

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

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRR 804 of 2024

With

CRR 1112 of 2024

Sri Rishikesh Meena

-vs.-

State of West Bengal & Anr.

Mr. Pratik Bhattacharyya,
Mr. Sudip Kumar Chakraborty,
Ms. Srijani Mukherjee.

...For the Petitioner.

Reserved on : 19.03.2024.

Judgment on : 20.03.2024.

Tirthankar Ghosh, J:-

The two revisional applications being CRR 804 of 2024 and CRR 1112 of 2024 are disposed of by a common order as in CRR 804 of 2024 the subject matter of challenge relates to the order dated 1.02.2024 passed in Sessions

Case no. 78/23 wherein the learned Chief Judge, City Sessions Court, Calcutta was pleased to dismiss the application for discharge prayed on behalf of the present petitioner by way of an application dated 19.12.2023; while in CRR 1112 of 2024 the subject matter of challenge is an order dated 19.02.2024 wherein the learned Chief Judge, City Sessions Court in Sessions Case No. 78/23 was pleased to frame charges against the petitioner under Section 498A/307/494/336 of the Indian Penal Code read with Section 4 of the Dowry Prohibition Act.

Mr. P. Bhattacharyya, learned Advocate appearing for the petitioner challenged both the orders passed by the learned Chief Judge, City Sessions Court on the grounds that the learned Chief Judge, City Sessions Court failed to appreciate the earlier order passed by the Hon'ble High Court, Calcutta as also did not adhere to the relevant provisions of Chapter XVIII of the Code of Criminal Procedure relating to sessions triable case. According to the learned Advocate there are no materials to frame charges under Section 307 of the Indian Penal Code and the learned Chief Judge, City Sessions Court acted as a post office and without perusing the materials available in the documents on which the prosecution has relied upon to prove its case mechanically framed the charges. Learned Advocate took strong exception with regard to the evidence of PW1 being taken into account, which was recorded by the learned Magistrate and submitted that the same cannot be looked into while considering the charges and the learned Sessions Judge in fact, took the same into consideration while dismissing the application for discharge which was

filed on behalf of the petitioner and automatically framed the charges under Sections 498A/307/494/336 of the Indian Penal Code read with Section 4 of the Dowry Prohibition Act. Learned Advocate emphasised that the provision of Section 323 of the Code of Criminal Procedure have been wrongly appreciated by the learned Sessions Judge and nowhere the prejudice caused to the accused was considered as the relevant provisions of Section 273 of the Code of Criminal Procedure were totally ignored. According to the learned Advocate, under Chapter XVIII of the Code of Criminal Procedure the learned Sessions Court is restricted to look only in respect of the materials which were collected by the investigating agency in course of investigation and there is no provision which would allow the learned Sessions Court to consider the evidence of the prosecution witnesses which was recorded by the learned Magistrate. To substantiate his argument learned Advocate relied upon certain authorities which included judgements of different High Courts and that of the Hon'ble Supreme Court.

Learned Advocate appearing for the petitioner relied upon the judgment of High Court of Gujarat being Vasurbahi Bhurabhai Bela -Vs. - State of Gujarat in R/Special Criminal Application (Quashing) No. 7660 of 2021, emphasise was laid on paragraph 34 which is as follows:

“34. Thus, from the law that is enunciated in the aforesaid judgments by various High Courts, the legal position is made very clear that when a case is committed by the Magistrate under section 323 of Code of Criminal Procedure, 1973, the Sessions Judge has to follow the

procedure prescribed in Chapter XVIII of Code of Criminal Procedure, 1973 and from the stage of framing charges he has to invariably take up a de novo trial. It is imperative on his part to take up de novo trial. He cannot act upon the evidence that was recorded by the Magistrate which is a committal Court. No prejudice would be caused to the accused by taking up such de novo trial by the Sessions Court as has been contended by the petitioner. This Court, after analyzing the aforesaid provisions of law i.e. section 323 and 326 and Chapter XVIII of Code of Criminal Procedure is in complete agreement with the law laid down by above High Courts in above reported judgments.”

