. State of Gujrat and Another)**, **(Smt. Asha and Others Vs. State of Karnataka before the Hon'ble High Court at Karnataka (Criminal Revision Petition No. 231 of 2016) (Sri M Basappa and Others Vs. State of Karnataka)**

**before the Hon'ble High Court at Karnataka Criminal Revision
Petition No. 380 of 2017.**

14. On the other hand the learned counsel for the respondents has submitted that there is no pre-requisite condition envisaged in the provisions of Section 319 Cr.P.C. that a prior hearing is to be given to the proposed accused before adding him as accused to the proceedings.

15. Each case is to be judged on its own merits.

16. This case has a chequered history. The murdered victim Himangshu Bairagi was himself accused of murdering one Soumya Biswas and a case was pending against him and during such pendency, he was murdered by several culprits. The place of occurrence was in the sub-divisional Town Bongaon of the District North 24 Parganas which is 77.2 KM away from the city of Kolkata. The proceeding in the relevant case where Himangshu Bairagi was the victim was conducted in a surcharged atmosphere. It was alleged that the investigation as well as prosecution of the case were not being done in the manner which it deserves. The relevant observation of the High Court in this connection is pertinent to mention hereunder. The High Court in CRR No. 3901 of 2015 vide order dated June 27, 2016 observed as hereunder:-

“In the backdrop of the aforesaid submissions, I have examined the materials on record. I find that the statement of the petitioners were recorded under Section 164 of the Code of Criminal Procedure and it appears that the petitioner no. 1 claimed to have witnessed the incident and named the opposite party nos. 2 to 9 as the assailants of the victim. Statements of other witnesses under Section 161 of the Code of Criminal Procedure have been recorded who also which also claim to have seen the incident but failed to name the assailants. In the backdrop of such factual matrix, I fail to appreciate as to what prevented the investigating agency from putting up the opposite party nos.2 to 9 in T.I. Parade examination for identification by the prosecution witnesses. Without resorting to such course, I find that the investigating agency recorded statements of persons either to improbabilise the version of petitioner no.1 as an eyewitness or for the purpose of establishing a purported alibi of the opposite party nos. 2 to 9 herein who have claimed to be present in a political meeting held at a different place at the material point of time. In the face of such indifferent investigation, it appears the mere slender material collected by the investigating agency in support of the prosecution case are the statements of the petitioners recorded under Section 161 of the Code of Criminal Procedure and thereafter under Section 164 of the Code of Criminal Procedure. I find that out of nine witnesses examined during trial by the prosecution, I am unable to understand why P.W 2 to 7 were examined as they play no role in

unfolding the prosecution case. No doubt it is the wisdom of the Public Prosecutor to decide which witnesses he would like to examine to establish his case but one is left wondering when one notices that the Public Prosecutor instead of examining the most vital witness like PW 1 chose to examine witnesses who instead of building the prosecution case seeks to bolster defence version of opposite party no.2 to 9 herein. It is also a matter of concern that two witnesses namely P.W.8 and 9 were found to have resiled from their earlier version were not declared hostile by the Public Prosecutor.

In this factual matrix and in view of the averments made in the petition for transfer that the petitioners and their lawyer feel extremely ill at ease in participating in the trial pending at Bongaon and in light of the brooding spectra of malevolent influence of the opposite parties no.2 to 9 herein who are well-connected political personalities in the concerned district, I am of the opinion that to inject a semblance of fairness and credibility in the prosecution and to instill confidence in the minds of the victims, one of whom claims to have seen the untimely ghastly end of her grandson before her own eyes, the prosecution requires to be invigorated by transfer of the proceeding to a place where the petitioners and their witnesses feel confident to participate and depose in the instant case without any fear or apprehension whatsoever.

Conduct of the Public Prosecutor, in the instant case, particularly, the manner of his

choosing witnesses and his failure not to declare witnesses, resiling from their earlier statements, as hostile does not inspire confidence. In this situation, I feel interest of justice would be best served if in addition to transfer of the proceeding, an experienced lawyer of unanimous repute is appointed as a special Public Prosecutor for the purpose of conducting the trial in a fair and impartial manner. Under such circumstances, I suggested the name of Mr. Ashoke Baxi, an eminent lawyer of repute and a former Public Prosecutor of the State to conduct the trial as a special Public Prosecutor and none of the parties have raised any objection thereto.”

