

(2001) 08 CAL CK 0065
Calcutta High Court
Case No: C.R.R. No. 2764 of 2000

S. K. Chakraborty

APPELLANT

Vs

Kajal Roy and Another

RESPONDENT

Date of Decision: Aug. 23, 2001

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 172(2), 311
- Evidence Act, 1872 - Section 113B, 154, 165
- Penal Code, 1860 (IPC) - Section 304B, 498A

Citation: 106 CWN 524

Hon'ble Judges: Amit Talukdar, J

Bench: Single Bench

Advocate: Alok Kumar Misra and Subir Ganguly, for the Appellant; Durga Prasad Mazumdar and Sauma Dasgupta, Ld. Addl. Public Prosecutor and Jr. Government Advocate for the State, for the Respondent

Final Decision: Dismissed

Judgement

Amit Talukdar, J.

Reticence may be good in many circumstances, but a Judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public-mind. But, there is nothing wrong in his becoming active or dynamic during trial so that criminal justice system being the end could be achieved. Criminal trial should not turn out to be about or combat between two rival sides with the Judge performing the role only of a spectator or even an umpire to pronounce finally who won the race. A Judge is expected to actively participate in the trial, elicit necessary materials from witnesses in the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief-examination or cross-examination or even during the re-examination to elicit truth. The corollary of it is that if a Judge felt

that a witness has committed an error or a slip it is the duty of the Judge to ascertain whether it was so, for to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled-out by witnesses during evidence-collecting process. It is a useful exercise for trial Judge to remain active and alert so that errors can be minimised.

This has been held by the Hon"ble Mr. Justice K.T. Thomas speaking for the Division Bench of the Hon"ble Mr. Justice A.S. Anand (as His Lordship then was) and the Hon"ble Mr. Justice K.T. Thomas in the case of State of Rajasthan vs. Ani alias Hanif & Ors. reported in 1997 SCC (Cr) 581.

This Court reminds itself of the passage of His Lordship then Hon"ble Mr. Justice K.T. Thomas by way of a silent prayer when it was entrusted to interfere with the order of acquittal recorded in favour of the accused in Sessions Trial No. XXXIX (January) 1998 by the learned Additional Sessions Judge, 1st Court, Howrah on 11-8-2000. At the behest of the Father of the unfortunate girl-Hena who met with her end in her matrimonial home on 21-8-91 two years after her marriage. This Court it rather pained and at the same time aghast to find as to how the entire Justice Delivery System has operated in the present case.

2. Before tracing out the jinxed matrimony of deceased Hena which led to her premature departure from the World of Living, this Court finds that the very sacred concept of Justice has been buried in the nitty-gritty of dead technicalities, which perhaps may not have even cut any ice in the mid-victorian judicial system but today we are reposed with the trust that the Criminal Justice System should be salvaged from the ruins of fallacies and to see that the debris of fallacy and errors do not snap the live-wire of the very system.

3. Here the accused along with his Mother (since deceased) was arrayed in the aforesaid trial to answer the following charge:

First-"That you in between 7th August, 1989 to 20th/21st, August, 1991 at Sukanta Abasan Old Government Housing Estate, 193 Andul Road, Police Station-Shibpur within the District of Howrah did commit torture upon the new bride of your family Hena Roy both mentally and physically and in fact said Smt. Hena Roy was subjected to cruelly initiated by you in the matrimonial home and you..... and thereby committed an offence punishable u/s 498A of the Indian Penal Code, within the cognizance of this Court of Sessions.

Secondly-"That you on or about the 20th/21st day of August. 1991 at the same place persuaded your legally married wife Smt. Hena Roy to bring dowry from her father"s family and she was subjected to cruelty for the same and said Smt. Hena Roy could not digest such torture for demanding dowry from your side and she committed suicide by hanging on the same day i.e. 21st August. 1991. Smt. Hena Roy died due to dowry demand coupled with torture and thereby you committed an

offence punishable u/s 304B of the Indian Penal Code and within the cognizance of this Court of Sessions.

4. The prosecution examined a host of witnesses/who unfortunately were not true to their salt resulting in the grounding of the prosecution case which was otherwise the duty of the learned trial Court to save.

5. Shri Alope Kumar Mitra, learned Advocate appearing with Shri Subir Ganguly for the petitioner has made several submissions for setting aside the order of acquittal. Shri Mitra put great emphasis on the fact that the petitioner who was the Defacto Complainant was not examined and although prayer for time was made on his behalf on 20-7-2000 only a day's adjournment was given.

