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(2013) 08 AHC CK 0212

Allahabad High Court (Lucknow Bench)

Case No: Criminal Miscellaneous case No. -3769 of 2013

Lokesh Singh — APPELLANT

Vs

State of U.P. — RESPONDENT

Date of Decision: Aug. 26, 2013

Acts Referred:

- Advocates Act, 1961 - Section 35
- Constitution of India, 1950 - Article 21
- Criminal Procedure Code, 1973 (CrPC) - Section 2(g), 2(h), 2(wa), 225, 24
- Penal Code, 1860 (IPC) - Section 120B, 302

Citation: (2013) 83 ALLCC 379

Hon'ble Judges: Vishnu Chandra Gupta, J

Bench: Single Bench

Advocate: Vaibhav Kalia, for the Appellant; K.K. Singh and AGA, for the Respondent

Final Decision: Allowed

Judgement

Vishnu Chandra Gupta, J.
By means of these petitions u/s 482 Criminal Procedure Code (for short "Cr.P.C.") the petitioners (Lokesh Singh son of deceased (C.P. Singh) has prayed for setting aside the order dated 16.08.2013 (in Crl. Misc. Case No. 3769 of 2013) and order dated 3.8.2013 (in Crl. Misc. Case No. 3770 of 2013 filed by petitioner (Virendra Singh, first informant of the case) passed by Additional District and Sessions Judge, Court No. 1, Lucknow and further directing the trial court to allow the victim/petitioner to address the oral arguments in Sessions Trial No. 341 of 2007, u/s 302, 120B IPC, P.S. Ashiyana, District Lucknow. Very interesting and important question of law has been raised in this petition;

whether an Advocate engaged by victim of the case has right to address the court after conclusion of the trial?

2. Sri Gopal Chaturvedi, learned Senior Advocate appearing on behalf of petitioner assisted by Sri Vaibhav Kalia, Advocate submitted that by Code of Criminal Procedure amendment Act 2008(5 of 2009) certain amendments were made in the Cr.P.C. to facilitate the participation of victim in criminal prosecution of an offender. Section 2(wa) definition of "victim" has been added quoted herein below:

2(wa) "victim" 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;)

3. In sub-section 8 of Section 24 of Cr.P.C. a proviso has been added whereby court was authorised to permit the victim to engage an Advocate of his choice to assist the prosecution. The relevant provision of Section 24(1) and 24(8) are reproduced herein below:-

24. Public Prosecutors.-

(1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2)...

(3)...

(4)...

(5)...

(6)...

(7)...

(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

[provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.]

4. The facts giving rise to present controversy are necessary to be looked into.

5. A sessions trial No. 341 of 2007 (State Vs. Shiv Bahadur and Ors), u/s 120-B and Section 302 IPC is pending in Additional Sessions Judge, Court No. 1, Lucknow. Under

proviso to Section 24(8) Cr.P.C. the petitioners sought permission for advancement of oral argument along with public prosecutor in the aforesaid Sessions trial for extending the necessary assistance and enabling the court to decide the case in proper way. It is not in dispute that entire evidence is over and Public Prosecutor has already finished the argument in the case on behalf of prosecution and only thereafter the right of audience has been claimed by the petitioners being son of the deceased and First informant of the case respectively. This request of both the petitioners were declined by the impugned orders dated 03.08.2013 and 16.8.2013. It was observed by the sessions court that they at the most have a right to file written argument after close of the oral argument of the prosecutor in view of Section 301 Cr.P.C.

6. As both the petitions are based on similar facts and common question of law is involved, hence both these petitions are being decided by this common judgment.

7. Learned counsel for the petitioners submits that the law relied upon by the trial court while deciding the application was not applicable in the present case because amended provision of the Cr.P.C. has not been taken into consideration while delivering the impugned orders.

8. It was further submitted that the victim has also given right to prefer an appeal u/s 372 Cr.P.C. The appeal is in continuous of the suit and in case of appeal filed by the victim he would have a right to address before the appellate court within the meaning of Section 325 Cr.P.C. being party. Than why he should not be given an opportunity to advance argument before the trial court after conclusion of the arguments of public prosecutor. He further submits that if the petitioner''s counsel is allowed to advance oral argument it will not at all cause any prejudice to the accused persons in any way specially when victim was authorised to engage his lawyer after the amendment.

