

## Dipak Kumar Mahata and Others Vs Susoma Mahata

**Court:** Calcutta High Court

**Date of Decision:** Oct. 6, 2004

**Acts Referred:** Criminal Procedure Code, 1973 (CrPC) â€” Section 311, 313  
Penal Code, 1860 (IPC) â€” Section 109, 494

**Citation:** (2005) 2 CALLT 649

**Hon'ble Judges:** Pravendu Narayan Sinha, J

**Bench:** Single Bench

**Advocate:** Milon Mukherjee, Sandipan Ganguly and Aniket Mitra, for the Appellant; Monish Sen, for the Respondent

**Final Decision:** Allowed

### Judgement

Pravendu Narayan Sinha, J.

This revisional application has been preferred by the petitioners assailing the order dated 17.05.02 passed by

the learned Additional Sessions Judge, Durgapur in Criminal Motion No. 31 of 2001 thereby setting aside the orders dated 18.06.01 and

27.06.01 passed by the learned Sub-Divisional Judicial Magistrate (in short SDJM), Durgapur in Case No. C.R. 339 of 1994.

2. Mr. Milon Mukherjee, learned advocate for the petitioners contended that the criminal case being C.R. Case No. 339 of 94 pending before the

learned SDJM, Durgapur was started on the basis of complaint lodged by opposite party Susoma Mahata under Sections 494/109 of Indian Penal

Code (in short IPC). It was a warrant procedure case and after evidence of witnesses for the complainant before charge and after charge the

accused persons, who are the petitioners here, were also examined u/s 313 of Criminal Procedure Code. The examination u/s 313 Criminal

Procedure Code was done on 11.06.01 and thereafter the learned SDJM fixed 18.06.01 as date of argument. On 18.06.01 the complainant

opposite party filed an application praying for recalling PW 3 Debasish Roychowdhury and the learned SDJM by his order dated 25.06.01

rejected the said prayer and fixed 29.06.01 for hearing arguments. Before that on 27.06.01 complainant filed another petition praying for re-

examination of prosecution witness No. 1, namely, complainant herself Susoma Mahata and PW 4 Pranab Bhattacharya. The learned Magistrate

after considering the said prayer and after hearing both parties rejected the said prayer also. Being aggrieved by and dissatisfied with the orders

dated 25.06.01 and 27.06.01 the complainant opposite party filed the criminal motion bearing No. 31 of 2001 and the learned Additional

Sessions Judge, Durgapur after hearing both the parties allowed the motion and set aside the orders dated 18.06.01 and 27.06.01 passed by the

learned SDJM. The accused persons have now moved this Court challenging the said order dated 17.05.02 passed by the learned Additional

Sessions Judge.

3. Mr. Mukherjee further contended that Section 311 of Criminal Procedure Code empowers any Court to summon any person as a witness or

recall or re-examine any person already examined at any stage of enquiry or trial but before judgment, if the Court thinks that such examination of

the witness is essential for the just decision of the case. The learned SDJM rejected the prayer of the complainant after assigning reasons and made

it clear in his orders that PW 3, PW 1 and PW 4 have already been examined and cross examined and in their evidence they have stated the

essential ceremonies performed in the marriage between petitioner No. 1 Dipak Mahata and petitioner No. 4 Rina Mahata. Therefore, the prayer

for recall or re-examination of the said three witnesses in respect of the points mentioned in the petition were not necessary at all. The learned

Additional Sessions Judge did not discuss what was the evidence that the complainant and her witnesses deposed in Court and whether after such

evidence there was any need for re-examination of such witnesses on the points as mentioned in the application for recall. It was not a case that

evidence of the said three prosecution witnesses remained completely blank in respect of the points for recall. The learned Additional Sessions

Judge did not consider that there was no need of further re-examination and after defence was disclosed and accused persons were examined u/s

313 Criminal Procedure Code there was no cogent ground to allow the prayer of complainant to fill in the lacuna of prosecution evidence. The

learned Additional Sessions Judge failed to appreciate the evidence as well as facts and circumstances of the case and order of the learned

Additional Sessions Judge was a product of non-application of judicial mind. Accordingly, the order of the learned Additional Sessions Judge

should be set aside.