Petitioner also relied upon a judgment of High Court of Delhi being Shankar @ Gori Shankar –Vs. – State of NCT of Delhi & Anr. in CRL.MC.42/2023 & CRL.M.A. 142/2023 (Stay) and attention of the Court was drawn to the following paragraphs:

“2. *The present petition raises an important question of law i.e., whether a de novo trial is required to be conducted when a case is committed by the Court of Magistrate to the Court of Session in terms of Section 323 of the Code of Criminal Procedure, 1973 (CrPC).*

3.4 *A revision petition was filed by the complainant challenging the aforesaid order dated 4th July, 2014, passed by the learned MM, which was allowed by the learned ASJ vide order dated 3rd September, 2015, setting aside the aforesaid order by observing that an offence under Section 307 of the IPC has been made out. Consequently, the learned MM vide order 15th October, 2015 committed the case to the Sessions Court.*

3.5 *The learned ASJ vide order dated 19th April, 2016 framed charges for the offences under Sections 307/341/323/326 read with Sections*

506-II/34 of the IPC. 3.6 Thereafter, trial commenced before the Sessions Court and three prosecution witnesses were examined, cross-examined and discharged. 3.7 Subsequently, vide order dated 22nd November, 2022, the learned ASJ ordered that a fresh de novo trial is not to be started, especially when all the witnesses have been examined by the learned MM.

5. Counsel for the petitioner submits that in the present case, charges have been framed by the learned Sessions Court vide order dated 19th April, 2016 and subsequent thereto, three prosecution witnesses have been examined by the learned ASJ. He further submits that it will cause procedural confusion and prejudice if the evidence recorded before the learned MM is read in the present case. In this regard, reliance is placed on the following judgments: i. *Sudhir v. State of M.P.*, (2001) 2 SCC 688. ii. Judgment dated 30th April, 2020 passed by the Madras High Court in CrI.R.C. No.952 of 2020 titled *Dr. G.Ilangovan v. Gokul @ Gokulakrishnan*. iii. *Mahmood Hasan v. State of Haryana*, 2019 SCC OnLine P&H 7637.

17. I am in respectful agreement with the aforesaid views taken by the High Courts of Madras, Punjab and Haryana and Madhya Pradesh. The mandate of Section 323 of the CrPC is clear. When a case is committed by the Magistrate to the Court of Session, the trial would have to begin de novo. The Court of Session would first frame charges and then proceed with the examination of the witnesses.

18. When a case is committed by the Court of Magistrate to the Court of Session, the Magistrate becomes functus officio and any evidence recorded therein cannot be held to be admissible for the purposes of a de novo trial before the committal Court. Therefore, the evidence would also have to be recorded de novo.”

Reliance was also placed in a judgment of Madras High Court being Dr. G. Ilangovan –Vs. – Gokul @ Gokulakrishnan & Ors. in CrI.Rc. No. 952 of 2020 and attention was drawn to paragraph 20 of the said judgment which is as follows:

“20. The Hon'ble Supreme Court while dismissing the Special Leave Petition passed the order as follows : "Since the prosecution/aggrieved party can well file an application under Section 326 of the Code of Criminal Procedure, 1973, before the transferee Sessions Court also, we are not inclined to interfere in the matter. The Special Leave Petition is, accordingly, dismissed. Needless to state that any application under Section 326 Cr.P.C has to be considered on its own merits without being influenced by our reluctance to entertain this Special Leave Petition. Pending application(s), if any, shall stand disposed of." While dismissing the SLP, the Hon'ble Supreme Court also observed that any application files under Section 326 Cr.P.C has to be considered on its own merits without being influenced by the reluctance of Hon'ble Supreme Court to entertain the SLP. Therefore, the Hon'ble Supreme Court is very conscious of fact that the Chief Metropolitan Magistrate committed the case to the Sessions Judge and the said order was challenged by the respondents 1 to 8 and this Court also dismissed the same against which they preferred the SLP. The Hon'ble Supreme Court also has taken into consideration of the fact that the Chief Judicial Magistrate after examining 13 witnesses, only two eye witnesses were left to be examined, has committed the case to the Sessions Judge. If the Hon'ble Supreme Court really wants to give relief to the petitioner herein, certainly would have made observation that the transferee Court should continue with the trial, at the stage, where the Chief Metropolitan Magistrate committed the case to the Sessions Court. Therefore, once the case is committed to the Sessions Court and

