

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No. 12 of 2022

An application under section 397 of the Code of Criminal Procedure, 1973 challenging the order dated 18.11.2021 passed by Additional Sessions Judge, Rairangpur in S.T. No. 17 of 2018.

AFR

**Dillip Kumar Agarwal @
Agarwalla**

..... **Petitioner**

-Versus-

State of Odisha and others **Opp. Parties**

Advocate(s) appeared in this case :-

For Petitioner : M/s. Kishore Kumar Mishra,
B.R. Behera, N.A. Kulraj & A. Baral,
Advocates

For Opp. Parties : Mr. S.K. Mishra,
Addl. Standing Counsel
[for O.P. No.1]

Mr. B.N. Mohapatra, Advocate
[for O.Ps. No.2 to 5]

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

31st January, 2022

SASHIKANTA MISHRA, J.

The present revision is directed against the order dated 18.11.2021 passed by learned Additional Sessions Judge, Rairangpur

in S.T. Case No. 17 of 2018, whereby, the petition filed by the petitioner- informant for alteration of charge under Section 216 of Cr.P.C. was rejected.

2. Sans unnecessary details, the facts of the case are that the petitioner lodged an FIR on 13.01.2018 before the Rairangpur Town Police Station alleging that his daughter, who was given in marriage to opposite party no.3 on 28.04.2015, was subjected to constant physical and mental cruelty by him and the other accused persons, who are her in-laws. It was further alleged that the opposite party no.2, who is the father-in-law, used to commit rape on his daughter-in-law and when she tried to complain, her husband questioned the paternity of their six months' old son and also threatened to kill the child. The victim thereafter narrated the incident to her brother and sister-in-law over phone as well as by sending messages on whatsapp. On 12.01.2018, the petitioner received a phone call from opposite party no.2 that his daughter had been admitted to the hospital with 90% burn injuries. On the next day, i.e. on 13.01.2018, at about 11.20 p.m. the victim succumbed to her injuries. In the meantime on 13.01.2018 at about 5 a.m., the petitioner-informant lodged the FIR which came to be registered as Rairangpur Town P.S. Case No.6 of 2018 corresponding to G.R.

Case No. 21 of 2018 of the Court of learned S.D.J.M., Rairangpur for the offences under Sections 498-A/307/376(2)(f)/376(2)(n)/506/201/34 IPC. After completion of investigation, police submitted charge sheet against the father-in-law (opposite party no.2) under Sections 498-A/307/376(2)(n)/506/201/34 IPC and against other accused persons under Sections 498-A/306/201/34 IPC. Learned S.D.J.M., Rairangpur vide order dated 17.03.2018 however took cognizance of the offences under Sections 498-A/302/376(2)(f)(n)201/34 of IPC against the father-in-law (opposite party no.2) and under Sections 498-A/302/201/34 IPC against the other accused persons. Challenging such order of cognizance, the accused persons approached this Court by filing CRLMC No. 329 of 2019 and CRLMC No. 367 of 2019, both of which were dismissed vide common order passed by this Court on 13.10.2020. Subsequently, the case was committed to the Court of Addl. Sessions Judge, Rairangpur for trial being numbered as S.T. Case No. 17 of 2018. Considering the materials on record, the learned Addl. Sessions Judge framed charge under Sections 498-A/ 376(2)(f)(n)/306/201/34 of IPC against the father-in-law (opposite party no.2), under Sections 498-A/306/201/34 of IPC against the husband (opposite party no.3)

and under Sections 306/201/34 of IPC against the other accused persons. In other words, no charge under Section 302 of IPC was framed despite cognizance being taken of the said offence. The petitioner-informant having been permitted to appear in the case through his counsel, challenged the order framing charge in CRLREV No.235/2021 before this Court, which was disposed of vide order dated 09.08.2021 by passing the following order:

- “1. This matter is taken up through Hybrid mode.*
- 2. Heard learned counsel for the petitioner.*
- 3. The petitioner, who is the informant in this case, has challenged the order 8.3.2021 passed by the learned Addl. Sessions Judge, Rairangpur in S.T. No.17 of 2018 not to frame the charge under Section 302 IPC against the accused persons and discharge them from the said offence though the cognizance of the said offence has been taken.*
- 4. Since the court has jurisdiction to alter the charge at any stage of the proceeding and during the course of trial, if any evidence is brought to the notice of the trial court indicating the fact that prima facie materials are there under Section 302 IPC, liberty is given to the petitioner to bring to the notice of the trial court at that very moment for alteration of charge and in that event, the trial court shall decide the same in its own merit than without being influenced by any of the observations made but by the evidence on the record in the interlocutory proceeding, this Court disposes of the Criminal Revision of the petitioner.*
- 5. Urgent certified copy of this order be granted on proper application.”*

Pursuant to such order of this Court, the petitioner filed an application under Section 216 of Cr.P.C. in the court below on 08.11.2021 with a prayer to add charge under Section 302 of IPC

against the accused persons. Said petition was rejected vide order dated 18.11.2021, which is impugned in the present revision.

3. Heard Mr. Kishore Kumar Mishra, learned counsel for the petitioner-informant, Mr. S.K. Mishra, learned Addl. Standing Counsel for the State and Mr. B.N. Mohapatra, learned counsel appearing for opposite parties no. 2 to 5.

4. Referring to the petition filed by the informant under Section 216 of Cr.P.C., which is enclosed as Annexure-6 to the Revision Petition, Mr. Kishore Kumar Mishra has contended that the so called dying declaration recorded by the I.O., which purportedly suggests a case of suicide by the deceased, is not at all free from doubts and moreover the same contradicts the I.O.'s own endorsement made in the inquest report regarding cause of death. It is further contended that the father (P.W.-30) and mother (P.W.-27) of the victim have categorically deposed that when they had met their daughter while she was undergoing treatment at Jamshedpur Hospital, she had clearly stated that her father-in-law had been raping her and since she shared such messages with her brother and sister-in-law, the accused persons after coming to know of the same set her on fire with an intention to kill her. According to Mr. Kishore Kumar Mishra, the uncontroverted testimony of the father and

mother of the deceased as above, prima facie gives rise to grave suspicion regarding commission of the offence of murder and not suicide as claimed by the I.O.. It is therefore, contended by Mr. Mishra that this much is sufficient to add charge under Section 302 of IPC but learned court below made a roving enquiry and tried to determine the probative value of the evidence thereby, prejudging the trial itself. It is also contended by Mr. Mishra that the detailed observations made by learned court below with regard to maintainability or otherwise of the electronic evidence are entirely unwarranted, premature and seriously prejudices the case of the prosecution.

5. Mr. Sangram Keshari Mishra, learned Addl. Standing Counsel fairly submits that even at the time of addition or alteration of charge as envisaged under Section 216 of Cr.P.C., the Court is not required to examine the probative value of the evidence adduced before it, but only to determine whether there are materials prima facie to presume the commission of the offence in question. Having submitted so, it is nevertheless contended by Mr. Mishra that the I.O. cannot be expected to be partial to any party and in the instant case, there are adequate materials on record to show that the I.O. had acted

with due promptitude and diligence in securing the electronic evidence suggesting commission of suicide by the deceased.

6. Mr. B.N. Mohapatra has supported the impugned order by submitting that learned court below has discussed the pros and cons of the case in detail duly considering the rival contentions put forth by the parties and therefore, the impugned order cannot be faulted with in any manner whatsoever. It is further submitted that apart from the evidence of the father and mother there is nothing on record to even remotely suggest that the offence under Section 302 was committed by the accused persons and on the contrary, there is foolproof evidence that the deceased had poured kerosene and set herself on fire. It is also contended by Mr. Mohapatra that the evidence of the father and mother of the deceased being on the face of it not believable, learned Court below has rightly rejected the same and therefore, no interference whatsoever is warranted.

7. Before advertng to the facts of the case, a brief discussion on the relevant position of law would be apposite. There is no dispute that the charge can be altered at any stage of the proceeding as provided under Section 216 of Cr.P.C. This Court in CRLREV No. 325 of 2021 as per the order quoted hereinbefore, granted liberty to the petitioner-informant to move the trial Court for

alteration of the charge specifically directing the Court below to decide the same basing on the 'evidence on record'.

