

# Calcutta High Court

HON'BLE JUDGE(S): **SIDDHARTHA ROY CHOWDHURY , J**

**CHAKINA KHATUN V. STATE OF WEST BENGAL**

CRR - 854 of 2011, decided on 12/12/2022

**(A) Criminal P.C. (2 of 1974) , S.309, S.276— Power to postpone the proceedings - Exercise of - Trial Court after the examination-in-chief of witness was over had deferred the cross- examination of witness on mere asking of Defence Counsel - Subsequent thereto, witness did not turn up to adduce evidence - Trial Court thereafter had expunged the evidence of witness from case record - Trial Court did not consider it expedient to give any reason for adjourning the case after examination-in-chief of witness was over - Conduct of trial Court not only flouted the statutory mandate but also gave a blow to the right of litigants to have speedy trial - Moreover, after recording of evidence of a witness, same cannot be expunged - Order of trial Court expunging the evidence of witness from case record, set aside - Directions issued that trial Court shall direct Officer-in-charge of Police Station to take all steps to secure presence of witness for cross-examination. AIR Online 2002 SC 266-Followed**

(Para 11, 12, 13, 17)

**(B) Criminal P.C. (2 of 1974) , S.225, S.309, S.276— Commencement of trial - Steps to be taken after - Discussed. AIR 2002 SC 270-Followed AIR 2004 SC 3114-Followed**

In every sessions case, immediately after commencement of trial:- i) The trial Court is required to indicate the dates fixed for recording of evidence. ii) The trial Judge shall inform the concerned Police Station in writing about the dates so fixed by the trial Court for recording of evidence of prosecution witnesses with a direction upon the Officer-in-charge of the concerned Police Station to ensure the presence of I.O. before the Court on such dates along with witnesses. iii) If due to some unavoidable circumstances it is not possible for the I.O. to remain present

before the Court, the Officer-in-charge shall depute any other competent Police Officer who shall ensure the presence of witnesses before the Court on the date of recording of evidence. iv) It is the duty of the I.O. to protect the witnesses and ensure their presence before the trial Court, for taking the trial to its logical conclusion. It will help both the victim and the accused person, to have speedy justice which pertains to their right to life as well. v) If the concerned Police Officer fails to act in terms of the direction of the Court, the trial Court shall be at liberty to take appropriate action to uphold the majesty of law including taking step for drawing up criminal contempt by competent Court of law. In appropriate cases such failure may be considered as an attempt of screening the offender from legal punishment.

**Case Referred :**

**Chronological Paras**

2013 AIR SCW 59	Para No.( 7)
AIR 2004 SC 3114 (Followed)	Para No.( 14, 19)
AIR Online 2002 SC 266 (Followed)	Para No.( 10)
AIR 2002 SC 270 : 2001 AIR SCW 4984 (Followed)	Para No.( 16, 19)
1985 Cri. L.J. NOC 38 (Del)	Para No.( 7)
AIR 1984 SC 618 : 1984 Cri LJ 340 (SC)	Para No.( 7)
1982 Cri. L.J. NOC 86 (All)	Para No.( 7)
AIR 1979 SC 1360	Para No.( 7)
(1912) 13 Cri. L.J. 861 (All)	Para No.( 7)

**Name of Advocates**

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Prasanta Bishal, for Petitioner; Bidyut Kr. Roy, for Respondent.

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**ORDER :-**Challenge in this revisional application is to the order passed by learned Additional District and Sessions Judge, Basirhat, North 24 Parganas in S.C. No. 13 (7) 09, S.T. No. 2(12) 09 arising out of Basirhat Police Station Case No. 199 dated 3 June, 2006 under Section 376/493 of the Indian Penal Code.

**1.** In consonance with the statutory mandate as laid down under Section 228A of the Indian Penal Code, I am not inclined to disclose the name of the lady who set the criminal administration of justice into motion, allegedly being

exploited sexually by Siraj Gazi, the accused person. She will, hereinafter, be referred to as a victim girl.

2. Briefly stated, the accused Siraj Gazi picked up a relationship with the victim girl, promised to marry her, gained her confidence, and established sexual relation with her. Consequent upon such sexual union the victim girl became pregnant and Siraj Gazi refused to shoulder the responsibility. The victim girl informed the local Police Station about the incident and having found commission of offence, cognizable in nature Officer-in-charge of Basirhat Police Station registered Basirhat

P.S. Case No. 199 dated 3 June, 2006 under Section 376/493 of the Indian Penal Code and took up investigation which culminated into submission of charge sheet against the accused person.

3. After commencement of trial on 10 February, 2010 prosecution examined Fazilul alias Fazlul Haque Gazi as P.W. 1 in part. After his examination-in-chief was over learned Defence Counsel asked a single question to that witness and learned Trial Court deferred the cross examination on the prayer of learned Defence Counsel. Subsequent thereto said witness did not turn up to adduce evidence.