6. Shri Mitra referred to the order sheet and showed the aforesaid position.

7. He further submitted that the judgment was delivered on 11.8.2000 and it was incumbent upon the learned trial Court to have given the petitioner reasonable opportunity to depose as he was the most affected person and in his absence the trial should not have been disposed of.

8. He also submitted that the order of acquittal was completely bad-in-law and required the intervention of this Court.

9. Shri Durga Prasad Mazumdar duly assisted by Shri Sauma Dasgupta appearing for the accused has submitted that the order of acquittal recorded by the learned trial Court was the only reasonable conclusion that could be arrived at and the learned trial Court having done so, there was no cause for interference by this Court.

10. Shri Mazumdar read out the entire text of the judgment and also took this Court through the evidence of the witnesses examined during the trial and submitted as they did not support the prosecution case, the learned trial Court very rightly passed the order of acquittal. He also submitted there is absolutely no material to support the charge framed against the accused. By making extensive reference to the entire evidence on record Shri Mazumdar showed that as they were not found trust-worthy, there was no other alternative before the learned Judge, except recording the order of acquittal.

11. As a part of his submission Shri Mazumdar relied on the Supreme Court decision [Pakalapati Narayana Gajapathi Raju and Others Vs. Bonapalli Peda Appadu and Another](#), in support of his contention that the revisional jurisdiction, when invoked by a private complainant against an order of acquittal, can only be exercised in exceptional cases where the interests of public justice require interference for the correction of a manifest illegality or the prevention of a gross miscarriage of Justice. It cannot be invoked merely because the lower Court has not appreciated the evidence properly. He also referred to the decision of Akalu. Ahir & Ors. vs. Ramdeo Ram, reported in MR 1973 SC 2145 on the selfsame proposition.

12. Lastly, Shri Mazumdar referred to [Bansi Lal and Others Vs. Laxman Singh](#), to illustrate his point that in only glaring cases of injustice resulting from some violation of fundamental principles of law by the trial Court, the High Court is empowered to set aside the order of acquittal and direct retrial.

13. Summing up Shri Mazumdar submitted that after all this Court is exercising its power of revision which is itself very restricted to the question of legality and/or otherwise the order before it and that too in connection with an order of acquittal where even if another view is possible, the High Court in such a case cannot take the same.

14. Shri Mazumdar made a very strenuous effort and showed that as in spite of summons the Defacto Complainant did not appear, the case had to be foreclosed and he could not be termed as a vital witness as he was residing at Bokaro whereas the proximate witnesses staying in the said same housing, did not sing to the tune of the prosecution case; so, his non-examination hardly mattered and although the Defacto Complainant on hearing the news of death of his daughter came on the very same night; the FIR was lodged long after in 1991 which was itself a very suspicious circumstance.

15. Since the State, in such a matter did not have any audience this Court requested the services of the learned Additional Public Prosecutor who appeared along with the learned Junior Government Advocate and made extensive submissions. The learned Additional Public Prosecutor appearing with the learned Junior Government Advocate for the State of West Bengal has submitted that it was the duty of the Court to secure production of the witness by exhausting all sources known to law. He submitted a witness not appearing before the Court upon being summoned, the Court cannot stop at that. Something more is required of a trial Court. The learned Additional Public Prosecutor with the learned Junior Government Advocate for the State of West Bengal further emphasised that since this is an application directed against an order of acquittal this Court can look into the matter from an objective angle as the said position was indeed a very disturbing point which was left uncovered by the learned trial Court.

16. The learned Additional Public Prosecutor appealing with the learned Junior Government Advocate further demonstrated the fact that since the accused was arrayed to answer the charge u/s 304B of the Indian Penal Code by necessary implication the provisions of Section 113B of the Evidence Act was also drawn in. There is no shred of discussion in the trial Court's order with regard to the same.

17. Winding up his submission the learned Additional Public Prosecutor appearing with the learned Junior Government Advocate also submitted that the tackling of the situation with regard to the question of hostile witnesses was not a correct proposition and it was necessary for the learned Judge to address himself about the evidence in its totality.

18. After having heard the submission made at the Bar and the decisions cited by the parties and on considering the materials-on-record and also the opening paragraph of the decision of [Smt. Paniben Vs. State of Gujarat](#), where the Hon"ble Mr. Justice S. Mohan writing the judgment for the Division Bench consisting of His Lordship and the Hon"ble Mr. Justice G.N. Ray held:

Everytime a case relating to dowry death comes up it causes ripples in the pool of the conscience of this Court. Nothing could be more barbadous, nothing could be more heinous than this sort of crime. The root cause for killing a young bride or daughter-in-law is avarice and greed. All tender feelings which alone make humanity disappear from the heart. Kindness which is the hallmark of human culture is buried. Sympathy to the fairer sex, the minimum sympathy is not even shown. The seedling which is uprooted from its original soil and is to be planted in another soil to grow and bear fruits is crushed.

