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C.R.R. No.2734 of 2019
(Via Video Conference)

In Re : An application under Section 401 read with Section 482 of the
Code of Criminal Procedure;

In the matter of : Jyotsna Ghosh ...petitioner.

Mr. Kallol Kumar Basu,
Md. Jannat ul Firdous.
...for the petitioner.

Mr. Ayan Bhattacharjee,
Mr. Shrequl Haque.
...for the opposite party nos.2 and 3.

Mr. Saswata Gopal Mukherjee,
Mr. Arijit Ganguly,
Mr. Sandip Chakraborty.
...for the State.

The learned advocate for the petitioner at the inception draws the attention of this Court to the order dated 20.06.2019 wherein the learned Magistrate on consideration of the application under Section 239 of the Code of Criminal Procedure was pleased to discharge the accused persons from the case.

I have perused the orders so passed and the consideration which weighed with the learned court while discharging the accused persons are as follows:

1. The statements recorded under Section 161 of the Code of Criminal Procedure by the Investigating Officer are identical and similar in respect of each of the witnesses which is improbable.
2. The defacto complainant's statement under Section

164 and Section 161 of Criminal Procedure Code, so recorded, reflect different time period so far as the incident is concerned.

3. Assessment of the injury report
4. Abuse of the process of the court.

Mr. Kollol Basu, learned advocate appearing for the petitioner draws the attention of this Court to paragraph 29 of the judgment of the Hon'ble Apex Court in State of Tamil Nadu By Inspector of Police Vigilance and Anti-Corruption Vs. N. Suresh Rajan and Others reported at (2014) 11 SCC 709 which reads as follows:

“True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a

conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage.”

Mr. Ayan Bhattacharjee, learned advocate appearing for the opposite party nos.2 and 3 submits that the instant case was initiated out of grudge and is tainted with mala fides. To that extent, learned advocate draws the attention of this Court to the documents under Section 207 of the Code of Criminal Procedure as also the injury report. Learned advocate emphasize that the injury report itself makes the case as the date referred to is almost three days after the alleged date of incident and the date provided regarding the age of the lady do not match with that of her son. Learned advocate supports the order passed by the learned Magistrate and submits that so far as the spirit of the order of the learned Magistrate is concerned, the same is in consonance with the settled principles of law.

Mr. Saswata Gopal Mukherjee, learned Public Prosecutor, appears on behalf of the State and submits that the order under challenge suffers from illegality and observations which

have been made by the learned Magistrate while considering the application under Section 239 of the Code of Criminal Procedure are in fact appreciation of evidence which are to be done at the end of the trial.

I have perused the statements under Section 161 of the Code of Criminal Procedure, Section 164 of the Code of Criminal Procedure, the injury report and the order passed by the learned Magistrate which is the subject matter of challenge. On an assessment of the order passed, I am of the view that the learned Magistrate at the very inception started disbelieving the prosecution case on the foundation of recording of the statement under Section 161 of the Code of the Criminal Procedure by the Investigating Officer of the case. It would not be out of pace to state that the Investigating Officer is supposed to record the gist of the statement in his own language and handwriting. As such, if there are limitations of the Investigating Officer so far as his command over language is concerned that may be reflected in the statement which has been recorded, but the same do not loose its corroborative value at the stage of consideration of charges. Appreciation of the injury report also have been referred to and relied upon by the court at this stage. In fact, the assessment which has been made by the learned Magistrate may not be incorrect when the final arguments are being heard or at the stage of consideration of conviction or acquittal in a criminal trial. But the learned Magistrate while considering the application under Section 239 of the Code of Criminal Procedure must be aware of the settled law that at this

stage the court is to weigh between grave suspicion and some suspicion and there must be prima facie assessment of the materials. If the court is of the opinion that the case is of grave suspicion there is no other option but to proceed with the case, in the alternative if there is some suspicion, the court would obviously exercise the provisions of Section 239 of the Code of Criminal Procedure in favour of the accused persons.

Having regard to the settled principles of law and the manner in which the learned Magistrate appreciated the prosecution materials at the stage of Section 239 /240 of the Code, I am of the view that the same is not in consonance with the settled principles of law and, as such, the same is liable to be set aside.

Accordingly, the order dated 20.06.2019 passed by the learned ACJM, Katwa in connection with GR 1031 of 2017 (T.R.174 of 2018) arising out of Ketugram Police Station Case No.376 of 2017 dated 13.12.2017 is hereby set aside. The learned Magistrate will freshly consider the application under Section 239 of the Code of Criminal Procedure without being prejudiced by any of the observations made by this Court which is limited to the issue of deciding the revisional application in the background of the order dated 20.06.2019 passed by the learned Magistrate.

The accused persons being the opposite party nos.2 and 3 are directed to appear before the learned ACJM, Katwa on 1.9.2021, in case they appear on the date fixed they will be allowed to continue on earlier bond which was filed before the court.

The learned Magistrate will thereafter within two weeks

fix the date for fresh hearing of the application under Section 239 of the Code of Criminal Procedure.

The learned advocate for the petitioner will be at liberty to either assist the Public Prosecutor appearing in the said matter or invoke the provisions of Section 301 of the Code, if so advised.

With the aforesaid observations, CRR 2734 of 2019 is disposed of.

Pending application, if any, is consequently disposed of.

All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Tirthankar Ghosh, J.)