

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision : 22nd January, 2013**

+ **CRL.REV.P.175/2012**

LEELAWATI

.....Petitioner

Through: **Mr.Shiv Kumar Sharma, Adv.**

versus

STATE & ANR.

.....Respondents

Through: **Mr.Navin Sharma, APP for
State/R-1.**

**Ms.Sunila Chaudhary, Adv. for
R-2.**

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

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PRATIBHA RANI, J. (ORAL)

1. Feeling aggrieved by the order dated 21.12.2011 passed by learned MM whereby he declined to take cognizance against accused person for committing the offence punishable under Section 306 IPC, this criminal revision petition has been preferred by petitioner Smt.Leelawati, who is mother of the deceased Nisha, as well the complainant in case FIR No.294/2011 under Section 498-A/306 IPC, PS Khazuri Khas, Delhi.
2. At the outset, it is necessary to mention that the impugned order has not been challenged by the State.
3. The grievance of the complainant is that her daughter Nisha died of burn injuries sustained at her matrimonial home. The police

registered FIR No.294/2011 under Section 498-A/306 IPC at PS Kahuri Khas on the basis of complaint made by her and thereafter, chargesheet was filed against the accused Deepak Singh (husband) for committing the offence punishable under Section 498-A/306 IPC. On 21.12.2011, the learned MM, after hearing the IO and the SHO and relying upon the alleged dying declaration, formed an opinion that no prima facie case for committing the offence punishable under Section 306 IPC is made out and thereby declined to take cognizance of the offence under Section 306 IPC.

4. Since the other offence, for which the chargesheet was filed, was under Section 498-A IPC, which is triable by Magistrate, the file was sent to Mahila Court.

5. The petitioner has questioned the jurisdiction of the Magistrate in declining to take cognizance against the accused for the offence punishable under Section 306 IPC which is exclusively triable by the Court of Sessions. The petitioner has prayed for setting aside the order dated 21.12.2011 and direction to the Magistrate to commit the case to the Court of Sessions.

6. Notice of the revision petition was given to the State/respondent No.1 as well as sent to respondent No.2.

7. I have heard Mr.Shiv Kumar Sharma, Advocate for the petitioner as well as Mr.Navin Sharma, APP for the State/respondent No.1 and Ms.Sunila Chaudhary, Advocate for respondent No.2.

8. On behalf of respondent No.1/State and respondent No.2, no serious dispute has been raised about the legal position that under Section 209 CrPC, the learned Magistrate had no power to go into the

merits of the case to form an opinion whether prima facie offence under Section 306 IPC, which is exclusively triable by the Court of Session, is made out against the accused or not.

9. Despite the fact that the State preferred not to challenge the order dated 21.12.2011 passed by learned Magistrate declining to take cognizance of the offence which is triable by the Court of Sessions, the High Court, in exercise of revisional jurisdiction, can set aside such an order which has been passed by learned MM without such power being vested in him, even at the instance of a private party. This Court has ample power, not only in its revisional jurisdiction, but also under Section 482 CrPC to exercise the power in exceptional cases on noticing glaring defects in the procedure or when there is manifest error on the point of law resulting in flagrant miscarriage of justice.

10. The police, on conclusion of the investigation, had submitted the chargesheet against accused-husband for committing the offence punishable under Section 498-A/306 IPC. After filing of the chargesheet, the Magistrate was required to consider the material placed on record for taking cognizance of the offence.

11. Perusal of the impugned order shows that the learned Magistrate, while taking cognizance, started a process of satisfying himself as to whether the ingredients of Section 306 IPC are satisfied. The reasons primarily given in the impugned order about declining to take cognizance of the offence punishable under Section 306 IPC are that he was, prima facie, of the view that no offence under Section 306 IPC is made out, are as under :-

(i) As per IO and SHO, it was opined to be a judicially weak case by

the prosecution;

(ii) The dying declaration made by the deceased that she caught fire due to sudden bursting of the stove while cooking.