the Sessions Court taken cognizance of the case, then it has to follow the procedures as contemplated under Chapter XVIII of the Code of Criminal Procedure which is mandatory as per the language used in Section 323 Cr.P.C. Therefore, this Court does not find any perversity in the order passed by the I Additional Sessions Judge, Chennai. However, the learned Sessions Judge is directed to frame the charges and conduct the trial in day to day basis and complete the trial within a period of three months from the date of receipt of a copy of this order.”

Reference was also made to the judgment of Punjab and Haryana High Court in Mahmood Hasan and Ors. –Vs. – State of Haryana in CRM-M-35697/2046 (O&M) and attention of the Court was drawn to the relevant part which is as follows:

“It is apparent that the order summoning the additional accused can be passed in the course of any enquiry into, or trial of, an offence. Such power is available to the Court when it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused. It may be noted here that the order passed by the committing Magistrate in the present case is also under Section 323 of “the Code” i.e. committing the case to the Court of Sessions but to this extent, the order has challenged. Section 323 of the Code reads as under:- “323. Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed.—If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained [and thereupon the provisions of Chapter XVIII

shall apply to the commitment so made].” It is apparent that when it appears to the Magistrate in any enquiry into the offence or the trial at any stage of the proceeding that the case is one which ought to have been tried by the Court of Sessions, he shall commit it to that Court under the provisions hereinbefore contained and thereupon provision of Chapter XVIII of “the Code” shall apply. Thus, procedure to be applied after the case has been committed to the Court of Sessions is provided in Chapter XVIII of “the Code”. Chapter XVIII of “the Code” deals with the trial before the Court of Sessions which starts with Section 225 of “the Code” and continue upto Section 237 of “the Code”. Once, the case has been committed to the Court of Session, the procedure as provided in Chapter XVIII of the Code is required to be followed. Section 227 of the Code provides that after hearing submissions of the accused and the prosecution, the Judge, if considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for doing so. Section 228 of the Code provides for framing of charge. Section 230 of the Code provides that if the accused refuses to plead guilty or does not plead or claims to be tried, the Judge shall fix the date for examination of witnesses. Section 231 of the Code provides that the evidence of the prosecution is to be recorded. Section 319 of the Code would be applicable in such case only after some evidence has been led by the prosecution as provided under Section 231 of the Code.

.....

This matter can be examined from another angle. Whatever evidence has been led before the Court of Judicial Magistrate, would not be read as evidence while deciding the case by the Court of Sessions. The Court of Sessions is obligated upon to follow the procedure as provided in Chapter XVIII of “the Code” which requires framing of charge and thereafter proceeding to record evidence of the prosecution in case the

accused does not plead guilty. The Court of Sessions also has a power to remit the case back to the Magistrate after finding that the case does not involve the offence which is exclusively triable by the Court of Sessions. If the Court of Sessions agrees with the committing Magistrate, first the charge has to be framed and thereafter the evidence has to be led de-novo. Therefore, once the Magistrate found that the case is exclusively triable by the Court of Sessions, he should have left it to the Court of Sessions to proceed in accordance with law.”

Learned Advocate for the petitioner also relied upon the judgment of the Hon’ble Supreme Court in *Sudhir and Ors. –Vs. State of MP* reported in (2001) 2 SCC 688, the relevant part was emphasised by the learned Advocate is as follows:

12.“323. If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that court under the provisions hereinbefore contained and thereupon the provisions of Chapter XVIII shall apply to the commitment so made.”

