

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : INDIAN PENAL CODE

Crl.M.C. No. 6230 of 2006 & Crl.M. No. 11312 of 2006

Reserved on : November 2, 2006

Pronounced on : November 14 , 2006

Ms. Bharti Yadav

.....Petitioner

through: Mr. R.N. Mittal, Sr. Advocate
with Mr. R.K. Kapoor,
Mr. Subhash Bhutton and
Mr. Puneet Mittal, Advocates

VERSUS

State of UP

.....Respondent

through: Mr. A.K. Vali with
Mr. Baldev Malik, Advocates
for the UOI.
Ms. Mukta Gupta,
Standing Counsel for NCT of Delhi.
Mr. P.K. Dey with Mr. Kaushik Dey,
Advocates for the Complainant.

A.K. SIKRI, J.

1. One Nitish Katara has been murdered. FIR No. 192/2002 under Sections 302/201/364 read with Section 34 of the Indian Penal Code has been registered. Apart from the other accused persons, two main accused are Vikas Yadav and Vishal Yadav. Trial in the case also proceeded with good alacrity and testimony of all the witnesses, but one, were recorded by 30.6.2004. The left over witness, whose testimony remains to be recorded, is Ms. Bharti Yadav, the petitioner in this petition. Due to her non-availability, the matter is hanging fire. She is in United Kingdom (UK) and pursuing higher studies there. In spite of summons sent to her, she did not respond initially. Prosecution even gave up this witness. However, the complainant challenged this move of the prosecution by filing Criminal Revision Petition in this Court. Vide detailed judgment dated 3.10.2005, this Court held that she is an essential and important witness in the prosecution case and that to drop her at this stage would damage the case resulting in failure of justice. Order of the Trial Court permitting the prosecution to drop her as witness was labelled as one that does not justify the ends it seeks to achieve. Therefore, this Court gave direction that Ms.

Bharti Yadav may be examined in accordance with law. While holding so, the Court, inter alia, recorded as under :-

“7. It appears to me that the trial court as also the High Court has repeatedly held in various orders that this witness, Ms. Bhati Yadav, is material and an essential witness for the prosecution. Her deposition will have an important bearing on the outcome of the trial. In that view of the matter, the prosecution not being able to secure her presence, is an act of despair knowing fully well that its case would suffer. Surely, an act of despair cannot be one which advances the ends of justice.”

2. Therefore, necessity of examining Ms. Bharti Yadav as a material witness cannot be countenanced as it has already been established by the aforesaid judicial order. After the aforesaid order was passed by this Court, the learned ASJ again made attempts to ensure the presence of the petitioner. The petitioner has, however, eluded these attempts so far. When in spite of various orders passed by the learned trial court the petitioner's attendance could not be procured, the learned trial court passed order dated 29.7.2006 in which the Court gave detailed account of various hearings and the orders passed from time to time with an attempt to procure the attendance of the petitioner. In this order itself, it is recorded that on 11.5.2006 some time was taken to consider the suggestion of the court for producing the petitioner for her evidence making all necessary arrangements for her security. Thereafter, on 22.5.2006 father of the petitioner appeared before the trial court and was asked to disclose the address of his friend with whom the petitioner was staying. On 22.7.2006, an application was moved by Mr. Bharat Singh, maternal uncle of the petitioner, making a request that the petitioner be examined either by way of Video Conferencing or on Commission, which request was declined vide order dated 29.7.2006. It was noted in that order that since she has chosen to stay away from the court, thereby delaying the proceedings substantially, the court was satisfied that she had absconded by avoiding appearance before the court despite having sufficient knowledge of the proceedings pending in the court where her presence as a witness was required and in these circumstances the learned trial court issued proclamation under Section 82 of the Code of Criminal Procedure (for short, 'the Code'). In the meantime, the Government of India has also revoked her passport. Even otherwise, Visa on which she has gone to England is also expiring on 30.11.2006.

3. In the present petition filed by the petitioner, the said order dated 29.7.2006 passed by the learned ASJ is impugned. When this petition came up for hearing on 27.9.2006, the following order was passed :-

“ Without going into the merits of the contention raised by the petitioner at this stage, I have, at the outset, put to learned senior counsel appearing on behalf of the petitioner as to why the petitioner is not coming to India to depose in the case FIR No. 192/2002. Learned senior counsel states and assures that he shall seek instructions from the petitioner in this behalf.

In view of the above assurance, notice is issued to the respondent. Ms. Mukta Gupta, learned Standing Counsel for the State, accepts notice.

Renotify on 16th October 2006.”

4. Thereafter, on an application filed by the petitioner, the Union of India through Secretary, Ministry of External Affairs, South Block, New Delhi as well as Secretary, Ministry of Home Affairs were impleaded as the respondents Nos. 2 & 3 respectively. This became necessary as learned counsel for the petitioner stated that the petitioner was ready and willing to come to India and depose in the case, but due to revocation of her passport her passage to India would not be possible.

