

A.F.R.

ORISSA HIGH COURT: CUTTACK

CRLMC No.2476 of 2015

In the matter of application under Section 482 of the
Criminal Procedure Code, 1973.

Somya Ranjan Parida Petitioner

-Versus-

State of Orissa and another Opp. Parties

For Petitioner : Mr. A.R.Das, Advocate

For Opp. Parties : Mr. P.K. Pattnaik, AGA,
Mr. D. Nayak, Sr. Advocate
[O.P. No. 2]

P R E S E N T:

HONOURABLE MR. JUSTICE G. SATAPATHY

Date of hearing: 27.10.2022: Date of judgment:22.12.2022

G.SATAPATHY, J. The Petitioner has challenged the order
passed on 25.04.2014 by learned S.D.J.M., Bhadrak in
protest petition in 1CC Case No.404 of 2013 taking
cognizance of offence U/Ss. 302/34 of IPC as well as the

issuance of process against the Petitioner and others and consequently, the complaint in an application U/S. 482 Cr.P.C.

2. The factual matrix in nutshell is that on 11.05.2011, one Bibhu Prasad Dash was found drowned in river Salandi at Bagurai Ghat near Januganj railway bridge and accordingly, Bhadrak Rural P.S U.D. Case No. 26 of 2011 was registered which was inquired into, but being dissatisfied, the father of deceased namely Satya Narayan Das presented a report addressing IIC Bhadrak Police Station on 15.11.11 which was registered as FIR vide Bhadrak Rural P.S. Case No. 487 of 2011 corresponding to G.R. Case No. 1848 of 2011 of the Court of S.D.J.M., Bhadrak in obedience to the order passed by this Court in W.P.(Crl) No. 1142 of 2011. In such FIR, the father of the deceased has alleged that he came to know that his son had not died out of drowning, but he suspects the five friends of deceased including the Petitioner Somya Ranjan Parida had conjointly killed his son in a pre-planned manner. It is also stated in the FIR that the Petitioner is

senior to the deceased and his friends had forcibly taken money from the deceased during his life time out of his mess expenses and they were also forcing him to roam outside. It is also alleged that during 28.04.2011 to 30.04.2011, one call had been received by the younger brother in the mobile phone of the deceased and in such call, co-accused Banti had threatened by taking the nick name of deceased as Raja to not to come to Bhadrak, otherwise he would not return. However, the younger brother of the deceased did not take it seriously. On the above facts, the father of the deceased suspects that his son had been killed by the Petitioner and his four friends in a pre-planned way.

3. On receipt of the FIR, the matter was investigated into, but the I.O. submitted a final report as "mistake of fact" in G.R. Case No. 1848 of 2011, whereafter the learned Court issued notice to the informant and pursuant to such notice, the informant Satya Narayan Das filed a protest petition in 1CC Case No. 404 of 2013 in which the learned S.D.J.M., Bhadrak recorded the initial statement of

the complainant and conducted inquiry U/S. 202 of Cr.P.C. by recording statement of witnesses. After going through the complaint, initial statement of the complainant and statement of other witnesses examined for the complainant in inquiry U/S. 202 of Cr.P.C. and on finding prima facie and sufficient materials, learned S.D.J.M., Bhadrak took cognizance of offence 302/34 of IPC and issued processes against the Petitioner and others. Hence, this CRLMC.

4. In assailing the impugned order, learned counsel for the Petitioner has submitted that pursuant to an order passed in W.P. (Crl.) No. 1142 of 2011 filed by OP No.2, Bhadrak Rural P.S. case No. 487 of 2011 was registered against the Petitioner and others for offence U/Ss. 302/34 of IPC, but such allegation was not found to be established in the course of investigation resulting in submission of final report as "mistake of fact" by the Investigating Police Officer and OP No. 2 being dissatisfied with such report of police has filed a protest petition in

shape of complaint against the Petitioner and others in 1.C.C. Case No. 404 of 2013 in which the learned S.D.J.M., Bhadrak by the impugned order has issued process against the Petitioner. Learned counsel for the Petitioner by drawing attention of the Court to the Post Mortem Report of the deceased has submitted that the cause of death of the deceased was opined by the Doctor to be on account of drowning and at the inception, the cause of death being not homicidal, no ingredient offence U/S. 302 of IPC is thereby, disclosed in the complaint and all the allegations made against the Petitioner and others are on the basis of the suspicion as the assertions made by the OP No. 2 in Paragraph 1 to 4 and 6 of the column No. 8 of the complaint under the heading "facts" discloses allegation against the Petitioner merely on surmises.

