

IN THE HIGH COURT AT CALCUTTA

CRIMINAL REVISIONAL JURISDICTION

Appellate Side

Present:

The Hon'ble Justice Jay Sengupta

CRR 1646 of 2020

Bikram Chatterjee @ Vikram Chatterjee

Versus

The State of West Bengal

For the petitioner : Mr. Sourav Chatterjee
Mr. Satadru Lahiri
Mr. Abhirup Chakraborty
..... Advocates

For the opposite party no. 2 : Mr. Sandipan Ganguly
Mr. Ayan Bhattacharjee
Mr. Soumen Mohanty
Mr. Karan Dudhewala
Mr. Piyush Kumar Ray
Mr. Agnish Basu
..... Advocates

For the State : Mr. Saswata Gopal Mukherjee
Mr. Sudip Ghosh
Mr. Apurba Kr. Datta
..... Advocates

Lastly heard on : 30.03.2022

Judgment on : 27.06.2022

Jay Sengupta, J.:

1. This is an application challenging an order dated 15.09.2020 passed by the learned Additional Sessions Judge, 6th Court, Alipore, South 24 Parganas in Sessions Case No. 3 (03) of 2018 arising out of Tollygunge Police Station Case No. 109 of 2017 dated 29.04.2017, thereby framing charges against the petitioner under Sections 304 (Part-II), 279, 338 and 427 of the Indian Penal Code and Section 185 of the Motor Vehicles Act.

2. On 29.04.2017 a suo motu FIR was lodged by the Police under Sections 279, 338, 427 and 304A of the Penal Code against petitioner. During investigation, a charge under Section 304 (Part-II) of the Penal Code was added. A charge sheet was filed on 19.07.2017. On 09.10.2018 a prayer for discharge made by the petitioner under Section 227 of the Code was rejected by the learned trial Judge. The petitioner filed a revisional application against the said order. By an order dated 13.02.2019 passed in CRR No. 3241 of 2018, this Court was pleased to dismiss the same. Thereafter, the learned trial Court was pleased to frame charges.

3. Mr. Sandipan Ganguly, learned senior counsel appearing on behalf of the added opposite party/victim's father, raised a preliminary point of non-maintainability of this application and submitted as follows. No separate hearing was required to be given for framing of charges under Section 228 of

the Code, especially when an extensive hearing had taken place in disposing of an application for discharge under Section 227 of the Code. In the present case, the order under Section 227 was, in fact, affirmed by the High Court in revision. Reliance was placed on the decision of the Hon'ble Apex Court in *Dinesh Tiwari vs. State of Uttar Pradesh*, (2014) 13 SCC 137. On the point that a Court was required to record reasons only if it decided to discharge an accused, reliance was placed on the decision of the Hon'ble Supreme Court in *Kanti Bhadra Shah vs. State of West Bengal*, (2000) 1 SCC 122 and *Om Wati vs. State, through Delhi Administration*, (2001) 4 SCC 333. A second application, in the garb of Section 482 of the Code, on the self-same materials was not maintainable in the eyes of law. Moreover, this Court had no power to recall or review its own order in a second petition under Section 482 of the Code. After passing of the earlier order by this Court, there has been no change in circumstance. As regards, the scope of consideration under Sections 227 and 228 of the Code, reliance was placed on *Simrikhia vs. Dolley Mukherjee and Chhabi Mukherjee*, (1990) 2 SCC 437 and *R. Annapurna vs. Ramadugu Anantha Krishna Sastry*, (2002) 10 SCC 401. At the stage under Section 227 of the Code, the Court would go by the standard of *prima facie* case as opposed to conclusive proof. At the stage of framing of charge, the Court had no jurisdiction to go into the merits of the allegations even under Section 482 of the Code. On the question of scope of interference under Section 482 of the Code at the stage of framing of charge, reliance was placed on *State through CBI vs. Dr. Anup Kumar Srivastava*, (2017) 15 SCC 560, *Bhawna Bai Vs. Ghanshyam & Ors.*, (2020) 2 SCC 2017

and Indu Jain vs. State of Madhya Pradesh, (2008) 15 SCC 341. The factual issues raised during arguments could only be appreciated after recording of evidence.

4. Mr. Sourav Chatterjee, learned counsel appearing on behalf of the petitioner submitted as follows, including on the question of maintainability. First, the principle of res judicata had no application in a criminal proceeding. On this reliance was placed on Devendra & Ors. vs. State of Uttar Pradesh & Anr., (2009) 7 SCC 495. Reliance was also placed on State vs. K.V. Rajendran & Ors., (2008) 8 SCC 673 and Harish Dahiya vs. State of Punjab, (2019) 18 SCC 69. Besides, in the judgment and order dated 13.02.2019 passed by this Court in CRR No. 3241 of 2018, it was specifically directed that the learned Trial Judge should look into the police papers and then decide as to whether a case was made out under Section 304A of the Penal Code or under Section 304 (Part-II) of the Penal Code. Neither the State nor the opposite party no. 2 challenged the said order. By passing such directions, this Court had only directed the learned Trial Judge to reconsider the petitioner's prayer for discharge. Thus, the issue of non-maintainability was of no consequence. On merits, no reliable material was placed by the prosecution to give rise to a grave suspicion that the act was done with the knowledge that it was likely to cause death. The speed of the vehicle at the time of accident was based on a report, submitted by the Forensic Laboratory. But, no earlier report of the car manufacturer was relied on. It could not be established from the breathalyser test that the petitioner was drunk at the material point. On the contrary, it was found