5. The matter was then discussed to find an amicable solution to this problem, which was mentioned in the order dated 17.10.2006, and it would be apposite to reproduce the said order at this stage :-

“ Order passed by learned Trial Court on 16.10.2006 is produced by the learned counsel for the parties for the perusal of this court. As per this order, the learned Trial Court has stated that keeping in view the previous conduct of the petitioner, the passport cannot be restored to her till she deposes before the court. The apprehension of the petitioner is to get visa extended in time after she deposes in the court, so that she is able to go back to U.K., where she is pursuing her studies. On the other hand, apprehension of the respondents as well as prosecution is that if the visa is extended, she may not come to India to depose. Certain proposals are noted to find a solution to this problem, so that apprehensions of both the parties are assuaged. Mr. Vali, learned counsel for the U.O.I. has sought time to take instructions and revert back. At his request, adjourned to 19th October, 2006 at 4PM.”

6. During the arguments which were addressed by the counsel for the parties thereafter, they were limited to address the aforesaid issues and to find a via media whereby the petitioner comes to India and her evidence is recorded in this case and at the same time, after this task is accomplished, there is no hurdle in her way in going back to England. Mr. R.N. Mittal, learned senior counsel appearing for the petitioner, appealed that to ensure that the petitioner is able to go back to UK after her testimony is recorded by the learned trial court, the Indian Government should withdraw the order of revocation of her passport; restore its validity; issue a fresh passport; and also get the Visa extended. For this, his suggestion was that a fresh passport may be issued immediately, on the strength whereof the petitioner be allowed to move an application for extension of Visa. He proposed that this application could be given to the UK High Commission with authorization to the Ministry of External Affairs to take charge of the passport with extended Visa from the UK High Commission, after it is granted. It was also suggested that the petitioner shall deposit her existing passport as well with the Ministry; she would be willing to come to India on the basis of the emergency travel documents to be issued by the Indian Government; and only after she has deposed before the trial court that she should be given her passport with extended Visa so that she is able to travel back to UK on the basis of the said document. According to Mr. R.N. Mittal, this suggested course of action would ensure her appearance in the Court and at the same time she would have no apprehension of having been stuck here and not able to go back, after the task is accomplished.

7. Mr. Vali, on the other hand, on instructions, stated that this course of action was not acceptable to the Government. His suggestion was that on emergency travel documents,

which shall be issued by the Government, the petitioner could arrive in India before 25.11.2006, the date fixed by the learned trial court for her evidence. It was assured that, at that time, the Government would issue fresh passport and the application of the petitioner for issuance/extension of Visa shall be taken up with the UK High Commission on priority basis. He assured that extra efforts shall be made at the Government level for getting the Visa of the petitioner so that she is able to go back to UK once she deposes before the learned ASJ in the pending trial. His submission was that this alternate course of action coupled with the assurance of the Government was equally efficacious and more balanced as it took care of interests of both the parties and was necessary in view of the past conduct of the petitioner.

8. Since agreement could not be arrived at between the parties on this aspect, it was left, by learned counsel for the parties, to this Court to pass appropriate directions. I may mention that learned counsel for the petitioner had also made various other suggestions and wanted appropriate directions to be issued in that behalf. The same would be taken care in this order.

9. I may state, at the cost of repetition, that the petitioner is very material witness in the trial relating to the murder of Nitish Katara, as held by this Court itself in earlier proceedings. Her testimony becomes all the more important in view of the alleged relationship between the petitioner and the deceased, evidence in support whereof has been produced by the prosecution, particularly in the testimony of Mrs. Neelam Katara (PW-30). The petitioner can, therefore, shed much light on the case.

10. We are a democratic society governed by Rule of Law, which is enshrined in the Constitution of India which the people of this country have given to themselves. While the Constitution guarantees citizens of this country many fundamental rights, which are basic human rights, at the same time for a political society to run in an orderly manner, citizens have certain duties to perform as well. The political society is not, and cannot be, an association. We do not enter it voluntarily. Rather we simply find ourselves in a particular political society at a certain moment of historical time. A person by birth becomes a citizen of this country and, therefore, member of this political society. We view political philosophy as realistically utopian: that is, as probing the limits of practicable political possibility. Our hope for the future of our society rests on the belief that the social world allows at least a decent political order, so that a reasonably just, though not perfect, democratic regime is possible. For a well ordered society there has to be a well regulated system of justice where the wronged persons are able to seek and get justice. One practical aim of justice as fairness is to be provided an acceptable philosophical and moral basis for democratic institutions. To achieve this there has to be a fair system of cooperation of the citizens. As John Rawls puts it: "the most fundamental idea in this conception of justice is the idea of society as a fair system of social cooperation over time from one generation to the next." He explains that this central organizing idea of social cooperation has at least three essential features, which are described by him in the following manner:-