4. Learned Trial Court issued witness warrant but failed to ensure the presence of the said witness and ultimately on 14 December, 2010 learned Trial Court observed following:-

"In such a position prosecution was allowed to bring and examine other witnesses. I am of the decision that P.W. 1 is not interested at all to proceed with this case. Let the evidence of P.W. 1 be expunged from this case record. W.W.A. is recalled as issued against the witnesses P.W. 1 named Fajlul Haque Gazi."

5. Aggrieved by the said order passed by learned Trial Court, the victim has preferred this application under consideration.

6. In **AKIL v. STATE** reported in **2013 AIR SCW 59** Hon'ble Supreme Court was pleased to give direction upon the Sessions Judges and Assistant Sessions Judges by holding inter alia:-

"28. In this context some of the decisions which have specifically dealt with such

a situation which has caused serious inroad into the criminal jurisprudence can also be referred to. In one of the earliest cases reported in *Badri Prasad v. Emperor* (1912) 13 Cri L J 861, a Division Bench of the Allahabad High Court has stated the legal position as under: ...

Moreover, we wish to point out that it is most inexpedient for a Sessions trial to be adjourned. The intention of the Code is that a trial before a Court of Session should proceed and be dealt with continuously from its inception to its finish. Occasions may arise when it is necessary to grant adjournments, but such adjournments should be granted only on the strongest possible ground and for the shortest possible period. (Emphasis added)

29. In a decision reported in *Chandra Sain Jain and Ors. v. The State*, 1982 Cri LJ NOC 86 (ALL) a Single Judge has held as under while interpreting Section 309 of Code of Criminal Procedure.

Merely because the prosecution is being done by C.B.I. or by any other prosecuting agency, it is not right to grant adjournment on their mere asking and the Court has to justify every adjournment if allowed, for, the right to speedy trial is part of fundamental rights envisaged under Article 21 of the Constitution, 1979 Cri LJ 1036 (SC), Foll. (Emphasis added)

30. In the decision reported in *The State v. Bilal Rai and Ors.* 1985 Cri L J NOC 38 (Delhi) it has been held as under: When witnesses of a party are present, the court should make every possible endeavour to record their evidence and they should not be called back again. The work fixation of the Court should be so arranged as not to direct the presence of witnesses whose evidence cannot be recorded. Similarly, cross-examination of the witnesses should be completed immediately after the examination in chief and if need be within a short time thereafter. No long adjournment should be allowed. Once the examination of witnesses has begun the same should be continued from day to day.

(Emphasis added)

31. In the decision reported in *Lt. Col. S.J. Chaudhary v. State (Delhi Administration)* MANU/SC/0094/1984 : (1984) 1 SCC 722 : (AIR 1984 SC 618), this Court in paragraphs 2 and 3 has held as under:

2. We think it is an entirely wholesome practice for the trial to go on from day-to-day. It is most expedient that the trial before the Court of Session should proceed and be dealt with continuously from its inception to its finish. Not only will it result in expedition, it will also result in the elimination of maneuvers and mischief. It will be in the interest of both the prosecution and the defence that the trial proceeds from day- to-day. It is necessary to realise that Sessions cases mustnot be tried piecemeal. Before commencing a trial, a Sessions Judge must satisfy himself that all necessary evidence is available. If it is not, he may postpone the case, but only on the strongest possible ground and for the shortest possible period. Once the trial commences, he should, exceptfor a very pressing reason which makes an adjournment inevitable, proceed de die in diem until the trial is concluded.

3. We are unable to appreciate the difficulty said to be experienced by the Petitioner. It is stated that his Advocate is finding it difficult to attend the court from day-to-day. It is the duty of every Advocate, who accepts the brief in a criminal case to attend the trial from day-today. We cannot over-stress the duty of the Advocate to attend to the trial from day-to-day. Having accepted the brief, he will be committing a breach of his professional duty, if he so fails to attend. The criminal miscellaneous petition is, therefore, dismissed." (Emphasis added)

8. Section 309 of the Code of Criminal Procedure has conferred power upon the presiding Judge to postpone or adjourn the proceeding. "Section 309 in The Code Of Criminal Procedure, 1973

309. Power to postpone or adjourn proceedings.

(1)In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued fromday to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or

adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody: Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time: Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing<sup>1</sup>:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.]

Explanation 1.- If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.- The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."

9. Sub-section (1) of Section 309 mandates on the Trial Court that proceeding shall be held expeditiously when examination of the witness begins the statutory command is that such examination shall be continued from day to day until all the witnesses in attendance have been examined. The solitary exception to such stringent rule is, if the Court finds that adjournment beyond the following day to be necessary, the same can be granted for which the condition is imposed on the Court that reasons for the same should be recorded but such dilution is taken away in proviso to sub-section (2). When witnesses are in attendance before the Court, the Court is not given any power to adjourn the case, except in the extreme contingency for which special reason is to be given. Thus, the settled legal position is that once examination of any witness is started the Court has to continue the trial from day to day until the witnesses in attendance have been examined.