9. The learned senior counsel appearing on behalf of the accused intervenor Sri I.B. Singh has submitted that there is specific bar contained in Section 301 Cr.P.C. regarding advancement of oral argument by an Advocate engaged by the victim and at the most he has right to file written argument. Hence the court has rightly decided the applications and there is no illegality in the impugned orders. It was further submitted that if after amendment of Section 24(8) Cr.P.C. by adding a proviso the legal position cannot be changed because Section 301 Cr.P.C. already contains a provision regarding rights of lawyer engaged by the victim prior to the amendment in Section 24(8) Cr.P.C.

10. The learned counsel appearing on behalf of accused persons/intervenor relied upon the judgment of the Apex Court report in 2000 JCRC 11 (SC), Shiv Kumar Vs. Hukum Singh and Ors. wherein rights in this regard of a private counsel has been defined. He also relied upon another judgment of this Court reported in 2012 (2) JIC 887 (All. H.C.) Anil Kumar Vs. State of U.P. and an order dated 18.10.2011 passed by division bench of this court in Anand Sen Yadav Vs. State of U.P., Cr. Appeal No. 1061 of 2011. After placing reliance upon these judgment it has been submitted that the Apex Court in light of

Section 301 Cr.P.C. provide that private counsel is to act on behalf of Public Prosecutor albeit the fact he is engaged in the case by private party. If the role of the Public Prosecutor is allowed to shrink to a supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in section 225 of the Cr.P.C. a dead letter. He after relying upon the judgment of Allahabad High Court in Anil Kumar''s case (supra) it has been submitted that the complainant has no right to intervene and independently make any submissions independently in opposing the bail application for interlocutory bail. The division Bench of this Court keeping in view the provision contained in Section 301 Cr.P.C. ruled that complainant has no authority to oppose the bail application. After relying upon the judgment in Anand Sen Yadav''s case (supra) it has been submitted that Advocate General or Additional Advocate General too cannot act as public prosecutors as they were not appointed u/s 24 of Cr.P.C. From the perusal of the order dated 18.10.2011 passed in Anand Sen Yadav case reveals that the provisions quoted of section 24 of Cr.P.C. in the order does not contain the amended proviso to Sub-sec. 8 of Sec 24 of Cr.P.C.

11. I have very carefully heard and considered the argument advanced by learned counsel for the parties and perused the material available on record filed in these petitions.

12. It is not in dispute that the legislature made certain amendment vide Act No. 5 of 2009 in Cr.P.C. by adding definition of victim and giving right to victim to engage counsel of his choice during prosecution of accused u/s 24 and also giving right to file an appeal u/s 372. The statement of object and reason for such amendment given in the bill are quoted herein below:-

Amendment Act 5 of 2009-Statement of Objects and Reasons:-The need to amend the Code of Criminal Procedure, 1973 to ensure fair and speedy justice and to tone up the criminal justice system has been felt for quite sometime. The Law Commission has undertaken a comprehensive review of the Code of Criminal Procedure in its 154th report and its recommendations have been found very appropriate, particularly those relating to provisions concerning arrest, custody and remand, procedure for summons and warrant-cases, compounding of offences, victimology, special protection in respect of women and inquiry and trial of persons of unsound mind. Also, as per the Law Commission''s 177th report relating to arrest, it has been found necessary to revise the law to maintain a balance between the liberty of the citizens and the society''s interest in maintenance of peace as well as law and order.

The need has also been felt to include measures for preventing the growing tendency of witnesses being induced or threatened to turn hostile by the accused parties who are influential, rich and powerful. At present, the victims are the worst sufferers in a crime and they don''t have much role in the court proceedings. They need to be given certain rights and compensation, so that there is no distortion of the criminal justice system. The application of technology in investigation, inquiry and trial is expected to reduce delays,

help in gathering credible evidences, minimise the risk of escape of the remand prisoners during transit and also facilitate utilisation of police personnel for other duties. There is an urgent need to provide relief to women, particularly victims of sexual offences, and provide fair trial to persons of unsound mind who are not able to defend themselves.

13. The objective to be achieved by the aforesaid amendment as per proviso added in Section 24(8) of Cr.P.C. seems to extend help the victims and to give more active role in dispensation of the criminal justice and to provide active participation of the victim in the justice delivery system keeping in view the concept of fair trial enshrined under article 21 of the Constitution of India. Prior to the amendment in Section 24(8) Cr.P.C., the Apex Court in Delhi Domestic Working Women''s Forum Vs. Union of India (UOI) and Others, felt need to issued direction to provide legal assistance to the victim of sexual assault even before the stage of trial and when the matter was at the stage of investigation. The Apex Court also directed to prepare a list of Advocate willing to act in such type of case where the victims are the women or the victim of sexual assault.

