

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ajoy Kumar Mukherjee

**C.R.R. 2531 of 2019
Smt. Dali Das @ Doli Das**

-vs-

Anandamoy Das @ Anandamay Das & ors.

For the Petitioner	: Mr. Prabir Kumar Mitra Mr. Pinak Kumar Mitra Ms. Subhannita Ghosh Ms. Ariba Shahab
For the State	: Mr. Madhusudan Sur, Ld. APP Mr. Dipankar Paramanick
For the Opposite Party nos. 1 to 6	: Mr. Avik Ghatak Mr. Amit Ranjan Pati
Heard on	: 30.6.2022
Judgment on	: 08.07.2022

Ajoy Kumar Mukherjee, J.

1. Present revisional application has been directed against order dated 24.10.2018 for not taking cognizance of offence under section 313 of Indian Penal code (IPC) by the Magistrate and also against order dated 04.03.2019 for framing of charge by the Magistrate against accused persons/opposite party no.1 to 6 herein only under section 498A/34 IPC excluding section 313 in connection with the Barabani Police Station Case No. 50/18 dated 28.05.2018, where accused persons were initially booked under sections 498A/313/34/506

of the Indian Penal code (IPC) corresponding to G.R. No. 1053/18 pending before the Learned Chief Judicial Magistrate, Asansol.

2. Petitioners contention is that police started investigation on the basis of a direction given by learned Magistrate under section 156 (3) of the Code of Criminal Procedure (code) at the behest of petitioner herein.

3. In the said written complain petitioner *inter alia* alleged about illegal demand of dowry and also about inflicting mental and physical torture by the accused/opposite parties and furthermore she also specifically alleged that after two- three months of her marriage when all the accused persons came to know that the complainant became pregnant, they forcibly compelled the complainant/petitioner to take some medicine which led to her abortion.

4. On the basis of allegation, said Baraboni police Station case No. 50/118 dated 28.05.2018 was initiated under section 498A /313/34/506 of the IPC. But unfortunately after completion of investigation the Investigating Officer submitted charge-sheet being charge-sheet 91/2018 dated 08.10.2018 under section 498A/506/34 of Indian Penal Code and the investigating officer inappropriately did not add section 313 of IPC in the charge sheet though sufficient materials collected during investigation to incorporate section 313 in the charge-sheet.

5. It is further alleged that learned Magistrate mechanically has taken cognizance upon the charge-sheet mentioned offences submitted by the investigating officer without applying his judicial mind and ignored the fact that the allegation and the materials specifically establish prima facie charge under section 313 of the code. Ultimately charge has been framed under

section 498A/34 I.P.C., excluding section 313 of the I.P.C., against accused persons.

6. Mr. Prabir Kumar Mitra learned counsel on behalf of the petitioner submits that learned Magistrate has failed to appreciate that the investigating officer intentionally with *malafide* motive did not add section 313 of the I.P.C. in the charge-sheet though allegation under section 313 has been well reflected in the First Information Report (F.I.R.) as well as in the medical papers which has been collected during investigation as well as the statements of the doctor recorded during investigation . Learned Magistrate also failed to appreciate that the advice about taking abortion pills, tactfully written on the back side of the prescription of Dr. A.K. Ghosh, despite of having ample space on the front side of the prescription.

7. Mr. Mitra further contended that investigating officer intentionally suppressed the materials available in the charge-sheet and he also did not mention the same in the seizure list and going beyond his jurisdiction, investigating officer commented on the ability of understanding of the petitioner /complainant. Investigating officer was pro-active to exonerate the accused persons from charging under section 313 of the IPC and surprisingly investigation officer has put the prescription in the case diary to the extent of front page only whereas in the backside of the prescription, medicine has been prescribed on the same day for termination of pregnancy which nowhere finds place in the case diary, though such original prescription was handed over to the police by the petitioner containing both the side of the prescription. Moreover recording of statement of witness Sima Pal under section 161 of the

code on 13.07.2018 i.e. after two months and just before submission of charge-sheet and also collection of certificate of the Doctor on 21.07.2018 which is also just before submission of the charge-sheet raised sufficient suspicion that investigating officer was desperate in protecting the accused persons from charging them under section 313 of I.P.C. Moreover, learned Magistrate failed to consider that the petitioner has got emotional set back due to terminating of her pregnancy in a tricky manner by the accused persons.

