SMT. SWARNALATA SARKAR

v.

STATE OF WEST BENGAL AND ORS.

MAY 1, 1996

[M.M. PUNCHHI AND K.T. THOMAS, JJ.]

Criminal Procedure Code, 1973—Section 245(3) as operative in the State of West Bengal, by virtue of West Bengal (Amendment) Act (24 of 1988)—Applicability—Delay in disposal of complaint—A substantial part attributable to the accused—Whether accused would be entitled to the beneficial employment of Section 245(3) of the Code—Held, No.

The appellant filed a criminal complaint alleging commission of offence u/S 494 r/w S 109 IPC, alleging that she was married to the second respondent on 6.12.1976, a son was born out of the wedlock and that her husband, the second respondent married the third respondent on 15.9.1983, to which ceremony/proceeding the 4th, 5th & 6th respondents illegally collaborated. The Magistrate issued process against the accused respondents u/S 204 Cr.P.C. on basis of preliminary evidence as envisaged u/S 200 of the Code, adduced by the appellant. An application was moved by the accused u/S 340 Cr.P.C. requesting the Court to undertake an enquiry as allegedly forgery had been committed on the record of the case inasmuch as initially the date of marriage in the case papers was shown as 6.11.1976 but was later over written as 6.12.1976 when the defence raised the plea that no such marriage had taken place on 6.11.1976 between the appellant and the 2nd respondent. The application was dismissed. The accused filed revision against the order. Proceedings before the Trial Magistrate were stayed. The application u/S 340 Cr.P.C. and the record of the main case kept tossing from one court to another, no date was ever fixed for production of witnesses. On 13.10.1993, the accused prayed that the action as contemplated u/S 245(3) Cr.P.C. as operative in the State of West Bengal, by virtue of West Bengal (Amendment) Act (24 of 1988), ought to have been taken. The High Court quashed the proceedings and the accused respondents were discharged, holding that the delay had occasioned from 24.4.1987 to 2.4.1990 at the instance of the accused persons, that the accused persons had appeared before the Magistrate on different dates between 6.2.1984 and 30.3.1986 and the appellant could not

A show from the record that requirements of sub-section (3) of Section 245 had been complied with. Hence this appeal.

The appellant contended that the appellant could not be blamed for not producing evidence after the appearance of the accused because of the dilatory tactics adopted by the accused in raking up a vexatious enquiry
B u/S 340 Cr.P.C. when there existed preliminary evidence disclosing commission of offence.

Allowing the appeal, this Court

C HELD : The evidence of the complainant already recorded is 'evidence' within the meaning of Section 245(3) of the Act, though the witnesses may not yet have been subjected to cross-examination. It was the frequent interferences by the superior courts at the interlocutory stages relating to inquiry under Section 340 Cr.P.C., a topic which was alien to
D the main case and of no importance that obstruction was caused towards the progress of the trial. It appears that the complaint was over-shadowed by those proceedings for which the appellant could never be blamed so as to lose her right to prosecute the complaint under sub-section (3) of Section 245 of the Code of Criminal Procedure. There was evidence already produced by the complainant disclosing commission of offences under
E Section 494 read with Section 109 IPC. The accused could not have been allowed to take advantage of their own wrong and side-track the issue on a matter which apparently was a trifle insofar as date of marriage between the parties was concerned. The factum to be established was the marriage between the spouses, and the date of its performance was secondary. Thus
F the accused deliberately delayed the matter and would not thus be entitled to the beneficial employment of Section 245(3) of Cr.P.C. It shall not be in the interest of justice to discharge the accused for the conduct above exhibited. It is unnecessary to apportion the blame as to the delay in the disposal of the complaint except to state that a substantial part of the part of it was attributable to the accused. [123-F-H; 124-A-C]

G

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1475 of 1995.

From the Judgment and Order dated 30.8.94 of the Calcutta High
H Court in Crl.R. No. 1971 of 1993.

S.N. Mehta, K.K. Nigam, P. Misra, D.N. Mukherjee, Dilip Sinha, J.R. Das for Sinha & Das, Raj Kumar Gupta for Rajesh, (H.P. Sharma) for A.N. Bardiyar for the appearing parties. A

The Judgment of the Court was delivered by

PUNCHHI, J. This appeal by special leave is against the judgment and order dated 30th August, 1994 of the High Court of Calcutta in Criminal Revision No. 1971 of 1983, whereby proceedings in a criminal complaint filed by the appellant were quashed. B

The case of the appellant is that she was married to the second respondent Shambhu Nath Sarkar on 6.12.1976. A son was born out of the wedlock on 20th November, 1977. The marriage between the spouses statedly was not smooth. On 15.9.1983, the second respondent married the third respondent before the Registrar of Marriages, to which ceremony/proceeding the 4th, 5th and 6th respondent, illegally collaborated. The appellant having come to know of the second marriage filed a criminal complaint on 4.4.1984 before the Judicial Magistrate, Basirhat, 24 Parganas, alleging commission of offence, under Section 494 read with Section 109 IPC. Preliminary evidence as envisaged under Section 200 of the Code of Criminal Procedure was adduced by the appellant whereafter the learned Magistrate issued process against the accused-respondents in exercise of powers under Section 204 Cr.P.C. The husband-second respondent appeared before the Court on 3.4.1985, and so did the other accused one after the other, either before or after the aforesaid date. C D E