It is also submitted that the complainant in his initial statement has merely suspected the involvement of the Petitioner which was also reiterated by her husband in the inquiry U/S. 202 of Cr.P.C., but suspicion howsoever strong cannot take the place of proof and in this case, the

learned S.D.J.M., Bhadrak without applying his mind has mechanically taken cognizance of the offence U/Ss. 302/34 of IPC which is never made out against the Petitioner and none of the ingredients of offence U/S. 302 of IPC is disclosed either in the complaint or in the statement of the complainant or witnesses and thereby, the impugned order having passed without any basis may be required to be quashed. In summing up his argument and relying upon the decision in the case of ***Harischandra Prasad Mani and others Vrs. State of Jharkhand and another; AIR 2007 SC 1117***, learned counsel for the Petitioner has submitted that when the order taking cognizance is merely on the basis of suspicion, such order together with the complaint is liable to be quashed. Accordingly, learned counsel for the Petitioner has prayed to quash the impugned order and the criminal proceeding against the Petitioner.

5. In reply Mr. D.Nayak, learned Senior counsel by taking through the averments of the complaint and initial

statement of the complainant has submitted that the learned S.D.J.M., Bhadrak has never committed any illegality in taking cognizance of offence in view of the fact that the place where the deceased was stated to have died due to drowning had depth of two to three feet in the river in which a normal person knowing swimming cannot die due to drowning, unless he is forcibly drowned. It is also submitted that the informant after lodging the FIR had many times requested the I.O. for proper investigation and measurement of the depth of water at the spot, but the I.O. had avoided such plea of the Informant in the investigation of the case for reason best known to him and the statement of witnesses were distortedly recorded by the I.O. and the motive of the crime, which was on account of relationship between the deceased and the sister of accused Bramhaswarup Mohapatra, was never investigated into which compelled the informant to file a protest petition in the shape of complaint and the learned S.D.J.M., Bhadrak after taking into consideration the materials in the complaint together

with initial statement of the complainant and statement of witness in an inquiry U/S. 202 Cr.P.C. has taken cognizance of offence and, therefore, the same having considered in proper prospective, the impugned order does not need any interference in this CRLMC. In relying upon the decision in the case of ***Bhusan Kumar and another Vrs. State (NCT of Delhi) and another;(2012) 5 SCC 424***, learned counsel for the Petitioner has submitted that at the stage of summoning of the accused, Magistrate is not required to explicitly state the reason for issuance of summon and when the Magistrate is of the opinion that there exists sufficient grounds for summons to be issued, he can issue summons to the accused and in this case, the Magistrate having judicially applied his mind has issued process against the Petitioner which cannot be faulted with and thereby, the impugned order having passed on sound judicial discretion of law needs no interference and accordingly, the CRLMC being unmerited may kindly be dismissed.

6. Reverting back to the facts on record, admittedly there appears death of one Bibhu Prasad Dash on 11.05.2011 and pursuant to such death, Bhadrak Rural P.S. U.D. Case No. 26 of 2011 was registered and the matter was enquired into, but subsequently, on 15.11.2011 an F.I.R. being presented by one Satya Narayan Dash (Father of the deceased), Bhadrak Rural P.S. Case No. 487 was registered against the Petitioner and others on 28.11.2011, pursuant to the direction passed in W.P. (Crl.) No. 1142 of 2011 and the allegation made by the informant was investigated into, but upon investigation, the police found the case to be a "mistake of fact" and accordingly, submitted final report and thereafter, the said Satya Narayan Dash instituted a complaint in the shape of protest petition in which the cognizance was taken by the impugned order which is under challenge by the Petitioner in this CRLMC. The word cognizance has not been defined in the Cr.P.C. although the expression "cognizance" and "issue of process" are found place in Sections 190 and 204 of Cr.P.C. According