8. Mr. Mitra further submits that the role of a judge is not like a post office or to act like mouth piece of investigation agency. On the contrary the court has to look into the materials collected in course of the investigation and apply it's mind at the time of framing of charge. While framing charge, the court has to primarily satisfied that the allegations made in the complaint and materials collected during investigation, the offence is made out but certainly the court will not make any roving enquiry about sustainability of the charge. In this context Mr. Mitra relied on **State of M.P. Vs. Mohan Lal Soni** reported in **(2000) SCC 9(Cri) 1110** and **Dilwar Baby Kurane Vs. State of Maharastra**, reported in **(2002) Cri LJ 980**.

9. Mr. Sur, learned counsel appearing on behalf of the state, submits that order impugned itself speaks that Magistrate has gone through the charge sheet and documents submitted under section 173(5) of the code and after considering the facts and materials, Magistrate was of the opinion that a prima facie case against accused persons are made out. Accordingly it is not correct to say that Magistrate without considering materials has taken cognizance of offence or has framed charge against accused persons.

10. Before going to further details let me reproduce the relevant orders passed by the Magistrate for taking cognizance and from framing charge which are as follows:-

“24/10/2018 Seen the C/S No-91/18, Date -08.10.2018.

Submitted U/s 173 (2) Cr.P.C. Against accd persons

Nemly (1) Anandamoy Das@Anandamay Das,

(2) Lakshi Narayan Das@Laxminarayan @Lakhinarayan

& Lakhsminarayan, (3) REkha Das,(4) Priyanka Mahanta(5) Goutam Das (6)

Ruplata Das,

U/S 498A/506/34 IPC SLNo-(1) to (6) are shown

abscond. I have gone through the C/S along with

Documents submitted U/S173(5) Cr.P.C. considering the fact & materials. I

am of the opinion that a prima facie case against accd persons are made out.

Hence cognizance is taken I/O prays for issuing

W/A against absconding accd persons SL No-(1) to (6).

The prayer of I/O is allowed. Issue W/A against them.

To-29/12/18 for E.R.”

“04/03/2019 (6) accd on C/B filed hazira

Ld. A.P.P. is present.

Hd. Both sides.

Perused the record Considered.

A prima facie case u/s 498A/34 of I.P.C has been made out

Therefore charge under said sections is framed. The contents

Of charge is read over and explained to the accd. Persons

To which they pleaded they pleaded not guilty and claimed

To be tried.

Fix 12/4/19 for evidence.

I issue summons upon csu-1”

11. Needles to say that the question of framing charge arises only when the court finds that the accused is not entitled to discharge under section 227 or 239 of the Code in Sessions Case and in warrant cases respectively. The provisions relating to discharge of the accused from a particular offence is very important and judge must consider first whether there are sufficient grounds for proceeding against the accused. Section 227 of the code empowers the Sessions Judge to discharge the accused from any case if he finds that there is no sufficient ground for proceeding against the accused and likewise section 239 of the code empowers the Magistrate to discharge the accused from any case where the charge leveled against the accused is groundless. Accordingly the stage of framing charge in both warrant cases and Sessions Cases comes only if accused is not discharged under the aforesaid provisions. It is true that while exercising power under section 228 of the code the judge is not required to record his reasons for framing of charge against the accused but upon hearing the parties and based upon the allegations and taking note of the allegations in the charge-sheet , if the court is satisfied that there is sufficient ground for proceeding against the accused then only will frame charge against the accused. This is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. See **Vhawan Bai Vs. Ghanshyam and others** in criminal appeal no. 1820 of 2019 (arising out of SLP (cri) No. 6964 of 2019) decided by Supreme Court on 03.12.2019.

