

Mosaref Hossain Mondal Vs The State of West Bengal and Others

Court: Calcutta High Court

Date of Decision: April 25, 2012

Acts Referred: Constitution of India, 1950 Article 14

Criminal Procedure Code, 1973 (CrPC) Section 164, 164A, 195A, 273, 327

Penal Code, 1860 (IPC) Section 120B, 195A, 228A, 354, 363

Citation: (2012) 5 CHN 370 : (2012) CriLJ 2893

Hon'ble Judges: Joymalya Bagchi, J

Bench: Single Bench

Advocate: Pabitra Biswa, for the Appellant; Debasish Roy, Ld. P. P., for State, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Joymalya Bagchi, J.

The writ petitioner is the de facto complainant of the First Information Report which has been registered as Deganga

Police Station Case No. 442 dated 31-12-2010 under Sections 363/366/120B of the Indian Penal Code in respect of kidnapping of his 14 year

old minor daughter. In the course of investigation the girl was recovered and it appears that her statement has been recorded u/s 164 of the Code

of Criminal Procedure. After much persuasion the police took steps to add offence u/s 376 of the Indian Penal Code to array of accusations in the

instant case. Subsequently, it appears that the principal accused was arrested and has been released on bail. The charge-sheet has been submitted

in the aforesaid case and the matter is awaiting trial. In the meantime, the petitioner complains that the accused persons and their associates have

held out threats and are intimidating the petitioner and his minor daughter-who are vital witnesses of the aforesaid case and has further threatened

the petitioner that his daughter would be kidnapped again.

2. The efficacy of criminal justice administration depends on the security and safety of the witness. It is the bounden duty of the State to create a

congenial atmosphere so that confidence is instilled in the minds of the witnesses so as to enable them to depose truthfully in a Court of law without

any fear or favour.

3. In the case of Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others, the Supreme Court held as follows :

Witnesses, as Bentham said : are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness

himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The

incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the Court or

due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on

account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in

power, their henchmen and hirelings, political clout and patronage and innumerable other corrupt practices ingeniously adopted to smother and

stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Broader public and societal interests require

that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do

not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the

administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the

edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time

has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and

justice triumphs and that the trial is not reduced to a mockery. The State has a definite role to play in protecting the witnesses, to start with at least

in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert the trial getting tainted

and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in Court the witness could safely depose

the truth without any fear of being hounded by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive

Activities (Prevention) Act, 1987 (in short "the TADA Act") have taken note of the reluctance shown by witnesses to depose against dangerous

criminals /terrorists. In a milder form also the reluctance and the hesitation of witnesses to depose against people with muscle power, money power

or political power has become the order of the day. If ultimately truth is to be arrived at the eyes and ears of justice have to be protected so that

the interests of justice do not get incapacitated in the sense of making the proceedings before Courts mere mock trials as are usually seen in

movies.

Legislative measures to emphasize prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of

the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt

with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the

society. On the contrary, the efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the

proper administration of justice must be given as much importance, if not more, as the interests of the individual accused. In this Courts have a vital

role to play.

4. In the case of National Human Rights Commission v. State of Gujarat and others, reported in (2009) 6 SCC 767 the Supreme Court reiterated

the importance of witnesses" protection for ensuring effective administration of criminal justice in the following words :

It is an established fact that witnesses form the key ingredient in a criminal trial and it is the testimonies of these very witnesses, which established

the guilt of the accused. It is, therefore, imperative that for justice to be done, the protection of witnesses and victims becomes essential, as it is the

reliance on their testimony and complaints that the actual perpetrators of heinous crimes during the communal violence can be brought to book.

5. In the aforesaid judgment the Supreme Court further held as follows :

.....In most of the cases, witnesses are the victims of the crime. Most vulnerable amongst them are women and children. Under the existing

system they are mere pawns in a crime trial and there is very little concern for protecting their real interests. The protection is necessary so that

there is no miscarriage of justice; but protection is also necessary to restore in them, a sense of human dignity.

6. The need for witness protection is furthermore in sexual offences, particularly, when victim is a minor as in the instant case.

7. Dealing with such a case of sexual violence, the Supreme Court in the case of State of Punjab Vs. Gurmit Singh and Others, observed the need

to lay down procedure for ensuring the comfort, dignity and security of rape victims, as follows :

.....The expression that the inquiry into and trial of rape ""shall be conducted in camera"" as occurring in sub-section (2) of Section 327, Cr. P.