14. The Apex Court in State of Kerala and Another Vs. B. Six Holiday Resorts (P) Ltd. and etc., has observed in regard to the insertion of proviso in statute book and held;

A proviso may either qualify or except certain provisions from the main provision; or it can change the very concept of the intendant of the main provision by incorporating certain mandatory conditions to be fulfilled; or it can temporarily suspend the operation of the main provision. Ultimately the proviso has to be construed upon its terms. Merely because it suspends or stops further operation of the main provision, the proviso does not become invalid. The challenge to the validity of the proviso is therefore rejected.

15. The Hon''ble Supreme Court in A. Manjula Bhashini and Others Vs. The Managing Director, A.P. Women''s Cooperative Finance Corporation Ltd. and Another, has considered the use of statement of object and reason while interpreting the statutory provision and observed in para 42 is as follows:

40 The proposition which can be culled out from the aforementioned judgments is that although the Statement of Objects and Reasons contained in the Bill leading to enactment of the particular Act cannot be made the sole basis for construing the provisions contained therein, the same can be referred to for understanding the background, the antecedent state of affairs and the mischief sought to be rermedied by the statute. The Statement of Objects and Reasons can also be looked into as an external aid for appreciating the true intent of the legislature and/or the object sought to be achieved by enactment of the particular Act or for judging reasonableness of the classification made by such Act.

16. Almost similar view has been taken by Apex Court in Tika Ram and Others Vs. State of U.P. and Others etc. etc., .

17. The Apex Court in Zameer Ahmed Latifur Rehman Sheikh Vs. State of Maharashtra and Others, ruled about interpretation of the statute. It has been observed that the statute has to be read in its entirety and not in isolation. The provision of law has to be seen in the context in which it is introduced.

18. In R. Rathinam Vs. State by DSP, District Crime Branch Madurai District, Madurai and Another, the Hon"ble Supreme Court permitted a lawyer to file an application for cancellation of bail. This view was approved by the Apex Court in Puran Vs. Rambilas and Another etc. etc., . In R. Rathinam"s case (supra) the Apex Court held that the frame of sub-Section 2 of Section 439 Cr.P.C. indicates that it is a power conferred on the court mentioned therein. It was held that there was nothing to indicate that the said power could be exercised only if the State or investigating agency or the Public Prosecutor moved an application. It was held that the power so vested in the High Court can be invoked by any aggrieved party he can addressed the court.

19. The Apex Court in Dwarka Prasad Agarwal (D) by LRs. and Another Vs. B.D. Agarwal and Others, held that party can not made to suffer adversely either directly or indirectly by reason of an order passed by any court of law which is not binding on him. The very basic upon which a judicial process can be resorted to is reasonableness and fairness in a trial. The fair trial is fundamental right of every citizen including the victim of the case under article 21 of our Constitution as held in Nirmal Singh Kahlon Vs. State of Punjab and Others, .

20. In view of the aforesaid authorities of the Apex Court the provision of statute to be looked into.

21. Section 301 Cr.P.C. is quoted herein below:-

301 Appearance by Public Prosecutors.

(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case, any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

22. This Section provides that Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear without any written authority before any court in which that particular case is under inquiry, trial or appeal. Sub-section 2 provides that if any private person instruct a pleader to prosecute any person in any court, the public Persecutor in

charge of the case shall conduct the prosecution and pleader so instructed shall act therein under the direction of public Prosecutor and may with the permission of the court submit written arguments after the evidence is closed in the case.

23. Section 301 Cr.P.C. has not been amended vide Act No. 5 of 2008. The insertion in the statute book, the proviso to Section 24(8) added by Act No. 5 of 2008, whether in any way, effects the provision of section 301, is sole question for consideration before the Court. Proviso added to section 24(8) Cr.P.C. provides that victim define in Section 2(wa) may be permitted to engage an advocate of his choice to assist the prosecution under this sub-section. Sub-section 8 provides appointment of Special Public Prosecutor, different from Public Persecutor appointed u/s 7 of Sub-section 24 of Cr.P.C. The basic distinction drawn in the statute by introducing the proviso that if the victim defined u/s 2(wa) Cr.P.C. is permitted to engage a lawyer he will acquire status of Special Public Prosecutor subject to riders imposed under the proviso.