"a) Social cooperation is distinct from merely socially coordinated activity – for example, activity coordinated by orders issued by an absolute central authority. Rather,

social cooperation is guided by publicly recognized rules and procedures which those cooperating accept as appropriate to regulate their conduct.

b) The idea of cooperation includes the idea of fair terms of cooperation: these are terms each participant may reasonably accept, and sometimes should accept, provided that everyone else likewise accepts them. Fair terms of cooperation specify an idea of reciprocity, or mutuality: all who do their part as the recognized rules require are to benefit as specified by a public and agreed-upon standard.

c) The idea of cooperation also includes the idea of each participant's rational advantage, or good. The idea of rational advantage specifies what it is that those engaged in cooperation are seeking to advance from the standpoint of their own good.”

{See – John Rawls – 'A Theory of Justice'; and John Rawls – 'Justice as Fairness – A Restatement'}

11. Reasonable persons understand that they are to honour these principles, even at the expense of their own interests as circumstances may require, provided others likewise may be expected to honour them. One of the basic principles of social cooperation is to assist the judicial system to impart justice which would ultimately help in achievement of social welfare and a well ordered society. Here comes the role of a citizen as a witness to which aspect I advert to now.

12. According to Bentham, witnesses are the 'eyes and ears of justice'. For successful prosecution of criminal cases, presence of relevant witnesses and their deposition is necessary. A witness is someone who has first-hand knowledge about a crime or dramatic event through his/her senses (e.g. seeing, hearing, smelling, touching) and can help certify important considerations to the crime or event. The court is concerned, in a given case, to find the truth and for this purpose deposition of the witnesses becomes paramount. A criminal case is built on the edifice of evidence, namely the evidence that is admissible in law. For that witnesses are required, whether it is direct evidence or circumstantial evidence. Since the justice delivery system, whether civil or criminal (and more so criminal justice system), largely depends upon witnesses who assist the court in trying to find out the truth, it becomes the solemn obligation of the witnesses, for a well ordered society, to appear in the court, as and when summoned, and assist the court in discharge of its divine function. It is for this reason, provisions are made in the Code of Criminal Procedure as well as in the Code of Civil Procedure for procuring the attendance of the witnesses. It is this public duty, which such persons who are witnesses in a case and may not otherwise be concerned with the case, are bound to discharge. A subpoena commands a person to appear. In many jurisdictions, including India, it is compulsory to comply, to take an oath, and tell the truth, under penalty of perjury. It is used to compel the testimony of witnesses in a trial.

13. On the one hand, keeping in view their importance in the trial process their attendance is ensured and for this purpose even coercive steps can be taken which are legally permissible, on the other hand, there is also a necessity to ensure that these witnesses are

given due protection. Thus, it also becomes bounden duty of the State to protect the witnesses. It is also the duty of the court to ensure that when these witnesses come for deposition, they are not unnecessarily harassed and humiliated. Under Sections 151 and 152 of the Indian Evidence Act, 1872, victims and witnesses are protected from being asked indecent, scandalous, offensive questions and questions intended to annoy or insult them. In a given case, if necessity arises, court can also hold In-Camera trials to ensure deposition of the witnesses without any fear or embarrassment. My aforesaid decisions are based on the dicta laid down by the Supreme Court in number of cases, some of which are the following :-

- i) State of Punjab v. Girmitt Singh,
1996 (2) SCC 384;
- ii) Zahira Habibullah Sheikh v. State of Gujarat,
2006 (3) SC 374;
- iii) National Human Rights Commission v. State of Gujarat,
2003 (9) Scale 329; and
- iv) Swaran Singh v. State of Punjab,
2000 (5) SCC 668.

14. Keeping in view the aforesaid considerations and parameters in mind, I have considered the respective submissions of the parties.

15. It may be noted in the first instance that as on today the passport of the petitioner is revoked. Technically, therefore, her stay in UK may not be legal. Even otherwise, her Visa is also expiring on 30.11.2006. Therefore, she is required to come back to India in any case. It is to be appreciated that, at last, this wisdom has dawned upon the petitioner that she should come to depose in the pending trial. Though the petitioner has expressed her willingness to depose, her apprehension is that she may not be stranded once she comes to India for deposition and is not able to go back to UK. It is for this reason that she wants that her passport and valid Visa is ready for her to travel back. She also apprehends that she may not be involved in other proceedings arising out of the above-noted FIR. Her apprehensions are sought to be assuaged as the Government of India has given solemn assurance to facilitate her travel back to UK, after she deposes, by ensuring issuance of fresh passport and cooperating in getting the Visa issued/extended. Above all, matter is seized by the Court and, therefore, if occasion demands, further necessary directions, to achieve this purpose, can be issued by the Court. Therefore, the petitioner need not have such apprehensions. If she has to fear anything, it should be her own conscience and she is expected to give honest, truthful and frank testimony in the court of law. I tried to give sociological analysis of the petitioner's mind in my order dated 21.8.2006 passed in Bail Appln. No. 2978/2005 filed by Mr. Vikas Yadav. She may be in dilemma. I only say that there are some circumstances in life where truth and simplicity are the best strategy in the world. I may also remind the petitioner what Mark Twain said - "When in doubt, tell the truth". The Bible (King James Version) also preaches as under :-