that the victim lady was in an inebriated state at the time of incident. Moreover, while no seat belt was found fastened on the victim lady, the petitioner who was purportedly driving the car was having a seat belt on. Even the witnesses purportedly made statements about the petitioner getting drunk ascribed different alcoholic beverages. These facts could not, by any stretch of imagination, attract Section 304 (Part-II) of the Penal Code. If at all, a charge under Section 304A of the Penal Code could be thought of. If it could not be proved that a person was drunk or under the influence of drug, Section 185 of the Motor Vehicles Act would also not be attracted. Although it was the prosecution's case that the CDR analysis was performed on the car with the help of engineers of Toyota, Toyota did not supply any CDR analysis report. There was an anomaly regarding the date on which the necessary examination was done. On whether Section 304 (Part-II) of the Penal Code could apply to such a case as the present one, reliance was placed on *Prabhakaran vs. State of Kerala*, (2007) 14 SCC 269, *Naresh Giri vs. State of M.P.*, (2008) 1 SCC 791, *Goutam Singh vs. State of West Bengal*, (2010) 2 CHN 691, *Keshub Mahindra vs. State of M.P.*, (1996) 6 SCC 129, *CBI vs. Keshub Mahindra*, (2011) 6 SCC 216, *Sushil Ansal vs. State*, (2014) 6 SCC 173, *State vs. Sanjeev Nanda*, (2012) 8 SCC 450, *Nitinchandra Somnath Raval vs. State of Gujarat*, (2019) 14 SCC 676.

5. Mr. Saswata Gopal Mukherjee, learned Public Prosecutor, relied on the case diary and submitted as follows. First, since the relevant facts were taken into consideration by the learned Trial Court at the time of consideration of the petitioner's prayer for discharge and the resultant order

was upheld by this Court in an earlier revision, such facts could not be agitated again at the time of formal framing of charge. If this Court was urged to consider those questions afresh, then that could amount to reviewing or recalling the earlier order passed by a Co-ordinate Bench of this Court. On merits, a *prima facie* case was made out against the petitioner in respect of the offences on which charges were framed. There was ample evidence that the petitioner was driving the car in extremely high speed and in an inebriated state. This was directly responsible for the death of the victim. The car was being driven at a high speed of about 100 km/hr on a normal city road. This would be evident from the CDR analysis report. The officials of Toyota only aided the experts of the investigating agency in preparing their report. Therefore, there was nothing that ought to be brought on record from the end of the car manufacturer. It was true that the sample, obtained from the petitioner, was insufficient to show whether he was drunk at the time of the accident. However, there were statements of several witnesses who were present at the places in question and who clearly stated that the petitioner was having drinks one after the other. The contention of the defence that different witnesses had stated about different drinks could at best give rise to a disputed question of fact that could be decided during trial. In fact, the petitioner might have very well taken different drinks at different points of time. In view of such gross indiscretions committed by the petitioner, it was quite inconsequential whether the victim was also drunk or whether she did not have the seat belt on. The latter issue could at best be taken into consideration at the time of

imposition of sentence on the errant driver. This Court could not hold a mini trial on disputed questions of fact, especially when the issues were already agitated earlier before this Court in the first revision.

6. Mr. Ganguly, learned senior counsel appearing on behalf of the private opposite party, further submitted as follows, on merits. The disputed questions of facts, raised during arguments by the petitioner, could only be decided by the trial Court. On the question that the petitioner on facts could very well be charged with an offence under Section 304 (Part II) of the Code, reliance was placed on the decision of the Hon'ble Apex Court in *Alister Anthony Pereira vs. State of Maharashtra*, (2012) 2 SCC 648. There were statements of witnesses recorded both under Sections 161 as well as 164 of the Code showing that the petitioner was in an inebriated state on the fateful night. The maximum speed limit at the place in question i.e., at the Rashbehari Connector was 40 Km/hr while the vehicle in question was driven by the petitioner at that place at a speed of almost 105 Km/hr. The forensic report in respect of the speed of the car was prepared by laboratory experts. They had only taken the assistance of experts from Toyota, which was not impermissible in law. As regards the purported fact of not wearing seat belt, according to Section 194B of the Motor Vehicles Act, it was the responsibility of the driver to ensure that the co-passenger wore a seat belt.

7. Mr. Sourav Chatterjee, learned counsel appearing on behalf of the petitioner tried strenuously to distinguish the decisions relied upon on behalf of the private opposite party in his reply.

8. I heard the submissions of learned counsels appearing on behalf of the petitioner, the State and the private opposite party and perused the revision petition, the case diary and the written notes of arguments filed.

9. For a better exposition of the question of law involved in the preliminary objection raised on behalf of the private opposite party, it is necessary to quote Sections 227 and 228 of the Code as under:-

“227. Discharge. - If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.”