to Section 190 Cr.P.C., cognizance of any offence may be taken upon receiving a complaint of facts which constitute such offence or upon a police report of such facts or upon information received from any person other than a police officer, or upon the knowledge of the Court taking cognizance, that such offence has been committed. It is, thus, clear that cognizance of offence can be taken only on commission of offence and, therefore, in essence the complaint or information must disclose commission of offence, otherwise cognizance cannot be taken. At the stage of taking cognizance, the Magistrate has to be satisfied on analysis of complaint of the facts/police reports of such facts/information received from any person other than a police officer, or upon his own knowledge, that there exists sufficient ground disclosing commission of offence for proceeding in the matter and at that stage, it is not the duty of the Magistrate to apply his mind to the evidence collected to be adequate for supporting the charge which can be determined only at the trial, but not at the stage of enquiry preceding taking

cognizance, and if the Magistrate considers that there are sufficient grounds for proceeding against the accused persons, the Magistrate may issue processes against such accused persons as contemplated U/S. 204 of Cr.P.C. In this case, the learned S.D.J.M.,Bhadrak by the impugned order has taken cognizance of offence and issued process against the Petitioner and it is ,therefore, required to be scrutinized whether the complaint and materials collected/submitted disclose the necessary ingredients of offence U/Ss. 302/34 of IPC which will enable the Magistrate to take cognizance of offence. On proceeding to examine to find out the impugned order to have successfully passed the legal scrutiny on the aforesaid principles, it appears that the informant has presented the FIR on 15.11.2011 before the IIC, Bhadrak which was registered on 28.11.2011 pursuant to the direction of this Court in W.P. (Crl.) No. 1142 of 2011 for the death of his son on 11.05.2011, but the date of death was not mentioned in the FIR. A careful perusal and scrutiny of the aforesaid FIR would go to disclose that the informant has

lodged the FIR on suspicion as he has stated in the FIR that the death of his son is not an unnatural death, but he suspects it to be pre-planned murder and he suspects the Petitioner and four others to have killed his son. One of the ingredients of murder is homicidal death of the deceased, but the Doctor who had conducted autopsy over the deceased has opined the cause of death was due to Asphyxia for drowning. The Post Mortem Report also discloses that the Doctor had conducted autopsy within six hours of death of the deceased. The Doctor in such Post Mortem Report has not mentioned any external injury to have found on the person of the deceased. It is stated in the Inquest Report of the deceased by the witness Radheshyam Dash (Brother of the Informant) about suspicious death, but the involvement of the Petitioner and others have never been stated in such Inquest Report.

7. Feeling aggrieved with the investigation of the case and submission of final report as a "mistake of fact", the

Informant has instituted the complaint, but in such complaint, nowhere the complainant has specifically attributed any allegation for the role of the Petitioner or anybody in the commission of murder of his son, no matter he suspects the Petitioner and others for the death of his son in the complaint, but law is well very clear that suspicion howsoever strong cannot take the place of proof. This Court, however, is conscious of the fact that what would be the mental condition of the father on the unnatural death of his young son and thereby, this Court has every sympathy for the complainant-father, but it cannot deviate the Court from the path of rectitude in rendering justice to the person who is entitled for it by taking a contrary view to the law merely on the ground of sympathy or emotion. It be noted, the learned Senior Counsel appearing for O.P. No. 2 has strenuously argued and tried to convince this Court that the learned S.D.J.M., Bhadrak has not committed any illegality in taking cognizance of offence, but the Court is duty bound to examine the allegations/materials as produced before it in

the final form/complaint and to carefully consider the evidence to find out whether the necessary ingredients of any offence are disclosed and to satisfy itself, whether the same make out any case against the accused to proceed further in the case by way of taking cognizance of offence and issuing process against the accused persons.

8. On coming back to scrutinize the initial statement of the complainant, it appears that the complainant in his initial statement has stated that on being asked by his wife, all the accused persons (Including the Petitioner) narrated different stories regarding death of his son and hence, suspecting the accused persons, he lodged the FIR against them. In his initial statement, the complainant has definitely complained of defect/fault in the investigation, but that *per se* would not attract any criminal liability against the Petitioner.