C. is not only significant but very important. It casts a duty on the Court to conduct the trial of rape cases etc. invariably ""in camera"". The Courts

are obliged to act in furtherance of the intention expressed by the legislature and not to ignore its mandate and must invariably take recourse to the

provisions of Section 327(2) and (3) Cr. P. C. and hold the trial of rape cases in camera. It would enable the victim of crime to be a little

comfortable and answer the questions with greater ease in not too familiar a surroundings. Trial in camera would not only be in keeping with the

self-respect of the victim of crime and in tune with the legislative intent but is also likely to improve the quality of the evidence of a prosecutrix

because she would not be so hesitant or bashful to depose frankly as she may be in an open Court, under the gaze of public. The improved quality

of her evidence would assist the Courts in arriving at the truth and sifting truth from falsehood. The High Courts would therefore be well-advised to

draw the attention of the trial Courts to the amended provisions of Section 327, Cr. P. C. and to impress upon the Presiding Officers to invariably

hold the trial of rape cases in camera, rather than in the open Court as envisaged by Section 327(2) Cr. P. C. When trials are held in camera, it

would not be lawful for any person to print or publish any matter in relation to the proceedings in the case, except with the previous permission of

the Court as envisaged by Section 327(3) Cr. P. C. This would save any further embarrassment being caused to the victim of sex crime. Wherever

possible, it may also be worth considering whether it would not be more desirable that the cases of sexual assaults of the females are tried by lady

Judges, wherever available, so that the prosecutrix can make her statement with greater ease and assist the courts to properly discharge their

duties, without allowing the truth to be sacrificed at the altar of rigid technicalities while appreciating evidence in such cases. The Courts should, as

far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity

of the victim of the crime must be maintained as far as possible throughout.

8. The 154th Report of the Law Commission (1996) noted as follows :

witnesses should be protected from the loathe of the accused in any eventuality.

9. The 172nd Report of the Law Commission (2000), dealing with the review of rape laws suggested that the testimony of a minor in the case of

child sexual abuse should be recovered at the earliest possible opportunity in the presence of a Judge and a child support person. It further urged

that the Court should permit the use of video-taped interview of the child or allow the child to testify by a closed circuit television and that the cross

examination of the minor should be carried out by the Judge based on written questions submitted by the defence. The Commission also

recommended insertion of a proviso to Sec. 273, Cr. P. C. to the effect that it should be open to the prosecution to request the Court to provide a

screen so that the child victim does not see the accused during the trial.

10. In its 178th Report (2001), the Law Commission recommended the insertion of S. 164A in the Cr. P. C. to provide for recording of the

statement of material witnesses in the presence of Magistrates where the offences were punishable with imprisonment of 10 years and more.

11. After referring to all the aforesaid recommendations made by the Law Commission, the Apex Court in Sakshi Vs. Union of India (UOI) and

Others, laid down further guidelines to ensure the protection of the victim of sexual abuse from the intimidating presence of the accused. The Apex

Court held as follows :

(1) The provisions of sub-section (2) of S. 327, Cr. P. C. shall, in addition to the offences mentioned in the sub-section, would also apply in

inquiry or trial of offences under Ss. 354 and 377, I.P.C.

(2) In holding trial of child sex abuse or rape:

(i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the

body or face of the accused;

(ii) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, should be given in writing to the

Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(ii) the victim of child abuse or rape, while giving testimony in Court, should be allowed sufficient breaks as and when required.

These directions are in addition to those given in State of Punjab v. Gurmit Singh (1996 Cri LJ 1278).

12. To further strengthen law relating to witness protection the legislature by the Criminal Law (Amendment) Act, 2005 and Code of Criminal

Procedure (Amendment) Act, 2009 introduced the following provisions to the Code of Criminal Procedure and Indian Penal Code.

Section 195A, Cr. P. C: Procedure for witnesses in case of threatening etc. - A witness or any other person may file a complaint in relation to an

offence u/s 195A of the Indian Penal Code (45 of 1860).

Section 195A, I. P. C: Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in

whom that person is interested, with intent to cause that person to give false evidence shall be punished with imprisonment of either description for

a term which may extend to seven years, or with fine, or with both;

and if innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years,

the person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent

person is punished and sentenced.