19. I am of the opinion that there has been a missing link which ought to have been bridged during the trial. The learned Judge proceeded on the footing that the prosecution witnesses did not support the case. Two of the witnesses-P.Ws. 1 and 2, no doubt, had turned hostile. But will that simply be enough ? To lay one"s hand off for deciding the question of guilt or otherwise of a accused in the trial. Even, after the prosecution has dabbed the witness as hostile u/s 154 of the Evidence Act, yet the duty is cast on the trial Court to cull out relevant portions of the evidence which has been castigated as hostile. In this context it is pertinent to refer to the latest decision of the Apex Court in the case of Gura Singh vs. State of Rajasthan reported in 2001(2) SCC 205 wherein the Apex Court relying on the earlier decision of [Sat Paul Vs. Delhi Administration](#), had categorised the position with regard to the treatment of hostile witnesses.

20. Herein, I am sorry that such an endeavour was not undertaken by the learned Judge and simply they were declared hostile, they were set aside. This is not to be so.

21. That apart, I also find that the question with regard to non-examination of the petitioner who was the Author of the FIR was also a very serious lacuna which ought to have been adverted to by the learned trial Court; instead. I find that the learned trial Court at the tail end of its finding held:

Furthermore I find although summons was issued several times upon the defacto complainant but he did not venture to attend Court and to dispose in this case.

By simple observation to this aspect and sending a few summons, the duty of the learned trial Court does not end. There should be an earnest endeavour on the part of the learned trial Court to exhaust all measures for securing the attendance of the said witness. No doubt, the said witness was a most vital witness for prosecution. u/s 304B of the Indian Penal Code it is a very serious offence and in fact, it is a challenge to our very civilised existence. It was apposite that the learned Judge

ought to have taken some more serious steps to secure the attendance.

22. That apart, I find much substance in the submission of the learned Counsel appearing for the petitioner that even though the petitioner did not appear pursuant to the summons, although I have my reservations with regard to the finding to that effect which will be discussed herein below, it was incumbent upon the learned trial Court to even issue a witness warrant as contemplated under the law. However, the said task was not undertaken by the learned trial Court.

23. Now, with regard to the question of non-compliance of the petitioner before the Court, I find, is also a very fallacious finding which has been arrived at by the learned trial Court. A petition was filed on his behalf on 20th July, 2000. On the premises that he is an elderly person, suffering from some ailment and he was at Bokaro and prayed for two months time. Although such a lengthy adjournment may not have been given by the learned trial Court as the calendar was fixed on a day-to-day basis; yet from the order sheet which I have very carefully perused I find that the learned Judge kept the said petition on record and rolled on evidence after evidence on each date and ultimately, on 4th of August, 2000 the evidence was closed and judgment was immediately delivered on 10-8-2000. In the interregnum period there was no attempt to secure the attendance of the most vital witness if not the star witness of the prosecution, by the learned trial Court.

24. In the process Hamlet was staged in the Theatre of Sessions Trial No. XXIX (January) 1998 without affording the prince of Denmark to perform.

25. The petition filed on his behalf appears very much from the trial Court records is not in consonance with the order sheet of the learned trial Court on and from 20th July, 2000.

26. That apart, another aspect of the matter which haunts the mind of this Court very much as indicated here in the prelude of the judgment that the learned Judge ought to have elicited the actual crux of the matter by playing a more active role, but instead, sat and counted the errors and watched as to who performed better among the parties. In this context. I am tempted to refer to the decision of the Supreme Court in the case of [Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi](#), wherein Their Lordships of the Supreme Court had held:

8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the

parties performed better.

27. From the charge-sheet it is found that there were several witnesses cited by the Investigating Agency in the witnesses column who were not unfortunately examined. Was it not the duty of the learned Judge to examine them as Court witnesses ? Further, was it not the duty of the learned trial Court to examine such other pertinent witnesses which it had thought fit in exercise of its powers u/s 311 of the Code of Criminal Procedure to arrive at the actual truth ? It appears that the learned trial Court adopted a very archaic notion and restricted itself to the parameters of the Investigational Report and proceeded by losing sight of the fact that he has a role to play to arrive at the ultimate goal i.e., to achieve actual Justice.