24. In proviso added to Section 24(8) Cr.P.C. the word used are "assist the prosecution" and not to "assist the public Prosecutor" as mentioned in Section 301 Cr.P.C. There is difference in the scheme of two sections. From perusal of Subsection 2 of section 301 Cr.P.C. made it clear that if in any case private person instruct a pleader to prosecute any person in any court even though the Public Prosecutor in charge of case shall conduct the prosecution and the pleader instructed shall act therein under the directions of the Public Prosecutor. Up to this stage no permission of court is needed for appointment of pleader by a private person. The permission is only required to the pleader if he want to file written argument in the case. However after insertion of proviso to Section 24(8) Cr.P.C. the court can permits a victims advocate to assist the prosecution. The status and position of Advocate engaged by the victim would be changed because in that situation the court at the very inception may permit the Advocate of the choice of the victim to participate in the proceeding and to assist the prosecution and not to the public prosecutor. Prosecution include investigation, enquiry, trial and appeal within the meaning of Section 24 Cr.P.C. Section 301 Cr.P.C. deals with only inquiry, trial or appeal. Inquiry has been defined in Section 2(g) Cr.P.C., means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court. As such inquiry is different from investigation as defined in section 2(h) Cr.P.C.

25. Neither word "prosecution" nor "trial" has been defined in the Cr.P.C. Trial has been defined by the Apex Court in Union of India and others Vs. Major General Madan Lal Yadav (Retd.), . It means an act of proving or judicial examination or determination of the issues including its own jurisdiction or authority in accordance with law or adjudging guilt or innocence of the accused including all steps necessary thereto. Meaning of trial changes in view of specific provision of the code. The expression "trial" used in Section 306 Cr.P.C. includes both an "inquiry" as well as "trial" as held by the Apex Court in A. Deivendran Vs. State of T.N., .

26. The prosecution has not been defined specifically in the light of proviso to Section 24(8) Cr.P.C. The meaning of word "prosecution" as defined in Webster Dictionary, 3rd Edition is as follow;

the carrying out of a plan, project, or course of action to or toward a specific end.

In view of the aforesaid definition the "end" for which a plan or project is carried out is called prosecution. In respect of proviso to Section 24(8) Cr.P.C. prosecution in respect of an offence begin with putting the law into motion by any individual or sufferer of crime. The "end" in a prosecution within the meaning of proviso to sub-section 8 of section 24 Cr.P.C. would be adjudication of guilt of an offender who is charged with commission of an offence in accordance with procedure established by law in a court constituted under this code. So the prosecution starts with giving information of commission of crime and continued during investigation or inquiry, trial of offender and if any appeal is filed finally end by an order passed in appeal. This whole process is the part of fair trial inbuilt in Article 21 of our Constitution. The word prosecution is also used in different sense in different situation. When word "prosecution" is used in defining the parties to criminal case it is used for the party who is siding the victim. When it used in respect of an accused means pending proceeding to ascertain the guilt of the accused. When an offence is committed it certainly committed against the society but the sufferer is called victim. Victim has direct nexus with the damage caused to him but society may have a remote effect. The legislature for the first time insert provision for protection of the right of victim in the Criminal Procedure Code and specially keeping in view being the worst sufferer of crime. Thus, the victim should not be kept aloof from the judicial process in which the wrongdoers is undergoing the process of ascertainment of his guilt for wrong committed by him. In this judicial process, by means of amendment made by Act No. 5 of 2008, the status of the victim has been improved from a silent expectator of proceeding before the court to a participant of the proceeding. Therefore the word used in the proviso added to Section 24(8) Cr.P.C. is to "assist the prosecution" and not to assist the "public prosecutor". Therefore there is basic difference in between proviso to Section 24(8) and Section 301 Cr.P.C. It is true that section 301 Cr.P.C. has not been amended by Act No. 5 of 2008 but if the principals of harmonies construction is applied while interpreting the different provision of same statute like proviso to section 24(8) and Section 301 Cr.P.C., the letter and spirit inducted in proviso added to sub-Section 8 of Section 24 of the Cr.P.C. cannot be diluted by saying that no amendment has been incorporated in Section 301 Cr.P.C.

27. The whole scheme if taken into consideration for prosecution and trial of an accused the dominant role is played by the public prosecutor but by insertion of proviso to Section 24(8) Cr.P.C. the Court is now authorised to permit the victim to engage a lawyer of his choice to assist the prosecution. The prosecution of an offender is virtually carried out in the court of law constituted under some statute presided over by a judge and not by any party to the proceedings. The public prosecutors, the advocate of the accused or special counsel appointed by the aggrieved person or the Advocate engaged by a victim, all are

officers of the court. They all assist the court to arrive at truth during prosecution of an accused. Therefore in section 24 or in section 301 phrase "with the permission of court" is used. So, once the permission is accorded to the Advocate of the victim to assist the prosecution his assistance could not be restricted to the termanalogy of Section 301, i.e. only to assist the prosecutor. The court in view of the same can permit to advance the oral argument too to the Advocate engaged by the victim apart from submission of the written argument. The importances of oral argument cannot be out weight by saying that right to written argument has been given in Section 301 Cr.P.C.