12. In the present case I have quoted two relevant orders above and the order in support of taking cognizance the Magistrate has only observed that he has gone through the charge-sheet along with the documents submitted under section 173 (5) Cr.P.C. and considering the fact and materials he is of the opinion that a prima facie case against accused person are made out and so cognizance was taken and it further appears from the order relating to framing of charge that learned Magistrate perused the record and considered and prima facie case under section 498A /34 of I.P.C has been made out and therefore charge under the said sections is framed.

13. The main line of attack made by Mr. Mitra, learned Advocate for the petitioner being that the Magistrate ought to have applied it's judicial mind so that it could have understood by the complainant /petitioner from the order impugned as to why the charge has not been framed under section 313 also when initially the accused persons were booked under section 313 of IPC along with other sections. The petitioner has knocked the door of High Court only for the reason that from the aforesaid two orders she could not make out the reason for exclusion of the section 313 either from the charge-sheet or from taking cognizance and framing of charge by the Magistrate.

14. In the case in hand, accused persons were initially booked under sections 498A/313/506/34 of IPC. Charge-sheet submitted under sections 498A/506/34 IPC and ultimately charge framed under sections 498A/34 IPC. It is expected from a judge that while framing charge he is to look into the materials placed before him and if he is of the view that no case was made out for framing of charge either under section 506 or under section 313, the order

ought to clear with respect to material placed before him. Here the Magistrate made a bald statement that prima facie case against accused persons are made out and he has not stated in his order as to why he was of the opinion that the materials available in the case diary was insufficient to frame charge either under section 313 or under section 506 and as such it casts a serious doubt about the “consideration” made by the Magistrate.

15. There is no dis-agreement with the proposition that at the stage of framing of charge only a prima facie case is to be seen and probative value of the evidence is not to be looked into and the court need not be satisfied whether the case ultimately end in a conviction but must simply reached a satisfaction that the accused might have committed the offence. Thus it would be corollary that this sufficient exercise of evaluation of the materials on record should be reflected in the order framing of charge in the line with the old legal adage “justice must not only be done but also seen to be done”.

16. Needles to say that section 239 which deals with discharge of accused, begins with the words “if upon considering ” which refers the word ‘consideration’. While section 239 and section 227 provides for recording the reasons for discharging an accused, although it is not so specifically stated in section 240 or in section 228 deals with framing of charge, it can certainly be said that when the charge under a particular section is dropped or diluted some immediate reasons to be recorded disclosing the consideration of the material on record because charge is to be framed, “upon such consideration” under section 240 or 228 of the code and therefore, that “consideration” must be reflected in the order. On perusal of above-mentioned impugned orders, I

am not convinced that Magistrate has taken cognizance or framed charge after taking into consideration the materials. A parrot like repetition of the words “ A prima facie case u/s 498/34 of IPC has been made out” does not reflect application of judicial mind by the Magistrate while taking cognizance of the offence or at the time of framing of charge.

17. In *R.S. Mishra vs. State of Orissa & others* (decided on 01.02.2011)

the observation of Supreme Court is as follows:-

“18. As seen from Section 227 above, while discharging an accused, the Judge concerned has to consider the record of the case and the documents placed therewith, and if he is so convinced after hearing both the parties that there is no sufficient ground to proceed against the accused, he shall discharge the accused, but he has to record his reasons for doing the same. Section 228 which deals with framing of the charge, begins with the words "If after such consideration". Thus, these words in Section 228 refer to the 'consideration' under Section 227 which has to be after taking into account the record of the case and the documents submitted therewith. These words provide an interconnection between Sections 227 and 228. That being so, while Section 227 provides for recording the reasons for discharging an accused, although it is not so specifically stated in Section 228, it can certainly be said that when the charge under a particular section is dropped or diluted, (although the accused is not discharged), some minimum reasons in nutshell are expected to be recorded disclosing the consideration of the material on record. This is because the charge is to be framed 'after such consideration' and therefore, that consideration must be reflected in the order. “

“19. It is also to be noted that a discharge order is passed on an application by the accused on which the accused and the prosecution are heard. At the stage of discharging an accused or framing of the charge, the victim does not participate in the proceeding. While framing the charge, the rights of the victim are also to be taken care of as also that of the accused. That responsibility lies on the shoulders of the Judge. Therefore, on the analogy of a discharge order, the Judge must give his reasons atleast in a nutshell, if he is dropping or diluting any charge, particularly a serious one as in the present case. It is also necessary for the reason that the order should inform the prosecution as to what went wrong with the investigation. Besides, if the matter is carried to the higher Court, it will be able to know as to why a charge was dropped or diluted.”