'Evidence on record' in the present context, obviously means consideration of the evidence on its face value to see whether a prima facie case is made out or not and not to determine the probative value thereof as is done to finally decide whether the accused is guilty or not.

8. In the case of *Hasanbhai Valibhai Qureshi vs. State of Gujarat*, reported in (2004) 5 SCC 347, the Hon'ble Supreme Court held that if during trial the trial court on a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced is satisfied that any addition or alteration of the charge is necessary, it is free to do so, and there can be no legal bar to appropriately act as the exigencies of the case warrant or necessitate. Therefore, it is clear that the Court can exercise the power of addition or modification of charges under Section 216 of Cr.P.C., only when there exists some material before it, which has some connection or link with the charges sought to be amended, added or modified.

9. Examined in the light of the above legal propositions, this Court finds that the point to be decided in this case hinges

around the question as to whether the deceased committed suicide or was murdered by the accused persons. The prosecution has led evidence in the form of the I.O. (P.W.-46) that at the time of initial treatment of the deceased at SDH, Rairangpur on the date of occurrence, i.e., on 22.01.2018 she stated before her that she poured kerosene over her body and set fire in order to commit suicide but did not disclose the cause of suicide or from which source she procured kerosene. The prosecution has also examined the father and mother of the deceased as already stated, both of whom testified that when they went to meet the victim while she was being treated at the Hospital in Jamshedpur, she stated before them of being raped by her father-in-law and that as she intimated the matter through Whatsapp to her brother and sister-in-law, the accused persons after coming to know about the same, collectively set fire to her. Thus, on the face of it, there are two views as regards the cause of death of the deceased. Though it has been argued at length by learned counsel for the petitioner that the I.O's testimony cannot be accepted because of non-compliance of the provision under Section 65-B of the Indian Evidence Act as also due to the fact that there is an unexplained delay of about six months in sending the purported statement recorded by the I.O. on her mobile phone to the SFSL, this Court is

of the view that it is a matter to be considered by the trial Court at the appropriate stage as any observation made by this Court may amount to influencing the decision of the trial Court. This Court therefore considers it just and proper to make only a prima facie assessment of the evidence on record to see whether a case for alteration/addition of charge is made out or not.

10. As already stated hereinbefore, the father and mother of the victim have clearly deposed that the accused persons collectively set fire to her with an intention to kill her. Significantly, these highly relevant statements have not been taken in contradiction during cross-examination by the defence. Further, in the FIR lodged at 5.00 a.m. on 13.01.2018, the informant has clearly alleged that his daughter revealed before him and his wife at TMH, Jamshedpur that as she had communicated about the misdemeanours of her in-laws through whatsapp messages, they had attempted to kill her by pouring kerosene and setting her on fire. The whatsapp messages referred to by the witnesses have also been seized by Police and the concerned seizure list has been admitted into evidence. In the inquest report, copy of which has been enclosed as Annexure-9 to the Revision Petition, the I.O. has stated as follows:

“The cause of death of deceased appears as reported by the complt. as due to pouring of kerosene and setting of fire.”

The inquest was held on 14.01.2018 in between 1 p.m. to 2.05 pm. So if the deceased had stated before the I.O. on the date of occurrence itself i.e. on 12.01.2018 at S.D.H., Rairangpur that she had poured kerosene and set herself on fire, it is not understood as to why the I.O. did not mention the same under the column of the inquest report meant for recording his opinion as to cause of death and instead chose to mention the cause as reported by the complainant. So taking a broad view of the evidence already on record as discussed above, the existence of at least materials to presume that the accused persons had committed murder of the deceased cannot simply be ignored. Of course this Court would hasten to add that the above observation may not be treated as a finding of guilt against the accused persons because the same would entirely depend upon appreciation of the probative value of such evidence by the trial Court after conclusion of the trial.