4. Learned advocate for the complainant opposite party contended that adequacy of evidence cannot be decided by the revisional Court. Scope

of this Court is very limited and this Court is to consider only whether the order of the learned Additional Sessions Judge suffers from any illegality

or irregularity. The learned Additional Sessions Judge in the order portion clearly observed that witnesses stated about some norms of marriage but

further stated "etc.etc". To remove the ambiguity as to what the witnesses wanted to say by using words "etc etc" the complainant should be given

opportunity to re-examine the witnesses. Therefore, the order of the learned Additional Sessions Judge was correct and proper and it requires no

interference.

5. Considering the submission made by the learned advocates of the parties and pursuing the revisional application I find that the opposite party

complainant lodged the complaint against her husband the petitioner No. 1 Dipak Mahata and others including the second wife Rina Mahata who

is petitioner No. 4 under Sections 494/109 of Indian Penal Code. As the punishment in the said offence is above two years it was a warrant

procedure case and accordingly complainant and her witnesses were examined before charge and thereafter charge was framed and after charge

the witnesses were again cross examined. Thereafter, the learned Magistrate examined the accused persons u/s 313 of Criminal Procedure Code

on 11.06.01 after closure of prosecution evidence and fixed 18.06.01 for hearing arguments. On 18.06.01 after the examination u/s 313 Criminal

Procedure Code was over the complainant filed a petition praying for recalling PW 3 Debasish Roychowdhury who allegedly acted as a priest in

the marriage between petitioner No. 1 and Rina Mahata and before marriage with the petitioner No. 1, she was Rina Misra. Learned Magistrate

rejected the said prayer giving reasons and fixed 29.06.01 for argument. In the meantime on 27.06.01 the complainant again filed a petition; this

time praying for recalling PW 1 Susoma Mahata, complainant herself and PW 4 Pranab Bhattacharya and the learned SDJM by his order dated

27.06.01 rejected the said prayer also. Challenging the order of the learned SDJM dated 25.06.01 and 27.06.01 complainant moved the

Additional Sessions Judge in Criminal Motion No. 31 of 2001 and the learned Additional Sessions Judge by order dated 17.05.01 allowed the

prayer and set aside the order of the learned SDJM dated 18.06.01 and 27.06.01.

Section 311 of Criminal Procedure Code runs as follows:

311. Power to summon material witness, or examine person present. Any Court may, at any stage to any inquiry, trial or other proceeding under

this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or re-call and re-examine,

any person already examined; and the Court shall summon and examine of recall and re-examine any such person if his evidence appears to it to

be essential to the just decision of the case.

6. This section manifestly makes it clear that the Court at any stage before judgment may recall and re-examine any witness who has already been

examined and may summon any person as a witness if such evidence appears to the Court to be essential for the just decision of the case. The

prime consideration to invoke provisions of Section 311 of Criminal Procedure Code is just decision of the case and it cannot be used to feel in

lacuna of prosecution case. If it is established that on any particular point or fact in issue evidence was already there jurisdiction of this section

cannot be invoked. If it appears to Court that any evidence which was not before it and such evidence is essential for the just decision of the case

relating to the offence, the Court has the power either to summon a new person to be examined as a witnesses or may recall and re-examine a

witness who has already been examined in order to bring light to Court regarding that point which was not before the Court. This section cannot be

invoked to summon a new witness or to recall a witness already examined relating to any point concerning the offence with which the trial was in

progress and evidence was already there in respect of the said point or fact in issue.

7. The order of the learned Additional Sessions Judge appears to be not in accordance with law from the face of the order. The learned SDJM on

18.06.01 did not pass any such order which can infringe any right of the complainant amounting to invoke jurisdiction to prefer a revision against

such order. In fact, learned SDJM rejected prayer of complainant to re-examine PW 3 by order dated 25.06.01 and rejected prayer of

complainant to recall PW 1 and PW 4 by order dated 27.06.01. Complainant, therefore, was aggrieved, if any, by the orders dated 25.06.01 and

27.06.01, but there was no such order dated 18.06.01 by which the complainant would have been aggrieved. But the order of the learned

Additional Sessions Judge reveals that the learned Additional Sessions Judge set aside the order dated 18.06.01 and of course order dated

27.06.01. The complainant did not prefer any revision challenging the order dated 18.06.01 and it prima facie shows that there was non

application of mind on the part of the learned Additional Sessions Judge. Non application of mind further appears from the body of order of the

learned Additional Sessions Judge itself, when the learned Additional Sessions Judge observed PW 5 stated "etc etc" and in order to remove

ambiguity regarding "etc etc" there was need of re-examination. In fact the complainant did not file any application before the learned SDJM

praying for recalling PW 5. Therefore, non application of mind by the learned Additional Sessions Judge is apparent on the face of the order of the

learned Additional Sessions Judge.