10. Hon'ble Supreme Court in MOHAMMAD KHALID v. STATE OF WEST

BENGAL, reported in (2002) 7 SCC 334 : (**AIR Online 2002 SC 266**) held that:-  
"When a witness is available and his examination-in-chief is over, unless compelling reasons are there, the trial Court should not adjourn the matter on the mere asking."

**11.** Here in this case learned Trial Court did not consider it expedient to give any reason for adjourning the case after examination-in-chief of P.W. 1 was over. Adjournment was granted on the mere asking of learned Defence Counsel. The way learned Trial Court exhibited his stoic indifference towards the statutory mandate is not only disquieting, it is a matter of distress as well. It is often said a sensitive Judge is more powerful than the words in a statute book, he can blow life to the words and an insensitive one can take the sting out of the statute by his inert and indolent attitude. In this case learned Trial Court by granting adjournment on the mere asking of learned Defence Counsel not only flouted the statutory mandate but also gave a blow to the right of the litigants to have speedy trial.

**12.** On 10 February, 2016, P.W. 1 was examined in part and on 14 December, 2010 evidence of P.W. 1 was ordered to be expunged. In between learned Trial Court made futile attempts to secure the presence of the said witness.

**13.** After recording of evidence of a witness the same cannot be expunged in the manner as has been done by the learned Trial Court and the order impugned, in my humble opinion is not only suffering from infirmity, it is perverse and should be set aside, which I accordingly do.

**14.** In **ZAHIRA HABIBULLAH H SEIKH v. STATE OF GUJRAT** reported in **2004 AIR SCW 2325**, Hon'ble Supreme Court held:-

"This Court stressed upon the need of the Investigating Officer being present during trial, in these compelling reasons exists for a departure."

**15.** In the instant case this does not appear to have been done and there is no explanation whatsoever as to why it was not done, even Public Prosecutor does not appear to have taken note of its desirability.

**16.** In *SAILENDRA KUMAR v. STATE OF BIHAR* reported in, **2001 AIR SCW 4984** Hon'ble Supreme Court held:-

"In our view, in a murder trial it is sordid and repulsive matter that without informing the police station Officer-in-charge, the matters are proceeded by the Court and by the A.P.P. and tried to be disposed of as if prosecution has not led any evidence. From the facts stated above, it appears that by one way or the other the Additional Sessions Judge as well as A.P.P. have not taken any interest in discharge of their duties. It was the duty of the Sessions Judge to issue summons to the Investigating Officer, if he failed to remain present at the time of the trial of the case. The presence of Investigating Officer at the time of trial is must. It is his duty to keep the witnesses present. If there is failure on the part of any witness to remain present, it is the duty of the Court to take appropriate action including issuance of bailable/non-bailable warrants as the case may be. It should be well understood that prosecution cannot be frustrated by such methods and victims of the crime cannot be left in lurch."

**17.** Therefore, learned Trial Court shall direct the Officer-in-charge of the concerned Police Station to take all steps to secure the presence of the said prosecution witness No. 1 for cross-examination and if the learned Advocate is unwilling to cross-examine such witness, his evidence shall be closed with the observation that learned Defence Counsel declines to cross-examine. If his presence cannot be secured due to certain contingency, beyond control in that event also evidence of P.W. 1 will be closed. Thereafter, evidence of next witness shall be recorded.

**18.** Before concluding, I would like to indicate that in every sessions case, immediately after commencement of trial:-

- i) Learned Trial Court is required to indicate the dates fixed for recording of evidence.
- ii) Learned Trial Judge shall inform the concerned Police Station in writing about the dates so fixed by the learned Trial Court for recording of evidence of prosecution witnesses with a direction upon the Officer-in-charge of the concerned Police Station to ensure the presence of I.O. before the Court on such

dates along with witnesses.

iii) If due to some unavoidable circumstances it is not possible for the Investigating Officer to remain present before the Court, the Officer-in-charge shall depute any other competent police officer who shall ensure the presence of witnesses before the Court on the date of recording of evidence.

iv) It is the duty of the Investigating Officer to protect the witnesses and ensure their presence before the Trial Court, for taking the trial to its logical conclusion. It will help both the victim and the accused person, to have speedy justice which pertains to their right to life as well.

v) If the concerned Police Officer fails to act in terms of the direction of the Court, learned Trial Court shall be at liberty to take appropriate action to uphold the majesty of law including taking step for drawing up criminal contempt by competent Court of law. In appropriate cases such failure may be considered as an attempt of screening the offender from legal punishment.

**19.** It goes without saying that the judgment passed by Hon'ble Supreme Court in the case of Zahira Habibullah H. Seikh, **2004 AIR SCW 2325**(supra) and Sailendra Kumar, **2001 AIR SCW 4984**(supra) are binding not only upon all Courts under Article 141 of the Constitution, it becomes law of the land. Police authority is bound to follow such mandate in letter and spirit.

**20.** Let a copy of this judgment be sent down to learned Trial Court for information and necessary compliance.

**21.** Learned Registrar General is directed to circulate this judgment amongst all the learned Judges holding trial of sessions cases for their information and compliance.

**22.** Urgent Photostat certified copy of this judgment, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

**Order Accordingly**