9. Similarly, it appears from the statement of the wife of the complainant in the inquiry U/S. 202 Cr.P.C. that when she asked them (accused persons) about the cause

of death of her son, they reacted in a suspicious manner and accused Satyajit told her that her son died by drowning in the water while they were taking bath in the river Salandi and she found the depth of the water to be only two to three feet at the spot and suspecting the accused persons, she lodged the FIR. Besides, one Nidhi Sethy has also been examined on behalf of the complainant in the inquiry U/S. 202 Cr.P.C. and it appears from his statement in such enquiry that he along with son of the complainant visited the spot where Raja (Deceased) died by drowning, but there, he found only knee level water, where a man cannot die by drowning. A careful scrutiny of the statement of complainant and witnesses in the inquiry U/S. 202 Cr.P.C., it goes without saying that they suspect the involvement of the accused persons in this case for murder of the deceased, but it is again reiterated that suspicion howsoever strong cannot take the place of proof.

10. Admittedly, the complainant appears to have not brought any direct evidence/material against the Petitioner and others for commission of murder of the deceased and the complainant suspects the accused persons mainly on the basis of conduct of accused persons giving prevaricating stories and one of the accused Brahmaswarup giving threatening for love relationship of the deceased with his sister and lastly, noticing some blood stain on the mouth and nose of the deceased as well as finding of sand inside the mouth of the deceased but the Post Mortem report does not disclose about finding any injury, either external or internal, on the person of the deceased nor it discloses finding of any blood stain on the mouth and nose of the deceased as well as the inquest report also reveals neither any injury nor any blood stain on the person of the deceased. Naturally, when the dead body of the deceased was recovered from the river, there may not be any possibility of finding any blood stain on the person of the deceased, especially when no injury was noticed by the Doctor conducting Post

Mortem over the dead body as per his report. The circumstances as stated above by the complainant and his witnesses would only go to show some suspicion, which cannot be the foundation for taking cognizance of offence U/S. 302 of IPC, more particularly when one of the essential ingredients of offence U/S. 302 of IPC which is homicidal death of the deceased, has not been disclosed/established in any of the material produced by the complainant. There cannot be any dispute about the fact that at least there must be some material on the basis of which cognizance may be taken and summon can be issued, but cognizance cannot be taken merely on suspicion. It is no doubt advanced on behalf of the O.P. No. 2 by relying upon the decision in **Bhusan Kumar (Supra)** that once the Magistrate has exercised his discretion, it is not for the High Court, or even the Apex Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegation in the complaint, if proved, would ultimately end in conviction of the

accused, but there is no such exercise by this Court to find out the guilt of the accused persons in this case, however, it has been held more than once by the Apex Court in catena of decisions that the High Court would be justified in quashing the complaint/criminal proceeding where on a bare perusal of uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused. Besides, the decision relied upon by the Petitioner in **Harish Chandra (Supra)**, the Apex Court has held that order taking cognizance merely on the basis of suspicion is liable to be quashed.

11. A cumulative assessment of complaint together with the initial statement of the complainant and the statement of the witnesses recorded in the inquiry U/S. 202 Cr.P.C. by the learned S.D.J.M., Bhadrak, this court is of the considered view that the complainant has raised only mere suspicion, but such suspicion raised by the

complainant after a long lapse of time of around six months as has been done in this case together with the complaint and other materials so produced by the complainant only disclose some feeble suspicion of involvement of the Petitioner in the case and when such suspicion is considered on the face of the opinion of Doctor as to the cause of death of the deceased to be on account of drowning and in absence of any allegation by the complainant either in his initial statement or in the complaint that the death of the deceased was on account of forcible drowning and taking into consideration a bare perusal of the complaint and the statement of the complainant and witnesses do not prima facie disclose the necessary ingredients of murder, this Court is of the considered view that the criminal proceeding against the Petitioner is nothing but an abuse of process of Court and a meticulous examination of the aforesaid materials, it is considered that the ultimate chances of conviction of the petitioner in this case are bleak and no useful purpose would likely to be served by allowing the criminal

prosecution to continue against the Petitioner. Hence, the impugned order is considered to have been passed without proper application of judicial mind and, therefore, the order summoning the accused is liable to be quashed and accordingly, the impugned order taking cognizance of offence together with issuance of process against the Petitioner is hereby quashed.

Resultantly, this CRLMC is allowed to the extent indicated above on contest, but in the circumstance without any order of costs. As a necessary corollary, the criminal complaint and the criminal proceeding as a whole being unsustainable in the eye of law is hereby quashed.

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G.SATAPATHY,
JUDGE

Orissa High Court, Cuttack
The 22nd December, 2022, Priyajit