17. Therefore, this case has a unique character which is different from the cases cited by both the parties. However as the proceedings in the Bongaon Court were conducted in a surcharged manner and has been depicted in the order dated June 27, 2016 as aforesaid and the proceedings ultimately have been shifted to City Sessions Court from the Sub-Division of Bongaon, North 24 Parganas the Learned Single Judge in the aforesaid matter by taking exceptional measure in exercise of Lordship’s Constitutional powers of judicial superintendence to ensure fair and impartial trial in the matter not only shifted the trial from the Learned Additional Sessions Judge Bongaon, North 24 Parganas to the City Sessions Court at Calcutta but also gave directions to ensure proper adjudication of the matter. In this regard the Learned Single Judge has been pleased to observe as

hereunder: “.....hence I am inclined to examine the prayer for summoning the opposite party nos. 2, 4, 5, 6 and 9, Sankar Addya @ Daku and four others namely Abhijeet Kaporia @ Abhi, Sandip Debnath, Anup Sandu, Boo Chakraborty as accused and for directing further re-investigation by CBI only after recording of more cogent evidence like that of the petitioner no. 1 (Binapani Bairagi) in the instant case (Emphasis added).” Relevant directions given by the Learned Single Judge in the aforesaid matter are as hereunder:-

“a) The impugned proceeding is transferred from the learned Court of the Additional Sessions Judge, First Court, Bongaon, North 24 Parganas to the learned Court of City Sessions Court, Calcutta. The trial shall be conducted by the learned Chief Judge, City Sessions Court, Calcutta or any other judge to whom the same may be transfer by the Learned Chief Judge.

b) Mr. Ashoke Baxi, learned Advocate and former Public Prosecutor is appointed as Special Public Prosecutor in the instant case and shall conduct the prosecution henceforth. The State through the legal Remembrancer is directed to forthwith appoint Mr. Baxi as Special Public Prosecutor under section 24(8) of the Code of Criminal Procedure. The Special Public Prosecutor shall take immediate steps to examine petitioner no.1 as a prosecution witness and shall place her evidence on record and/or other evidence that may be recorded before this Court on the next date of hearing.

The lawyer of the petitioners would be entitled to assist the Special Public Prosecutor in terms of the proviso to section 24(8) of the Code.

c) It would also be open to the Special Public Prosecutor to assess the materials collected till date and delete such witnesses cited in the charge-sheet, who in his considered opinion may not be relevant for unfolding of the prosecution case. It shall also be open to him in consultation with the petitioners/victims to summon additional witnesses or production of documents, if necessary, for a just decision of the case.

d) The trial shall continue as directed and a report thereof including the deposition of petitioner no.1 shall be filed before this Court by the State on the next date of hearing.

e) The petitioners shall be given police protection at their residence as well as for the purpose of their going to the trial Court and deposing in the matter.”

18. From the aforesaid direction it appears from Part C that the Learned Single Judge has been pleased to empower the Learned Special Public Prosecutor to take appropriate steps in consultation with the petitioner/victim to summon additional witnesses or production of documents, if necessary for a just decision of the case. If that be so there is serious illegality on the part of the Special Public Prosecutor to submit the prayer dated 06.11.2017 before the Learned

City Sessions Court under Section 319 Cr.P.C. It is true that as per record of CRR 3901 of 2015 the said revisional application is still pending and by order dated 12.06.2017 the Hon'ble Court has directed that further evidence in the case be recorded by the learned Trial Court and a report be filed before the court on the next date of hearing.

19. From the above materials on record it transpires that the Hon'ble Court has been pleased to keep the matters relating to issuance of summons against the proposed accused persons and also for directing CBI to re-investigate the case against them, pending for adjudication till it receives the reports proposed to be filed before this court. In such a situation, filing of the petition under Section 319 Cr.P.C. at the instance of the prosecution before the City Sessions Court Kolkata can be said to have directly contradicted the order passed by the High Court in CRR No. 3901 of 2015. There is no authority given to the prosecution by the High Court to file an application under Section 319 Cr.P.C. for summoning any additional accused in the course of trial before the City Sessions Court. The prosecution committed a serious wrong by filing the aforesaid petition before the City Sessions Court without waiting for further order of the High Court in connection with CRR No. 3901 of 2015. As the High Court has reserved passing of any order in connection with the prayer

for summoning additional accused for itself, the relevant petition under Section 319 Cr.P.C. filed by the prosecution before the Learned City Sessions Court as well as the relevant order dated 12.09.2019 of the said court are not in accordance with the direction of the High Court and as such for the sake of judicial discipline and propriety, We are constrained to set aside the order dated 12.09.2019 passed by the City Sessions Court Kolkata.

20. From the above it transpires that as per direction of the High Court, the evidence of Binapani Bairagi and Rakesh Bairagi have been completed in the trial being conducted at City Sessions Court at Calcutta and as such the prosecution is directed to submit a detailed report before this court regarding the evidence of Binapani Bairagi and Rakesh Bairagi and to assist this Court in connection with CRR No. 3901 of 2015 for passing appropriate order on the prayers of the petitioners, Binapani Bairagi and Rakesh Bairagi for summoning the proposed accused person namely Sankar Addya, Abhijeet Kaporla, Sandip Debnath, Anup Sandu, Boo Chakraborty. The parties are at liberty to agitate all the law points including cited judicial decisions before the Hon'ble Court at the time of hearing of CRR No. 3901 of 2015.

21. CRR No. 2751 of 2019 is allowed and the order no. 57 dated 12.09.2019 passed by the Learned City Sessions Court, Calcutta in connection with Sessions Case No. 62 of 2016 is hereby set aside. List CRR No. 3901 of 2015 for submitting report from the side of the prosecution after the second week of February, 2024.

22. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities

I Agree.

(ARIJIT BANERJEE, J.)

(APURBA SINHA RAY, J.)