28. Voice of the Hon"ble Mr. Justice O. Chinnappa Reddy speaking for the Division Bench of the Supreme Court in the case of Ram Chander vs. State of Haryana, reported in 1981 SCC (Cr) 683 rings in my mind and alas: how true the anxiety of His Lordship the Hon"ble Mr. Justice O. Chinnappa Reddy has become in the fact situation of the instant case:

What is the true role of a Judge trying a criminal case ? Is he to assume the role of a referee in football match or an umpire in a cricket match, occasionally answering as Pollock and Maitland point out, the question "How is that", or, is he to, in the words of Lord Denning "drop the mantle of a Judge and assume the robe of an Advocate"? Is he to be a spectator or a participant at the trial? Is passivity or activity to mark his attitude ? If he desires to question any of the witnesses how far can he go? Can he put on the gloves and "have a go at the witness who he suspects is lying or is to be soft and suave? These are some of the questions which we are compelled to ask ourselves in this appeal on account of the manner in which the Judge who tried the case put questions to some of the witnesses.

2. The adversary system of trial being what it is, there is an unfortunate tendency for a Judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a criminal Court is to be an effective instrument in dispensing Justice, the presiding Judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. As one of us had occasion to say in the past:

Every criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact,

relevant or irrelevant Section 172(2) of the Code of Criminal Procedure enables the Court to send for the police-diaries in a case and use them to aid it in the trial. The record of the proceedings of the Committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial.

29. While this Court does not take any delight in picking up holes in the fabric of the Investigation, yet the fact remains something better was desired and simply on the basis of the defects in the investigation the finding of an acquittal cannot be based, as has been held by the Supreme Court that in the case of [State of West Bengal Vs. Mir Mohammad Omar and Others etc.](#), that Criminal Justice System has to be salvaged and simply on the ground of remissness on the part of the Investigating Agency the prosecution case cannot fail.

30. Further. I find that the Court proceeded on a totally erroneous footing and did not marshal the evidence of the prosecution witnesses but simply, the same were discussed. This is rather in anguish to note that an order of acquittal from a charge, no less than a charge under Sections 498A and 304B of the Indian Penal Code was recorded by the learned trial Court just on the basis of a two-page order which is; not only laconic but suffers from the vice of erroneous appreciation of the evidence in the light of the discussions held hereinabove.

31. This Court has also addressed itself to the various decisions-

1. Pakalapati Narayan Gajapathi Raju & Ors. vs. Bonapalli Peda Appadu & Anr. (supra).

2. Akalu Ahir & Ors. vs. Ramdeo Ram (supra).

3. Bansi Lal & Ors. vs. Laxman Singh, (supra)

cited by Shri Mazumdar and this Court is of the view that while there is no dispute with the fact that a revisional Court acting in an application against an order of acquittal has to tread on an extremely restricted path and unless there is patent illegality or gross perversity the Court cannot interfere with an order of acquittal. I am also conscious of the fact that where another view is possible, the second view cannot be adopted by a revisional Court while interfering with an order of acquittal. The decisions cited by Shri Mazumdar are quite trite law on the aforesaid proposition and I respectfully bow down to the ratio of the same as there cannot be any dispute.

32. However, the riddle lies elsewhere. In the present case, as it has been discussed hereinabove the very judgment of the learned trial Court is not only perverse but suffers from the basic fallacy of some legal principles as have been discussed hereinabove, if not, that is a jurisdictional error it is certainly an error which has robbed the very veracity of the order of the learned trial Court and in the event, this Court shuts its eyes to the same and rolls down the shutters on the face of the de facto complainant, then it would be justice which will be buried in the process as it is

the endeavour to every Court of Law in the Justice Delivery System to achieve the ultimate goal of truth.

33. With this spirit in mind the impugned order is set aside.

34. Accordingly, the order of acquittal passed by the learned Additional Sessions Judge, 1st Court, Howrah on 11.8.2000 in Sessions Trial No. XXXIX (January) 1998, is set aside.

35. The matter now goes back on remand in the light of the discussions held hereinabove.

36. Lest, even unconsciously the trial Court is prejudiced by any observation made hereinabove it is stated that the learned trial Court would obviously act according to its independent decision within the procedures as known to Law after taking into account the guidelines hereinabove.

37. Revisional applications allowed.

38. No order as to costs. The Rule is made absolute.

Let a copy of this Rule be communicated to the learned trial Court forthwith along with the Lower Court Records.