12. Once the challan has been put in the Court, it was not part of the duty of the Magistrate to hear the Investigating Officer and the SHO about the opinion rendered by the prosecution regarding the strength or weakness of the case relating to the offence punishable under Section 306 IPC. The job of the investigating agency was over on filing the chargesheet and for purpose of taking cognizance, the learned Magistrate was required to consider the chargesheet and the material annexed therewith. Under Section 209 CrPC, when it appears to learned Magistrate that some of the offences, in respect of which chargesheet has been filed, are triable exclusively by the Court of Sessions, it is mandatory on the part of the Magistrate to commit the case to the Court of Sessions after complying with the requirements of Section 207 and 208 CrPC. The learned Magistrate had no jurisdiction or power to consider and scrutinize the evidence as a trial Court. He had no power to discharge the accused for the offence punishable under Section 306 IPC which is exclusively triable by the Court of Sessions.

13. To understand the job of the Magistrate and procedure to be followed by him in a case triable by the Court of Sessions, it would be advantageous to refer to the decision of the Apex Court in ***Raj Kishore Prasad vs. State of Bihar & Anr. AIR 1996 SC 1931*** wherein it was held as under :-

'9. While enacting the Code of Criminal Procedure, 1973, the prefatory note before the Parliament containing 'Objects and Reasons' gave out the changes proposed to be made with a view to speed up the disposal of criminal cases. Item (a) specifically provided "the preliminary inquiry which precedes the trial by a Court of Session, otherwise known as committal proceeding, is being abolished as it does not serve any useful purpose and has been the cause of considerable delay in the trial of offences."

10. The Law Commission beforehand in its 41st Report while recommending change on the subject opined as follows :

17.11 - Where the case (whether instituted on a police report or on complaint) relates to an offence triable by the Court of Session, the Magistrate has to send up the case to the Court of Session. Since an inquiry by the Magistrate is not contemplated in the scheme which we propose in regard to such offences, the provision in this respect can take a simple form and can be placed in this chapter as forming part of the commencement of proceedings before Magistrates. It will be convenient to refer to this process as "commitment of the case to the Court of Session" although the procedure is radically different from the commitment proceedings at present provided in chapter 18.

(ii) Clause 214 (Section 209) - "Preliminary inquiries by Magistrates in cases exclusively triable by the Court of Session are being dispensed with as such an inquiry has served no useful purpose and, on the contrary, it involves a great deal of infructuous work causing delay in the trial of serious cases. The abbreviated form of inquiry provided for by the amendments made in 1955 and contained in Section 207A has been the subject of controversy and opinion is almost unanimous that this procedure while solving no problems, created fresh problems. Preliminary inquiries are, therefore, being dispensed with in cases triable by a Court of Session. However, to perform certain preliminary functions like granting copies, preparing the records, notifying the Public Prosecutor, etc. provision is being made that the Magistrate taking cognizance of the case will perform these preliminary functions and formally commit the case to the Court of Session. As

regards private complaints in cases triable exclusively by a Court of Session the inquiry into the complaint by the Magistrate under the existing Section 202 will serve the purpose of a preliminary scrutiny." - S.O.R. Gaz. of Ind. 10.12.1970, Pt/II, Section 2, Extra, p. 1309 (1320).

(Emphasis supplied)

11. The present Section 209 is thus the product of the aforesaid expert deliberation followed by legislative exercise. It is thus to be seen prominently that preliminary inquiries then known as "committal proceedings" have been abolished in cases triable by a Court of Session. The functions left to be performed by the Magistrate, such as granting copies, preparing the records, notifying the Public Prosecutor etc. are thus preliminary or ministerial in nature. It is of course true that the Magistrate at that juncture takes cognizance of a sort, but that is solely to perform those preliminary functions as a facilitator, towards placement of the case before the Court of Session, rather than being an adjudicator. It is thus manifest that in the sphere of the limited functioning of the magistrate, no application of mind is required in order to determine any issue raised, or to adjudge anyone guilty or not, or otherwise to pronounce upon the truthfulness of any version. The role of the Magistrate thus is only to see that the package sent to the Court of Session is in order, so that it can proceed straight away with the trial and that nothing is lacking in content, as per requirements of Section 207 and 208 of the Code of Criminal Procedure. Such proceedings thus, in our opinion do not fall squarely within the ambit of "inquiry" as defined in Section 2(g) of the Code of Criminal Procedure, which defines that "inquiry means every inquiry, other than a trial conducted under this Code by a Magistrate or a the Court", because of the prelude of its being "subject to the context otherwise requiring". As said before, the context requires the proceedings before a Magistrate to be formal, barely committal in that sense, and that any notion based upon the old state of law of its being an inquiry to which Section 319 could get attracted, has been done away with. Therefore, it would be legitimate for us to conclude that the Magistrate at the stage of Section 209 Cr.P.C. is forbidden to

