IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 247 of 2020

Hasin Jahan

Vs

State of West Bengal & Ors.

For the Petitioner	: Mr. Ashis Kumar Chowdhury, Mr. Avijit Kar.
For the State	: Ms. Sujata Das
For the Opposite party nos. 2 & 3	: Mr. Sandipan Ganguly, Mr. Somopriyo Chowdhury, Mr. Biswajit Kumar.
Heard on	: 27.02.2023
Judgment on	: 28.03.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the order dated 09.09.2019 passed by the Learned Session Judge, South 24 Parganas in Criminal Motion no. 339/2019 arising out of Jadavpur Police Station Case No. 82/18 dated 08.03.2018 under Sections 498A, 354 IPC which is pending before the Learned Additional Chief Judicial Magistrate, Alipore, South 24 Parganas.
2. The petitioner's case is that she was married with Mohammad Shami who by profession is a Cricketer and a regular member of the Indian National Cricket Team, on 07.04.2014 in presence of both sides guardians, friends, relatives and well-wishers at 128, Prince Golam Hossain Shah Road, "Senkuthi", 1st Floor, Flat No. 1-B, P.S. – Jadavpur, Kolkata – 700 032.
3. After her marriage she along with her husband started to live their conjugal life and out of their wedlock, one girl child was born on 17.07.2015.
4. That after the birth of their child she came to know that her husband is a womanizer and he maintains steady sexual relation with many women. It is alleged that when the petitioner protested and raised her voice for such type of activities, Opposite Party No. 3/her husband assaulted the petitioner on 23.02.2018.

5. That in spite of being brutally assaulted she tried her best to adjust with her husband, only with the hope, that Opposite Party No. 2 will realize his fault and they will live a happy conjugal life with their children.

6. But her husband did not change his behavior. He also stopped giving the petitioner's day to day expenses. Moreover he gave false declaration in some news channels about the petitioner and made baseless allegations against her, which is very harmful for the petitioner's reputation.

7. The petitioner finding no other option has filed a written complaint with Jadavpur police station being Jadavpur P.S. Case no. 82/19 dated 08.03.2018 under Sections 498A/354 of the IPC, which ended in charge sheet.

8. The Learned Additional Chief Judicial Magistrate, Alipore on 29.08.2019 issued Warrant of Arrest against the Accuseds/Opposite parties.

9. **One of the reason given by the Magistrate for issuing the warrant of arrest instead of summons, was that as the Opposite Party No. 3/Mohammad Shami (husband of the petitioner) being a cricketer in the Indian team, a bad message would go to the society specially to the petitioner, who may think she has been prejudiced as the Opposite Party No. 3 is a high profile accused.**

10. The said view of the Magistrate is against the guidelines laid down by the Supreme Court **in Satender Kumar Antil vs Central Bureau of Investigation, Miscellaneous Application No. 1849 of 2021 in Special Leave Petition (Crl.) No. 5191 of 2021, where in the Court on 11 July, 2022, held:-**

> *"**25.** ....*
> *11. Our endeavour in this judgment is to ensure that police officers do not arrest the accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, **we give the following directions:**-*
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> > *11.1. All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 CrPC;*
> > *11.2. All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);*
> > *11.3. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;*
> > *11.4. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;*
> > *11.5. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;*
> > *11.6. Notice of appearance in terms of Section 41-A CrPC be served on the accused within two weeks from the date of institution of the*

> *case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;*
> *11.7. Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction.*
> *11.8. Authorising detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.*
> *12. We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A IPC or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, whether with or without fine.*

26. *We only reiterate that the directions aforesaid ought to be complied with in letter and spirit by the investigating and prosecuting agencies, while the view expressed by us on the non-compliance of Section 41 and the consequences that flow from it has to be kept in mind by the Court, which is expected to be reflected in the orders.*

30. *We also expect the courts to come down heavily on the officers effecting arrest without due compliance of Section 41 and Section 41A. We express our hope that the Investigating Agencies would keep in mind the law laid down in* ***Arnesh Kumar (Supra),*** *the discretion to be exercised on the touchstone of presumption of innocence, and the safeguards provided under Section 41, since an arrest is not mandatory. If discretion is exercised to effect such an arrest, there shall be procedural compliance. Our view is also reflected by the interpretation of the specific provision under Section 60A of the Code which warrants the officer concerned to make the arrest strictly in accordance with the Code.*

Section 87 and 88 of the Code

> ***"87. Issue of warrant in lieu of, or in addition to, summons.—****A Court may, in*