13. The above section does not make an inroad into Section 209 because the former is intended to cover cases to which Section 209 does not apply. When a Magistrate has committed a case on account of his legislative compulsion by Section 209, its cross-case, having no offence exclusively triable by the Sessions Court, must appear to the Magistrate as one which ought to be tried by the same Court of Session. We have already adverted to the sturdy reasons why it should be so. Hence the Magistrate can exercise the special power conferred on him by virtue of Section 323 of the Code when he commits the cross-case also to the Court of Session. Commitment under Sections

209 and 323 might be through two different channels, but once they are committed their subsequent flow could only be through the stream channelised by the provisions contained in Chapter XVIII.

14. Now we have to deal with the powers of the Sessions Court in the light of Section 228 of the Code which says that when the Sessions Court, after hearing under Section 227, is of the opinion that none of the offences presumed to have been committed by an accused is triable by a Court of Session he is to transfer the case for trial to the Chief Judicial Magistrate.

15. In this context, we may point out that a Sessions Judge has the power to try any offence under the Penal Code, 1860. It is not necessary for the Sessions Court that the offence should be one exclusively triable by a Court of Session. This power of the Sessions Court can be discerned from a reading of Section 26 of the Code. When it is realised that the Sessions Judge has the power to try any offence under the Penal Code, 1860 and when a case involving offence not exclusively triable by such court is committed to the Court of Session, the Sessions Judge has to exercise a discretion regarding the case which he has to continue for trial in his court and the case which he has to transfer to the Chief Judicial Magistrate. For this purpose we have to read and understand the scope of Section 228(1) in the light of the above legal position. The sub-section is extracted below:

“228. (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, and thereupon the Chief Judicial 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.”

(emphasis supplied)

16. *The employment of the word “may” at one place and the word “shall” at another place in the same sub-section unmistakably indicates that when the offence is not triable exclusively by the Sessions Court it is not mandatory that he should order transfer of the case to the Chief Judicial Magistrate after framing a charge. In situations where it is advisable for him to try such offence in his court there is no legal obligation to transfer the case to the Chief Judicial Magistrate. One of the instances for not making the transfer is when a case and a counter-case have been committed to the Sessions Court and one of those cases involves an offence exclusively triable by the Sessions Court and the other does not involve any such offence.”*

Before appreciating the issues so canvassed by the learned Advocate appearing for the petitioner the background of the present case is required to be taken into account in view of the instant case being committed to the Court of Sessions, pursuant to the order of the High Court being set aside in respect of its findings under Section 323 of the Code of Criminal Procedure and the order of the learned Magistrate being affirmed. It would be worthwhile to quote the order of the Hon’ble Supreme Court in Criminal Appeal no. 2655 of 2023 which is as follows:

“2. *The short issue involved in the instant appeal is as to whether the approach adopted by the High Court in the impugned order in its revisional jurisdiction on an application under Section 323 of the Code of Criminal Procedure, 1973 (for short Cr.P.C.) holding thereby a prima*

facie offence under Section 307 of the Indian Penal Code was premature and consequently setting aside the order of the learned Trial Court and remanding the matter back to the learned Chief Metropolitan Magistrate is correct or not?

3. *The case has a chequered history. The matrimonial discord between the parties has reached a different level culminating into a criminal case. The question for consideration, as stated, is with respect to the remittal order passed by the High Court in the impugned order finding fault with the exercise of power by the learned Chief Metropolitan Magistrate (for short, 'CMM') in committing the matter to the jurisdictional Sessions Court after exercising the powers under Section 323 Cr.P.C. in coming to the conclusion that the charge under Section 307 of the Indian Penal Code, 1860 (for short, 'IPC') is required to be heard by way of an additional charge. In such view of the matter, the learned CMM exercised the powers under Section 216 read with 323 Cr.P.C.*

4. *Heard learned Senior Counsel appearing on behalf of the appellant as well as learned counsel appearing on behalf of the respondents and carefully perused the material placed on record.*