“228. Framing of charge.-(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report.

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

10. In *Dinesh Tiwari vs. State of U.P.* (supra), the Hon’ble Apex Court had categorically held that from Section 228 it is clear that no separate hearing was required to be given for framing of charge if the accused was not discharged upon consideration of the record of the case and documents and after hearing of submissions under Section 227. This makes the position abundantly clear that once the contentions of the accused are taken into consideration in an application for discharge, the same need not be taken into consideration all over again while framing formal charges.

11. It is quite clear from the plain reading of the provisions under Sections 227 and 228 of the Code that the hearing of an accused on the question of discharge and the formal framing of charge are done nearly simultaneously, regardless of the fact that there may be a temporal gap between the two. What is important here is the stage and not the time gap, if any.

12. In the present case, after the petitioner’s prayer for discharge was rejected by the learned trial Court he preferred a revisional application before this Court being CRR No. 3241 of 2018 and the same was disposed of upon merits. Therefore, unless there is a specific direction by the Co-

ordinate Bench of this Court deciding CRR No. 3241 of 2018 to remand back the matter for fresh consideration of the petitioner's application for discharge, this Court cannot enter into the disputed questions of fact involved in the petitioner's prayer for discharge and/or the formal framing of charge.

13. In this context, it is necessary to quote relevant portions of the judgment and order dated 13.02.2019 passed by the Co-ordinate Bench of this Court in CRR No. 3241 of 2018. In the middle of the said judgment and before most of the inferences on merits could be drawn, this Court had recorded the following:-

"I have made it clear in my foregoing paragraph that the learned trial Court has to consider the police papers at the time of consideration of charge as to whether the offences alleged in the charge-sheet would come within the realm of Section 304A IPC or under Section 304 II of IPC."

After this, the judgment went on to discuss several issues. At the end of the said judgment, it was observed as follows:-

"Therefore, it emerges from such observation made by the Hon'ble Supreme Court that at the initial stage of opening of the trial it is not open for the trial Court to make a roving or fishing inquiry into the probabilities and surrounding circumstances concerning the offence.

I am of the considered opinion that trial starts after the framing of the charge on the basis of the charge-sheet and the case diary containing the documentary evidence collected at the time of investigation. Indubitably,

charge-sheet in respect of the aforesaid sections has been submitted on conclusion of investigation on finding *prima facie* case which are required to be substantiated on evidence to be adduced by the prosecution at the trial to hold the petitioner guilty or not guilty of the offences charged with.

Ergo, having regard to the cardinal principle of law in the field and on perusal of the order impugned I do not find that it suffers from any illegality. Notwithstanding the observation so made in this judgment I hold that it shall have no bearing in the trial of the case and the learned trial Court will proceed to consider framing of the charge in accordance with law and to take all endeavor for disposal of the case as expeditiously as possible.

In the result, revisional application being No. CRR 3241 of 2018 and CRAN No. 3192 of 2018 are disposed of.”

14. From the above, this Court finds that the Co-ordinate Bench of this Court was of the view that there was no illegality in the impugned order rejecting the petitioner’s prayer for discharge. Implicitly, it was concluded that a *prima facie* case was made out to proceed to the next stage. More particularly, there was no direction either implicit or explicit, to remand back the matter to the learned trial Court for deciding the prayer of the accused for discharge afresh.

15. It is germane to mention that the petitioner did not challenge the order passed by the Co-ordinate Bench of this Court in CRR 3241 of 2018 before the Hon’ble Apex Court.

16. The observations of the Co-ordinate Bench of the this Court, as quoted earlier, as regards the requirements for the framing of charge can

only be treated as a part of general discussions and a prefatory reasoning for considering the materials on record in order to come to the conclusion that there was no illegality in the impugned order. The said above referred portion does not at all indicate that the learned trial Court was to hear out the matter afresh on the question of discharge of accused. Therefore, in view of the decision in *Dinesh Tiwari vs. State of U.P.* (supra), it is not necessary that the disputed questions of fact had to be gone into afresh at the stage of formal framing of charge when those had already been going into while deciding the prayer of the accused for discharge.

17. Moreover, entertaining a revisional application on the same disputed questions on which a revision had earlier been decided would amount to reviewing the earlier decision, which is not permissible in law.

18. Besides, the order framing charge is in form and there is no illegality per se in the impugned order passed by the learned Trial Court. In fact, the learned Trial Court need not have given such detailed reasoning for framing the formal charges. But, that does not vitiate the order framing charges.

19. In view of the above discussions, this Court is of the view that the present revisional application cannot be maintained on the grounds taken and consequently, the other issues agitated on merits by the parties herein need not be gone into.

20. The revisional application is, accordingly, dismissed.

21. However, there shall be no order as to costs.

22. The learned Trial Court is requested to conclude the proceeding as expeditiously as possible. The petitioner shall be at liberty to raise all the points taken up in this revision before the learned Trial Court.

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

24. Parties shall act on a server copy of the order obtained from the official website of High Court at Calcutta.

(Jay Sengupta, J.)

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