> *any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, after recording its reasons in writing, a warrant for his arrest—*
> *(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or*
> *(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.*
> ***88. Power to take bond for appearance.—*** *When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial."*

31. *When the courts seek the attendance of a person, either a summons or a warrant is to be issued depending upon the nature and facts governing the case. Section 87 gives the discretion to the court to issue a warrant, either in lieu of or in addition to summons. The exercise of the aforesaid power can only be done after recording of reasons. A warrant can be either bailable or non-bailable. Section 88 of the Code empowers the Court to take a bond for appearance of a person with or without sureties.*

32. *Considering the aforesaid two provisions, courts will have to adopt the procedure in issuing summons first, thereafter a bailable warrant, and then a non-bailable warrant may be issued, if so warranted, as held by this Court in Inder Mohan Goswami v. State of Uttaranchal, (2007) 12 SCC 1. Despite the aforesaid clear dictum, we notice that nonbailable warrants are issued as a matter of course without due application of mind and against the tenor of the provision, which merely facilitates a discretion, which is obviously to be exercised in favour of the person whose attendance is sought for, particularly in the light of liberty enshrined under Article 21 of the Constitution. Therefore, valid reasons have to be given for not exercising discretion in favour of the said person. This*

Court in Inder Mohan Goswami v. State of Uttaranchal, (2007) 12 SCC 1, has held that:-

> *"50. Civilised countries have recognised that liberty is the most precious of all the human rights. The American Declaration of Independence, 1776, French Declaration of the Rights of Men and the Citizen, 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, 1966 all speak with one voice—liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with procedure prescribed by law.*
>
> *51. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.*
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> *52. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilised society. Sometimes in the larger interest of the public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.*
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> ***When non-bailable warrants should be issued**.*
>
> *53. Non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when:*
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> *• it is reasonable to believe that the person will not voluntarily appear in court; or*
>
> *• the police authorities are unable to find the person to serve him with a summon; or*
>
> *• it is considered that the person could harm someone if not placed into custody immediately.*
>
> *54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the*

summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts 18 and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive.

55. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the court's proceeding intentionally, the process of issuance of the nonbailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

56. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straitjacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of nonbailable warrants should be avoided.

57. The court should try to maintain proper balance between individual liberty and the interest of the public and the State while issuing nonbailable warrant."

33. *On the exercise of discretion under Section 88, this Court in* ***Pankaj Jain v. Union of India****, (2018) 5 SCC 743, has held that:*

"12. The main issue which needs to be answered in the present appeal is as to whether it was obligatory for the Court to release the appellant by accepting the bond

under Section 88 CrPC on the ground that he was not arrested during investigation or the Court has rightly exercised its jurisdiction under Section 88 in rejecting the application filed by the appellant praying for release by accepting the bond under Section 88 CrPC.

13. Section 88 CrPC is a provision which is contained in Chapter VI "Processes to Compel Appearance" of the Code of Criminal Procedure, 1973. Chapter VI is divided in four sections — A. Summons; B. Warrant of arrest; C. Proclamation and Attachment; and D. Other rules regarding processes. Section 88 provides as follows:-

*"**88. Power to take bond for appearance.—**When any person for whose appearance or arrest the officer presiding in any court is empowered to issue a summons or warrant, is present in such court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such court, or any other court to which the case may be transferred for trial."*

14. We need to first consider as to what was the import of the words "may" used in Section 88.

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22. Section 88 CrPC does not confer any right on any person, who is present in a court. Discretionary power given to the court is for the purpose and object of ensuring appearance of such person in that court or to any other court into which the case may be transferred for trial. Discretion given under Section 88 to the court does not confer any right on a person, who is present in the court rather it is the power given to the court to facilitate his appearance, which clearly indicates that use of the word "may" is discretionary and it is for the court to exercise its discretion when situation so demands. It is further relevant to note that the word used in Section 88 "any person" has to be given wide meaning, which may include persons, who are

not even accused in a case and appeared as witnesses."

41. *...*

4. ....If the Court is satisfied, after taking into account, on the basis of information placed before it, that the accused has his roots in the community and is not likely to abscond, it can safely release the accused on his personal bond. To determine whether the accused has his roots in the community which would deter him from fleeing, the Court should take into account the following factors concerning the accused:

1. The length of his residence in the community,

2. his employment status, history and his financial condition,

3. his family ties and relationships,

4. his reputation, character and monetary condition,

5. his prior criminal record including any record of prior release on recognizance or on bail,

6. the identity of responsible members of the community who would vouch for his reliability,

7. the nature of the offence charged and the apparent probability of conviction and the likely sentence insofar as these factors are relevant to the risk of non-appearance, and

8. any other factors indicating the ties of the accused to the community or bearing on the risk of wilful failure to appear.