Section 228A, I. P. C: Disclosure of identity of the victim of certain offences, etc-(1) Whoever prints or publishes the name or any matter which

may make known the identity of any person against whom an offence u/s 376, Section 376A, Section 376B, Section 376C or Section 376D is

alleged or found to have been committed (hereinafter in this section referred to as the victim) shall be punished with imprisonment of either

description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if

such printing or publication is -

(a) by or under the order in writing of the officer in charge of the police station or the police officer making the investigation into such offence acting

in good faith for the purposes of such investigation; or

(b) by, or with the authorisation in writing of, the victim; or

(c) where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim;

Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called,

of any recognised welfare institution or organisation.

Explanation. - For the purposes of this subsection, "recognised welfare institution or organisation" means a social welfare institution or organisation

recognised in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a Court with respect to an offence referred to in sub-section (1)

without the previous permission of such Court shall be punished with imprisonment of either description for a term which may extend to two years

and shall also be liable to fine.

Explanation.- The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the

meaning of this section.

13. In the light of the aforesaid statutory provisions and the law declared by the Apex Court in the aforesaid judgments, I proposed to deal with

the matter in issue.

14. The instant case depicts a hapless state of affairs where the father of a rape victim has approached this Court with complaints of threats and

criminal intimidation held out to him and his family including the victim by the accused persons in order to deter them from effectively prosecuting

the criminal case.

15. I have perused the case diary in the instant case as well as complaints lodged by the petitioner with regard to such acts of threats and criminal

intimidation with the police authorities. Such complaints of threat and criminal intimation have not been acted upon at all by the police authorities

and no steps have been taken to protect the victim and his family from the wrath of the accused persons. On the other hand, a perusal of the case

diary shows that the investigation was conducted in a lackadaisical manner and only after much persuasion the police authorities added the offence

u/s 376 in the instant case.

16. A victim is as much a part of the criminal justice system as the accused is. It is the bounden duty of the State to ensure a free and effective

access to justice to all victims of crime, more particularly, victims of sexual assault. Failure to do so, infracts the ""equality protection clause

enshrined in Article 14 of the Constitution of India which provides for ""equal protection of law"" to all the citizens of India. Bearing in mind socio-

psychological impact of sexual offences on victims, the prosecuting agency must be alive and sensitive to its duty to ensure all forms of support

and/or protection to such victims so that their access to justice is not impaired by the hostile acts of the accused or the insensitivity which is

endemic in our male dominated society.

17. In view of the aforesaid facts. I feel appropriate directions require to be passed so as to ensure adequate protection of the petitioner, the minor

victim and their relations who are vital witnesses in the criminal trial.

18. I, therefore, dispose of the instant writ petition with the following directions:

(I) Respondent Nos. 2 and 6 shall take all necessary steps to ensure the safety and security of the petitioner, the minor victim and other witnesses

in the instant case from any act of violence, coercion, undue influence and/or criminal intimidation from the accused persons.

(II) The respondent Nos. 2 and 4 shall forthwith act on the representation made by the petitioner on 13-1-2012 being Annexure P-5 to the writ

petition, by drawing up a First Information Report in respect thereof against the accused persons u/s 195A. I.P.C. and/or take such other steps

available in law against the accused persons for misusing their liberty while on bail.

(III) In the event further complaints are made against the accused persons for threatening and/or intimidating the victim girl or other witnesses, the

respondent Nos. 2 and 4 having due regard to gravity of such accusation, provide police picket or such other measures as they may deem fit and

proper to ensure the safety and security of the witnesses.

(IV) Police escort is to be provided to the victim girl and other witnesses from their residence to the Court house at the time when they go to the

Court for deposing in the criminal case.

(V) The respondent Nos. 2 and 4 shall take all other steps which is necessary in order to ensure a free and conducive atmosphere so that the

victim girl and other witnesses can depose with confidence in the forthcoming trial.

(VI) The provisions u/s 327, Cr. P. C. 1973 for holding trial in camera and the other guidelines laid down by the Apex Court in the case of Gurmit

Singh : (1996 Cri LJ 1278) (supra) and Sakshi: (2004 Cri LJ 2881) (supra) shall be followed in the course of trial in the instant case.

19. With the aforesaid directions, the instant writ petition is disposed of.

20. There shall be no order as to costs. Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of

necessary formalities.