“Great is truth and mighty achieve all things” – and – “And yea shall know the truth and the truth shall make you free.”

16. Once the petitioner speaks the truth, she will be in peace for the rest of her life, which should be more important to her than any other considerations. Following words of Thomas Jefferson, said about 'truth', are also to be borne in mind :-

“And, finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.”

This realization should come that in case witness is not deposing truthfully or not cooperating with the justice delivery system, justice may become casualty in a particular case and, therefore, the immediate adverse affect may be only on those involved in such particular case, but ultimately it may affect the society as such and the backlash thereof, sooner or later, would be felt by the same persons who failed in their duty as witnesses. Therefore, let the petitioner come and depose truthfully. Once she discharges this legal and moral duty, courts are there to ensure that there is no impediment in her freedom.

17. I, therefore, direct that :-

(a) the Government of India shall immediately issue the emergency travel documents, on the basis of which the petitioner would arrive in India before 25.11.2006, the date fixed by the learned trial court for her evidence. She shall inform the Indian Government about the date of her arrival. On her arrival in India, she shall deposit her passport, which has already been revoked, with the Ministry. The Government shall issue fresh passport on her arrival and get application for Visa also signed from her, which application shall be submitted to the UK High Commission on the same day. The Government of India shall, as assured, take up the matter with the UK High Commission for issuance of the Visa on priority basis, so that it is issued within a couple of days. Once the Visa is issued/extended by the UK High Commission, the same shall be deposited with the trial court. On the completion of her testimony, the learned trial court shall hand over the passport and Visa to the petitioner;

(b) the petitioner, on her arrival in India, shall not be detained by the Police or any other authority at the airport or thereafter, nor shall she be kept/detained for any kind of questioning or be subjected to any surveillance during this period;

(c) the petitioner's deposition before the trial court would start on 25.11.2006 and would go on day-to-day basis. Depending upon the nature of testimony etc., if the trial court is of the opinion that the proceedings should be held In-Camera, the trial court shall be competent to pass appropriate orders in this behalf. It would also be permissible for the trial court to pass an order as to who shall be entitled to remain present in the court at the time when the evidence of the petitioner is recorded. It will also be open to the trial court to pass the orders regarding participation of the Media at the time of recording of the petitioner's testimony, keeping in view the principles of law applicable in such cases. Section 327 of the Code provides for trial in the open court and Section 327(2) provides for In-Camera trials for offences involving rape under Section 376 IPC and under Sections 376-A to 376-D IPC. Section 273 requires the evidence to be taken in the

presence of the accused. Section 299 indicates that in certain exceptional circumstances an accused may be denied his right to cross-examine a prosecution witness in open court. Further, under Section 173(6) of the Code, the police officer can form an opinion that any part of the statement recorded under Section 161 of a person the prosecution proposes to examine as its witness need not be disclosed to the accused if it is not essential in the interests of justice or is inexpedient in the public interest;

(d) depending upon the nature of deposition, it would be open for the trial court to pass any appropriate orders as to whether the evidence of the petitioner so recorded is to be made public by the prosecution or any other person till the time the petitioner is in India;

(e) neither the accused persons or their family members, nor the complainant or other witnesses shall try to influence the petitioner in any manner, directly or indirectly. After the examination-in-chief of the petitioner, all the accused persons, including co-accused Sukhdev, shall cross-examine the petitioner one after the other, in quick succession, and the case shall not be deferred for this reason;

(f) once the petitioner deposes before the trial court, the non-bailable warrants as well as the proceedings under Sections 82/83 of the Code or under Section 174-A IPC shall be deemed infructuous and dropped accordingly;

(g) the authorities of the Central Government or the State Government, including Police, shall not prevent or create any hindrance in her going back to England in any manner, after her evidence is over before the learned trial court in the said case; and

(h) the State shall pay to the petitioner, at the time of her first appearance before the learned trial court, the expenses for her 'to and fro' journey from UK to India and back to UK in cash.

18. List the matter for further proceedings, if any, on 12th December 2006.

Sd/-
A.K.SIKRI, J.