If the court is satisfied on a consideration of the relevant factors that the accused has his ties in the community and there is no substantial risk of non-appearance, the accused may, as far as possible, be released on his personal bond.................."

11. The Opposite Parties preferred a revision against the said order of the Magistrate before the Learned Sessions Judge, Alipore, who vide order dated 09.09.2019 admitted the revision and was pleased

to grant an order of stay till the matter would be adjudicated on merit.

12. **The present revision** has been filed against the said order of the Learned Session Judge by the Complainant on the ground that the Learned Session Judge has given **undue advantage** to the Opposite parties by staying all proceedings before the learned trial court which is in total non application of judicial mind and thus liable to be set aside, as the impugned order was passed by the Learned Session Judge without going through all the records of the case and the serious allegation of the victim and is thus bad in law and liable to be set aside. As otherwise, it would result in gross failure of justice.

13. Heard both sides. Perused the material on record. Considered.

14. On 21.11.2019, the complainant entered appearance.

15. The Supreme Court in **Honnaiah T.H. Vs State of Karnataka and Ors., Criminal Appeal No. 1147 of 2022, on August 04, 2022,** held:-

> *"**12.** There would be a serious miscarriage of justice in the course of the criminal trial if the statement were not to be marked as an exhibit since that forms the basis of the registration of the FIR. The order of the trial judge cannot in these circumstances be treated as merely procedural or of an interlocutory in nature since it has the potential to affect the substantive course of the prosecution. The revisional jurisdiction under Section 397 CrPC can be exercised where the interest of public justice requires interference for correction of manifest illegality or the prevention of*

gross miscarriage of justice. A court can exercise its revisional jurisdiction against a final order of acquittal or conviction, or an intermediate order not being interlocutory in nature. In the decision in ***Amar Nath v State of Haryana,*** *this Court explained the meaning of the term "interlocutory order" in Section 397(2) CrPC. This Court held that the expression "interlocutory order" denotes orders of a purely interim or temporary nature which do not decide or touch upon the important rights or liabilities of parties. Hence, any order which substantially affects the right of the parties cannot be said to be an "interlocutory order". Speaking for a two-Judge Bench, Justice Murtaza Fazal Ali observed:*

> *"6. […] It seems to us that the term "interlocutory order" in Section 397(2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Any order which substantially affects the right of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in Section 397 of the 1973 Code. Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie under Section 397(2) of the 1973 Code. But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the High Court."*

Explaining the historical reason for the enactment of Section 397(2) CrPC, this Court observed in ***Amar***

Nath *(supra) that the wide power of revision of the High Court is restricted as a matter of prudence and not as a matter of law, to an order that "suffered from any error of law or any legal infirmity causing injustice or prejudice to the accused or was manifestly foolish or perverse." In* ***KK Patel v State of Gujarat****, where a criminal revision was filed against an order taking cognizance and issuing process, this Court followed the view as expressed in* ***Amar Nath*** *(supra), and observed:*

> *"11. [….] It is now well-nigh settled that in deciding whether an order challenged is interlocutory or not as for Section 397(2) of the Code, the sole test is not whether such order was passed during the interim stage (vide Amar Nath v State of Haryana, Madhu Limaye v State of Maharashtra, VC Shukla v State, and Rajendra Kumar Sitaram Pande v Uttam). The feasible test is whether upholding the objections raised by a party, it would result in culminating the proceedings, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code. In the present case, if the objection raised by the appellants were upheld by the Court the entire prosecution proceedings would have been terminated. Hence, as per the said standard, the order was revisable."*

13. *In the decision in* ***VC Shukla (supra)****, this Court noted that under the CrPC, the question whether an order such as an order summoning an accused[11] or an order framing a charge[12] is an "interlocutory order" must be analysed in the light of the peculiar facts of a particular case. In the present case, the objection taken by the defense counsel (which was upheld by the trial judge) that the statement of the informant is a statement under Section 161 CrPC travels to the root of the case of the prosecution and its acceptance would substantially prejudice the case of the prosecution. According to the charge sheet, the statement of the appellant/ informant formed the basis of the FIR and set the criminal law in motion. Rejection of the prayer of the Public Prosecutor to mark the statement as an*

exhibit would possibly imperil the validity of the FIR. In this background, the order of the trial court declining to mark the statement of the informant as an exhibit is an intermediate order affecting important rights of the parties and cannot be said to be purely of an interlocutory nature. In the present case, if the statement of the appellant/ informant is not permitted to be marked as an exhibit, it would amount to a gross miscarriage of justice.