28. In Section 301 Cr.P.C. there seems no previous permission to engage a private pleader by any private person even if he has no personal interest. The permission is required only if he intents to file the written argument. However in proviso to Section 24(8) Cr.P.C. permission is accorded to the Advocate of the choice of the victim to assist the prosecution and not to the public prosecutor.

29. Section 301 Cr.P.C. does not say that oral argument cannot be permitted to an advocate engage by the victim. It only prohibits that if a private party engaged a pleader he can assist the public prosecutor and court may permit him to file the written argument. There is difference between the pleader and Advocate. Advocate is treated to be officer of the court and supposed to assist the court in arriving the truth, so, right to address the court to an Advocate cannot be curtailed while representing his client in the light of provisions of Advocates Act. In Poonam Vs. Sumit Tiwari AIR 2010 SC 1385 their Lordship has discussed the importance of assistance of a lawyer in the light of section 35 of Advocates Act and observed that in absence of proper assistance to Court by the lawyer, there is no obligation on the part of the Court to decide the case, for the simple reason that unless the lawyer renders the proper assistance to the Court, the Court is not able to decide the case properly. It is not for the Court itself to decide the controversy. The counsel cannot just raise the issues in his petition and leave it to the Court to give its decision on those points after going through the record and determining the correctness thereof. It is not for the Court itself to find out what the points for determination can be and then proceed to give a decision on those points. In case counsel for the party is not able to render any assistance, the Court may decline to entertain the petition. Moreover if the petition is decided in such cases the judgment given may be violative of principles of natural justice as the opposite counsel would not "have a fair opportunity to answer the line of reasoning adopted" in this behalf.

30. In Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, their Lordship of Hon"ble Supreme Court observed that Public Prosecutor is an officer of the Court but there are instances in which the Public Prosecutor is either not competent or act only on the instructions given by the State.

31. The Public Prosecutor simply conduct the trial with sense of detachment whereas the victim remain attached with his case and ventilates his grievance because a decision given in the matter may not have any impact upon Public Prosecutor but it effects the

victim.

32. The Apex Court held in M/s. J.K. International Vs. State, Govt of NCT of Delhi and Others, , that a complaint is sought to be quashed by accused then the de-facto complainant have a right to be heard.

33. A similar view has been propounded by the Apex Court in Bhagwant Singh Vs. Commissioner of Police and Another, wherein in the case of submission of closer report/final report by the investigating agency the right has been conferred upon the informant/complainant of being heard before acceptance of the same.

34. Hence, this Court is of the view that after insertion of proviso to Section 24(8) Cr.P.C. if the court permits the victim to engage an advocate of choice, the court thereafter cannot deprive the Advocate to address the court in addition to his right to file the written argument as contained in Section 301 Cr.P.C. after close of evidence.

35. Moreover, if the Advocate of victim is allowed to advance oral arguments it will not caused any prejudice to the accused. Of course, this right should not be allowed to be used as a tool in the hand of such advocate to delay or to create hurdles during the trial. The Judge presiding over the Court should monitor the trial keeping in view the concept of fair trial. Fair trial does not mean only to protect the interest of the accused person but it also include to protect the rights of the victim. However, under the garb of this right a victim cannot be allowed to linger on proceedings.

36. Hence, in view of above this Court is of the view that the orders passed by the trial court are not sustainable and the same are liable to be set aside.

37. The Advocate appointed by the victim should be permitted to assist the court by supplementing the arguments already advanced by Public Prosecutor by oral submissions in addition to written argument if any filed by him.

38. Consequently, these petitions are allowed. The impugned orders dated 3.8.2013 and 16.8.2013 are set aside. The trial court is directed that the Advocate appointed by victim of the case shall be permitted to advance oral argument in addition to written argument if any earlier filed, fixing a date and maximum time which the trial court may think reasonable in one stretch but not less than a day. This will be an opportunity granted only once to the victim alone as defined in Section 2(wa) of Cr.P.C. No further adjournment shall be allowed to the victim in this regard. The interim order stand discharged.