While so, on 12.9.1986, an application was moved by the accused under Section 340 of the Code of Criminal Procedure requesting the Court to undertake an inquiry as allegedly forgery had been committed on the record of the case inasmuch as initially the date of marriage in the case papers was shown as 6.11.1976 but was later over-written to 6.12.1976 from 6.11.1976, because the defence had raised the plea that no such marriage on 6.11.1976 had taken place between the appellant and the 2nd respondent. It was therefore suggested that the complainant be found guilty of the forgery punishable under Section 193 IPC. The appellant's counsel did not deny the over-writing but stated that the marriage in fact had taken place on 6.12.1976 and had mistakenly been described as if having taken place on 6.11.1976 and it was unknown who made the over-writing. The defence insisted that offence under Section 193 IPC had been committed. F G H

A The complainant denied the interpolation. While enquiry was going on, proceedings in the main case stood suspended under court orders. The learned Magistrate dismissed the application on 25.2.1987.

The accused took the matter in revision before the Court of Sessions, Alipore against the order dated 25.2.1987. Proceedings before the trial B Magistrate were stayed and the record was called. The appeal was allowed and the order of the learned Magistrate was set aside remitting the case to another Magistrate requiring it to dispose of the application under Section 340 Cr.P.C. afresh. The record of Trial Magistrate was thus sent back.

C

The succeeding Magistrate completed the enquiry on 19.2.1988, which was again subjected to appeal before the Court of Session. Again the file of the Trial Court was summoned by the Court of Session. Since the application under section 340 Cr.P.C. and the record of the main case kept tossing from one court to another, no date was ever fixed by the D learned Magistrate for production of witnesses and the case was kept fixed for appearance and order on various dates till 13.10.1993. On that date grievance was voiced by the accused that the action as contemplated under section 245(3) of the Code of Criminal Procedure as operative in the State of West Bengal, by virtue of West Bengal (Amendment) Act (24 of 1988), E ought to have been taken. The said Section 245 together with Sub-section 3 reads as follows :

> "245. WHEN ACCUSED SHALL BE DISCHARGED - (1) If, upon taking all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case F against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.
>
> (2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, G for reasons to be recorded by such Magistrate, he considers the charge to be groundless.
>
> (3) If the evidence referred to in Section 244 are not produced in support of the prosecution within four years from the date of appearance of the accused, the Magistrate shall discharge the H accused unless the prosecution satisfies the Magistrate that upon

the evidence already produced and for special reasons there is ground for presuming that it shall not be in the interest of justice to discharge the accused." A

The High Court became seisen of the prayer for quashing in exercise of its revisional jurisdiction. It opined that the delay had occasioned from 24.4.1987 to 2.4.1990 at the instance of the accused persons. It was further opined that the accused persons had appeared before the learned Magistrate on different dates between 6.2.1984 and 30.3.1986. Section 245(3) of the Code of Criminal Procedure was noticed to have come into force on 2.5.1989. Thus counting the years it was held that the appellant could not show from the record that requirements of Sub-section (3) of Section 245 had been complied with. The proceedings therefore were quashed, and the accused-respondents were discharged. Hence this appeal. B C

A critical look at Sub-section (3) of Section 245 would show that if all the evidence referred to in Section 244 is not produced in support of the prosecution within four years from the date of the appearance of the accused, the Magistrate shall discharge the accused unless the prosecution satisfies that on the basis of the evidence already recorded and for other special reasons that it will not be in the interest of justice to discharge the accused. The counsel for the appellant on the strength of the decision of this Court in *Santosh De* v. *Archna Guha,* [1994] 2 SCC 420 contends that the appellant could not be blamed for not producing evidence after the appearance of the accused because of the dilatory tactics adopted by the accused in raking up a vexatious enquiry under Section 340 Cr.P.C. and then to be faulting that no evidence was produced, when there existed preliminary evidence disclosing commission of offence. The expressed view of this Court is that the evidence of the complainant already recorded is 'evidence' within the meaning of Section 245(3) of the Act, though the witnesses may not yet have been subjected to cross-examination. It was the frequent interferences by the superior courts at the interlocutory stages relating to inquiry under Section 340 Cr.P.C., a topic which was alien to the main case and of no importance that obstruction was caused towards the progress of the trial. It appears that the complaint was over-shadowed by those proceedings for which the appellant could never be blamed so as to lose her right to prosecute the complainant under sub-section (3) of Section 245 of the Code of Criminal Procedure. There was evidence already produced by the complainant disclosing commission of offences D E F G H

A under Section 494 read with Section 109 IPC. The accused could not have been allowed to take advantage of their own wrong and side-track the issue on a matter which apparently was a trifle insofar as the date of marriage between the parties was concerned. The factum to be established was the marriage between the spouses, and the date of its performance was secondary. Thus it appears to us that the accused deliberately delayed the matter
B and would not thus be entitled to the beneficial employment of Section 245(3) of the Code of Criminal Procedure. It shall not be in the interest of justice to discharge the accused for the conduct above exhibited. It is unnecessary to apportion the blame as to the delay in the disposal of the complaint except to state that a substantial part of it was attributable to
C the accused.

As a result, this appeal is allowed, the judgment and order of the High Court is set aside and the matter is put back to the file of the learned Magistrate having jurisdiction, directing it to undertake the trial and conclude it as expeditiously as possible.

D

R.A. Appeal allowed.