8. Copy of the evidence of the witnesses were shown to this Court on behalf of the petitioners. As it is a case u/s 494 of Criminal Procedure Code

complainant has to prove strictly both the marriages i.e. her own marriage and also the second marriage of her husband and ceremonies performed

in both the marriages must be there in the evidence before the Court. Evidence of PW 1 clearly reveals that she in her evidence stated that on

21.4.94 her husband married Rina Misra for the second time and Debasish Roychowdhury acted as priest and marriage ceremonies like

"saptapadi", "malabadal", "sindurdan" were performed. PW 3 Debasish Roychowdhury in his evidence stated that on 21.4.94 he was a priest of

Kalyaneswari Temple and he acted as priest in the marriage between Dipak Mahata and Rina Mahata and stated that the said marriage was

performed according to Hindu religious rites and essential ceremonies of marriage like "saptapadi", "malabadal", "sindurdan", "hastabandhan" and

other performances were performed. PW 4 Pranab Bhattacharya was a chance witness who allegedly went to Kalyaneswari Temple on that day

and stated that at Kalyaneswari Temple he found Dipak Mahata is going to marry Rina Misra. He raised objection stating that Dipak Mahata is

already married with Susoma Mahata, but his objection was turned down by all who were present there. In the second marriage of Dipak Mahata,

Debasish Roychowdhury acted as priest and all sorts of religious performance namely "saptapadi", "malabadal", "sindurdan" were performed in

his presence. There was no prayer by complainant to recall PW 5 but the learned Judge without going through the order of the learned Magistrate

mentioned in his order that PW 5 stated "etc etc". It appears to me that PW 5 Sahadeb Pramanik was not present in the second marriage between

Dipak Mahata and Rina Misra and he did not state anything about essential ceremonies that were performed or observed in the second marriage

of Dipak Mahata.

9. It is evident that the complainant wanted to recall PW 3, herself and PW 4 regarding points as to whether there was any "Homa" or "saptapadi"

in the second marriage of Dipak Mahata and if those ceremonies were not performed what were the causes of it and what were the other

ceremonies i.e. "etc." were performed and what is the caste of the parties and what ceremonies were performed in marriage according to their

caste. After such evidence of PW 1, PW 3 and PW 4 that the second marriage of Dipak Mahata were performed with Rina Misra according to

Hindu marriage religious rites as stated by PW 1 and PW 3), and all performances of Hindu religious rites were observed as stated by PW 3, there

was no need of recall or re-examination of the said witnesses. PW 4 also stated about some of the ceremonies performed in the alleged second

marriage and he added "etc" were performed. After closure of prosecution evidence and examination of accused persons u/s 313 of Criminal

Procedure Code there cannot be any ground to recall PW 4 to state what he wanted to mean by the word "etc" when he already stated some of

the essential ceremonies performed in the alleged second marriage.

10. It is clear from the evidence that the learned SDJM appreciated the matter properly and passed a reasoned and correct order. The learned

Additional Sessions Judge without applying proper mind and without considering that there was sufficient evidence that the marriage was

performed according to Hindu religious rites and customs and the witnesses for whom prayer for recall were made already stated in their evidence

what ceremonies were performed made mistake by setting aside the order of the learned SDJM. Learned Additional Sessions Judge in the instant

case failed to realise the essential ingredients of Section 311 of Criminal Procedure Code and in the instant case after such evidence there was no

ground for recalling PW 1, PW 3 and PW 4 u/s 311 of Criminal Procedure Code. I have already indicated above the non application of mind on

the part of the learned Additional Sessions Judge. The order of the learned Additional Sessions Judge was, therefore, not in accordance with law

and the said order was improper, illegal and incorrect. The order of the learned Additional Sessions Judge being not in accordance with law is

hereby set aside.

11. In view of the aforesaid discussion the revision application is allowed. Order dated 17.05.02 passed by the learned Additional Sessions Judge,

Durgapur in Criminal Motion No. 31 of 2001 is hereby set aside. Learned SDJM, Durgapur is directed to proceed with the case as expeditiously

as possible since the case is of the year 1994 and to dispose of the same after hearing arguments from both parties.

All intention orders of stay passed earlier stand vacated.

Send a copy of this order to the learned Additional Sessions Judge, Durgapur and the learned SDJM, Durgapur for information and necessary

action.

Urgent xerox certified copy be given to the parties, if applied for, expeditiously.