“20. The observations of this Court in the case of State of Bihar Vs. Ramesh Singh [AIR 1977 SC 2018] / [1977 (4) SCC 39] are very apt

in this behalf. A bench of two Judges of this Court has observed in that matter that at the initial stage of the framing of a charge, if there is a strong suspicion/evidence which leads the Court to think that there is ground for presuming that the accused has committed an offence, then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The Court referred to the judgment of a bench of three Judges in *Nirmaljit Singh Hoon Vs. State of West Bengal* [1973 (3) SCC 753], which in turn referred to an earlier judgment of a bench of four Judges in *Chandra Deo Singh Vs. Prokash Chandra Bose* [AIR 1963 SC 1430], and observed as follows in para 5:-

"5. In *Nirmaljit Singh Hoon v. State of West Bengal* - Shelat, J. delivering the judgment on behalf of the majority of the Court referred at page 79 of the report to the earlier decisions of this Court in *Chandra Deo Singh v. Prokash Chandra Bose* - where this Court was held to have laid down with reference to the similar provisions contained in Sections 202 and 203 of the Code of Criminal Procedure, 1898 "that the test was whether there was sufficient ground for proceeding and not whether there was sufficient ground for conviction, and observed that where there was prima facie evidence, even though the person charged of an offence in the complaint might have a defence, the matter had to be left to be decided by the appropriate forum at the appropriate stage and issue of a process could not be refused". Illustratively, Shelat, J., further added "Unless, therefore, the Magistrate finds that the evidence led before him is selfcontradictory, or intrinsically untrustworthy, process cannot be refused if that evidence makes out a prima facie case".(emphasis supplied) Further, as observed later in paragraph 6 of a subsequent judgment of this Court in *Niranjan Singh Vs. Jitendra Bhimraj* [1990 (4) SCC 76], at the stage of the framing of the charge, the Judge is expected to sift the evidence for the limited purpose to decide if the facts emerging from the record and documents constitute the offence with which the accused is charged. This must be reflected in the order of the judge."

18. In this context it may also be apposite to refer Hon'ble Apex Court Judgment in the case of ***Union of India Vs. Prafulla Kumar Samal and another*** , reported in **AIR 1979 SC 366** wherein it was observed:

"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained

the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.”

19. In view of above it is quite clear that either from the aforesaid impugned order regarding taking cognizance or by the order by which charges were framed defacto complainant/petitioner did not have any scope to know whether the magistrate at all made any ‘consideration’ before framing of charge as both the orders contains simplistic words “a prima facie case against accused persons are made out”.

20. In view of the aforesaid discussion the order dated 24.10.2018 and all subsequent orders are hereby set aside. Learned Magistrate is directed to take fresh look upon the materials available in record and to hear in presence of defacto complainant, accused and the state and after such consideration, if he finds that the materials discloses any offence triable by a court of Sessions he will commit the case to the court of Sessions without taking cognizance (as in case of sessions triable offence, sessions judge is only empowered to take cognizance under section 193 of the code and Magistrate’s power to take

cognizance under section 190 is subject to the provisions of chapter XIX of the code). But if he finds that materials do not disclose any sessions triable offence then, he will take cognizance and will proceed in terms of chapter XIX of the Code . Here I want to make it clear that I have not gone to the merit of the case.

21. CRR 2531 of 2019 is accordingly disposed of.

However, there shall be no order as to costs.

Urgent photostat certified copies of this order may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.

(AJAY KUMAR MUKHERJEE, J.)