14. *The challenge to the maintainability of the revision at the instance of the appellant impugning an order passed during the pendency of the trial must also be rejected. The revisional jurisdiction of a High Court under Section 397 read with Section 401 of the CrPC, is a discretionary jurisdiction that can be exercised by the revisional court suo motu so as to examine the correctness, legality or propriety of an order recorded or passed by the trial court or the inferior court. As the power of revision can be exercised by the High Court even suo moto, there can be no bar on a third party invoking the revisional jurisdiction and inviting the attention of the High Court that an occasion to exercise the power has arisen. Holding a revision petition instituted by a complainant maintainable, Justice Santosh Hegde writing for this Court in* ***K Pandurangan v SSR Velusamy*** *observed:*

> *"6. So far as the first question as to the maintainability of the revision at the instance of the complainant is concerned, we think the said argument has only to be noted to be rejected. Under the provisions of the Code of Criminal Procedure, 1973, the court has suo motu power of revision, if that be so, the question of the same being invoked at the instance of an outsider would not make any difference because ultimately it is the power of revision which is already vested with the High Court statutorily that is being exercised by the High Court. Therefore, whether the same is done by itself or at the instance of a third party will not affect such power of the High Court. In this regard, we may note the following judgment of this Court in the case of Nadir Khan v. State (Delhi Admn)."*

15. *The view of the High Court that a victim/ complainant needs to restrict his revision petition to challenging final orders either acquitting the accused or convicting the accused of a lesser offence or imposing inadequate compensation (three requirements mentioned under Section 372 CrPC) is unsustainable, so long as the revision petition is not directed against an interlocutory order, an inbuilt restriction in Section 397(2) of the CrPC. In the present case, the appellant filed a criminal revision as his interests as an informant and as an injured victim were adversely affected by the trial court rejecting the prayer to mark the statement of the informant as an exhibit. Having held that the order of the trial court is not interlocutory in nature and that the bar under Section 397(2) of the CrPC in inapplicable, a criminal revision filed by an informant against the said order of the trial court was maintainable. In* ***Sheetala Prasad v Sri Kant,*** *a two Judge Bench of this Court has held that a private complainant can file a revision petition in certain circumstances, including when the trial court wrongly shuts out evidence which the prosecution wishes to produce. Noting the principles on which revisional jurisdiction can be exercised by the High Court at the instance of a private complainant, this Court observed:*

> *"12. The High Court was exercising the revisional jurisdiction at the instance of a private complainant and, therefore, it is necessary to notice the principles on which such revisional jurisdiction can be exercised. Sub-section (3) of Section 401 of the Code of Criminal Procedure prohibits conversion of a finding of acquittal into one of conviction. Without making the categories exhaustive, revisional jurisdiction can be exercised by the High Court at the instance of a private complainant*
>
> *(1) where the trial court has wrongly shut out evidence which the prosecution wished to produce,*
>
> *(2) where the admissible evidence is wrongly brushed aside as inadmissible,*

(3) where the trial court has no jurisdiction to try the case and has still acquitted the accused,

(4) where the material evidence has been overlooked either by the trial court or the appellate court or the order is passed by considering irrelevant evidence, and

(5) where the acquittal is based on the compounding of the offence which is invalid under the law."

The principles which have been enunciated in ***Sheetala Prasad*** *(supra) have been recently relied upon by this Court in* ***Menoka Malik v State of West Bengal*** *to hold that the High Court can exercise its revisional jurisdiction in a revision petition filed by the first informant where the trial court overlooked material evidence............."*

16. In the present case the learned Session Judge passed an order of stay. The hearing of the revision is still pending. And as such in view of the Judgment of the Supreme Court in **Honnaiah T.H. (Supra)** the order of the learned Session Judge requires no interference.

17. The order of the learned Magistrate dated 29.08.2019 was not in accordance with law and totally against the principle of natural justice and the learned Session Judge vide order dated 09.09.2019 rightly passed an order granting 'stay' of the order of the learned Magistrate. Thus the order of the learned Session Judge dated 09.09.2019 passed in Criminal Motion No. 82/18 dated 08.03.2018 being in accordance with law requires no interference.

18. **CRR 247 of 2020 is dismissed.**

19. There will be no order as to costs.

20. All connected Application stand disposed of.

21. Interim order if any stands vacated.

22. Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

23. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)