apply his mind to the merit of the matter and determine as to whether any accused need be added or subtracted to face trial before the Court of Session.'

14. Way back in 1978, the Apex Court in ***Sanjay Gandhi vs. Union of India & Ors. (1978) 2 SCC 39*** has deliberated upon the powers of the Committing Magistrate under the new Code and held that the Committing Magistrate has no power to discharge the accused in a case exclusively triable by the Court of Sessions. Relevant paras of the report are extracted hereunder:

'2. We have heard Counsel on both sides and proceed to elucidate certain clear propositions under the new Code bearing upon the committal of cases where the offence is triable exclusively by the Court of Sessions. The Committing Magistrate in such cases has no power to discharge the accused. Nor has he power to take oral evidence save where a specified provision like Section 306 enjoins. From this it follows that the argument that the accused has to cross-examine is out of bounds for the Magistrate, save in the case of approvers. No examination-in-chief, no cross-examination.

3. Secondly, it is not open to the committal Court to launch on a process of satisfying itself that a prima facie case has been made out on the merits. The jurisdiction once vested in him under the earlier Code but has been eliminated now under the present Code. Therefore, to hold that he can go into the merits even for a prima facie satisfaction is to frustrate the Parliament's purpose in remoulding Section 207-A (old Code) into its present non-discretionary shape. Expedition was intended by this change and this will be defeated successfully if interpretatively we hold that a dress rehearsal of a trial before the Magistrate is in order. In our view, the narrow inspection hole through which the committing Magistrate has to look at the case limits him merely to ascertain whether the case, as disclosed by the police report, appears to the Magistrate to show an offence triable solely by the Court of

Session. Assuming the facts to be correct as stated in the police report, if the offence is plainly one under Section 201 IPC, the Magistrate has simply to commit for trial before the Court of Sessions. If, by error, a wrong section of the Penal Code is quoted, he may look into that aspect. Shri Mulla Submits if the Magistrate's jurisdiction were to be severely truncated like this the prosecution may stick a label mentioning a sessions offence (if we may use that expression for brevity's sake) and the accused will be denied a valuable opportunity to prove his ex facie innocence. There is no merit in this contention. If made-up facts unsupported by any material are reported by the police and a sessions offence is made to appear, it is perfectly open to the Sessions Court under Section 227 CrPC to discharge the accused. This provision takes care of the alleged grievance of the accused.'

15. In view of the above settled legal position, as per requirement of Section 209 CrPC, the learned Magistrate was required to commit the case to the Court of Sessions as Section 306 IPC is an offence which is exclusively triable by the Court of Sessions. Only the Session Judge had the power under Section 227 CrPC to discharge the accused if so satisfied from the material placed on record that prima facie, no offence under Section 306 IPC is made out against the accused and to transfer the case to the committal Court, in exercise of power under Section 228 CrPC, on forming an opinion that the accused has committed an offence, which is triable by the Court of Magistrate.

16. In the instant case, since the impugned order dated 21.12.2011 passed by learned Magistrate is without jurisdiction, the order dated 21.12.2011 is set aside and learned Magistrate is directed to proceed with the case in accordance with law to commit the case to the Court of Sessions without causing further delay in the matter.

17. With above observations, the petition stands allowed. Parties are

directed to appear before learned Trial Court on 7th February, 2013.

18. Copy of the order be sent to learned Trial Court for necessary compliance and also given dasti to learned counsel for the parties.

PRATIBHA RANI, J

January 22, 2013

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