11. In this context, reference to a recent decision of the Apex Court rendered in the case of ***Dr. Nallapareddy Sridhar Reddy vs. The State of Andhra Pradesh and others*** reported in (2020) 12

SCC 467 would be in order. In the said case, the Apex Court have held as under”

“22. The appellant has relied upon a two-Judge Bench decision of this Court in Onkar Nath Mishra v. State (NCT of Delhi) (2008) 2 SCC 561 : (2008) 1 SCC (Cri) 507] to substantiate the point that the ingredients of Sections 406 and 420 IPC have not been established. This Court while dealing with the nature of evaluation by a court at the stage of framing of charge, held thus :

“11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.”

(emphasis supplied)

25. The veracity of the depositions made by the witnesses is a question of trial and need not be determined at the time of framing of charge. Appreciation of evidence on merit is to be done by the court only after the charges have been framed and the trial has commenced. However, for the purpose of framing of charge the court needs to prima facie determine that there exists sufficient material for the commencement of trial. The High Court has relied upon the materials on record and concluded that the ingredients of the offences under Sections 406 and 420 IPC are attracted. The High Court has spelt out the reasons that have necessitated the addition of the charge and hence, the impugned order does not warrant any interference.”

12. Coming to the impugned order, this Court is constrained to observe that learned Court below has dealt with the matter from an entirely different approach and has also delved deep into the evidence, to determine its probative value, which was absolutely not required and has ended up making certain observations which may amount to prejudging the trial itself. In particular, the observations made by learned Court below to test the veracity of the evidence of the father and mother of the deceased (P.Ws. 30 and 27) are entirely unwarranted and unnecessary. Similarly, the observations with regard to admissibility of the electronic evidence to conclusively hold that there has not been any manipulation of the videograph of the statements of the deceased also amounts to prejudging the trial. In fact, the learned Court below has even gone to the extent of holding that “there is nothing to disbelieve the oral evidence of the I.O. that the deceased had given an oral dying declaration before her stating therein that she has poured kerosene and then set her fire to herself in order to commit suicide”. Similarly, learned Court below after making a detailed dissection of the evidence of P.Ws. 27 and 30 has observed –“therefore, in view of the discussions made above, prima facie it has to be held that evidence of both P.W. 27 and P.W.30 are not believable to add charge under Section 302/34 of

IPC". All these observations were entirely unwarranted and not required to be made while dealing with the application under Section 216 of Cr.P.C.

13. It is stated at the cost of repetition that the only thing the Court should have looked into is the existence or otherwise of evidence to draw a presumptive opinion regarding commission of the offence under Section 302 IPC without undertaking an exercise to determine the veracity of the evidence of the I.O. and P.Ws.27 and 30. The same is required to determine whether the accused persons are guilty of the alleged offence or not but not at the stage of addition/alteration of charge. At this stage, the only thing required to be seen by the Court is if the materials on record have a direct link or nexus with the ingredients of the alleged offence. On the contrary, it is seen that learned court below did not assess the evidence of P.Ws. 27 and 30 in the proper perspective having regard to the fact that they had made identical allegation at the earliest possible opportunity, that is, in the FIR. Further, the fact of seizure of the whatsapp messages as also the endorsement of the I.O. in the inquest report also ought to have been considered by learned Court below.

14. For the forgoing reasons therefore, this Court finds that the reasoning adopted by the learned Court below is erroneous and

hence, not acceptable. As has already discussed hereinbefore, the evidence on record is sufficient to form a presumptive opinion regarding commission of the offence under Section 302 of IPC against the accused persons and therefore, in the considered view of this Court, addition of the charge under the said offence is warranted.

15. In the result, the impugned order is set aside. Learned Court below is directed to add charge under Section 302 of IPC. It is needless to mention that in doing so, learned Court below shall adopt such procedure as is envisaged under Section 216 of Cr.P.C. before proceeding further. It is made clear that any observation made in this order shall not influence the trial Court while finally deciding the case.

As the restrictions due to resurgence of Covid-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No. 4587, dated 25th March, 2020, modified by Notice No. 4798, dated 15th April, 2021, and Court's Office Order circulated vide Memo Nos. 514 and 515 dated 7th January, 2022.