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IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.3042 of 2011

Smt. Mita Nayak and another

....

Petitioners

Mr. S.P. Mohanty, Advocate

-versus-

State of Orissa

....

Opposite Party

Mr. S.N. Das, A.S.C.

**CORAM:
THE CHIEF JUSTICE**

**ORDER
25.03.2022**

Order No.

10. 1. The present application has been filed by two sisters-in-law of the deceased questioning the framing of charge by the trial court by an order dated 27th July 2011 in ST No.208 of 2010.
2. While issuing notice in the present petition on 15th September 2011, there was an interim stay of the proceedings in the trial court. That interim stay order has continued.
3. Learned counsel appearing for the Petitioners points out that although among the other offences mentioned, one punishable under Section 302 IPC was stated in the charge sheet, it was mentioned in the charge sheet itself that "however, evidence under Section 302 IPC could not be established." Even in the order passed by the trial court on 17th June 2011 rejecting petition filed by the present Petitioners under Section 227 of Cr.P.C. The trial court only mentioned that "I have reason enough to hold that there are sufficient materials on record for framing charge against the accused persons under Sections 498A IPC, 304B IPC, 306 IPC read with 34 IPC and under Section 4 of Dowry Prohibition Act."

4. Despite observing as above and the charge sheet itself stating that there was no evidence for the offence under Section 302 IPC, while framing the charge by the impugned order dated 27th July 2011, the trial court appears to have added Section 302 IPC while framing the charge.

5. Learned counsel for the Petitioners places reliance on the decision in *Jasvinder Saini v. State (Government of NCT of Delhi) (2013) 7 SCC 256* to urge that there has to be a proper discussion by the trial court if it was going to add a grave charge like one punishable 302 IPC particularly when the order passed rejecting the application for discharge made no reference to it.

6. Mr. S.N. Das, learned Additional Standing Counsel for the State refers to Section 216 Cr.P.C. and submits that it would be open to the trial court to add a charge at the stage of framing of charge if the evidence warrants it.

7. As far as the last submission is concerned, it is seen that the charge sheet itself says that there was no evidence justifying the charge under Section 302 IPC. That apart, the order of the trial court dismissing the application filed by the present Petitioners under Section 227 Cr.P.C. seeking discharge made no reference to Section 302 IPC. The addition of Section 302 IPC as an offence while framing the charge is not to be done casually as explained in the following paragraphs in *Jasvinder Saini* (supra):

"15. It is common ground that a charge under Section 304B IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304B also there is a death involved. The question whether it is murder punishable under Section

302 IPC or a dowry death punishable under Section 304B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial Court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the Court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial Court in that view of the matter acted mechanically for it framed an additional charge under Section 302 IPC without advertent to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir's case (supra). The High Court no doubt made a half hearted attempt to justify the framing of the charge independent of the directions in Rajbir's case (supra), but it would have been more appropriate to remit the matter back to the trial Court for fresh orders rather than lending support to it in the manner done by the High Court.

16. In the light of what we have said above, the order passed by the trial Court and so also that passed by the High Court are clearly untenable and shall have to be set aside. That would not, however, prevent the trial Court from re-examining the question of framing a charge under Section 302 IPC against the appellant and passing an appropriate order if upon a prima facie appraisal of the evidence adduced before it, the trial Court comes to the conclusion that there is any room for doing so. The trial Court would in that regard keep in view the decision of this Court in Hasanbhai Valibhai Qureshi v. State of Gujarat and Ors. (2004) 5 SCC 347 where the Court has recognized the principle that in cases where

"the trial Court upon 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".

8. In the present case, the Court is satisfied that without any discussion of the evidence whatsoever, the trial court ought not to have proceeded to add Section 302 IPC. No purpose will be served in remanding the entire matter to the trial court to re-examine if Section 302 IPC needs to be added because the charge sheet itself clearly states that there is no evidence to support such a charge. In that view of the matter, the impugned order dated 27th July 2011 framing the charge is modified by deleting Section 302 IPC from the offences for which the present Petitioners stand charged. The trial against the present Petitioners will therefore proceed only for the offences under Sections 498A IPC, 304B IPC, 306 IPC, 406 IPC read with Section 34 IPC and Section 4 of Dowry Prohibition Act.

9. The CRLMC is disposed of in the above terms. The interim order dated 15th September 2011 passed in the present application stands vacated.

10. Urgent certified copy of this order be issued as per rules.

(Dr. S. Muralidhar)
Chief Justice