5. *We find force in the submission made by learned Senior Counsel for the appellant that the procedure adopted by the High Court in the impugned order is not correct. The High Court directed the learned CMM to undertake the exercise of committal in pursuant to a decision to be taken as to whether a charge can be added under Section 307 IPC only after the conclusion of the entire evidence of P.W.1 namely, the appellant before us. For exercising such a power, it is not mandatory for the learned CMM to wait for the completion of the entire evidence of P.W.1, which is inclusive of crossexamination. In other words, such a subjective satisfaction would depend upon the materials*

available before the Court whatever may be its nature. The procedure adopted by the High Court in the impugned order is not mandated under Section 216 or 323 Cr.P.C. Section 323 Cr.P.C. gives a discretion to the Court to exercise its power at any stage of the proceeding before signing judgment. It is, evident from the statute that the power under Section 323 Cr.P.C. may be invoked by the learned Magistrate at any stage of the proceeding prior to signing of the Judgment. Thus, it is a settled provision of law that the said power may be invoked even after the deposition or the examination-in-chief of a witness. The key requirement for the invocation of the power under the Section 323 is that the learned Magistrate concerned must feel that the case is one which ought to be tried by the Court of Sessions.

6. *In such view of the matter, we are inclined to set aside the impugned order passed by the High Court as we find that the learned CMM has correctly exercised his discretion.*

7. *In view of the above, the impugned order passed by the High Court is set aside and the one passed by the learned CMM is restored.*

8. *The appeal stands allowed to the extent indicated above. 9. We make it clear that we have not expressed any opinion on the merits of the case and it is open to the Sessions Court to proceed further in the matter.”*

The learned Advocate for the petitioner emphasised on the part of the order wherein the Hon’ble Apex Court observed that it had not “expressed any opinion on the merits of the case”. According to the learned Advocate at this stage it was open to the learned Sessions Court to discharge the accused and not to frame the charges under Section 307 of the Indian Penal Code since the materials collected by the investigating Agency do not reflect any ingredients of

Section 307 of the Indian Penal Code. Such submissions of the learned Advocate for the petitioner lacks foundation in view of the word 'merits' being used by the Hon'ble Apex Court, would definitely refer to the final outcome of the trial of the case and not to the stage of immediately after commitment or in other words the framing of charges under Section 307 of the Indian Penal Code will not be deemed to be proved and the prosecution by way of cogent evidence has to prove the same. It would not be out of place to state that appreciation of materials at the stage of consideration of charges are different from appreciation of the materials which are available at the end of the trial, as at the stage of consideration of charges, grave suspicion can be considered a ground for framing of charges, while at the end of the trial, however strong the suspicion may be it cannot take the place of proof.

This Court has also considered the submissions of the learned Advocate for the petitioner including the judgment so relied upon and the present set of circumstances available in respect of the instant case wherein the learned Magistrate was prima facie of the opinion that an offence under Section 307 of the Indian Penal Code is made out immediately after examination-in-chief of PW1 i.e. the de facto complainant was over. The said order was challenged before the Hon'ble High Court, Calcutta and the Hon'ble High Court, Calcutta was of the opinion that such consideration should be after the cross-examination of PW1 was over. However, the said order was challenged before the Hon'ble Supreme Court and the Hon'ble Supreme Court was of the opinion that the examination-in-chief of PW1 was enough for coming to a conclusion in

respect of an additional charge under Section 307 of the Indian Penal Code. It was additionally observed by the Hon'ble Supreme Court that if the learned Magistrate feels that the case is one which is ought to be tried by the Court of Sessions then in that case under Sections 323 of the Code of Criminal Procedure it can commit the case to the Court of Sessions.

In order to appreciate the contentions additionally this Court feels that there is a distinction between a commitment of a criminal case under the provisions of Section 209 of the Code of Criminal Procedure and the commitment of a case under Section 323 of the Code of Criminal Procedure. At the stage of Section 209 of the Code of Criminal Procedure the language used is that when a case is initiated on a police report and it appears to the Magistrate that the offence is triable exclusively by a Court of Sessions he has to commit the case. While in Section 323 of the Code of Criminal Procedure which deals with "Procedure when, after commencement of enquiry or trial, Magistrate finds case should be committed". In this case trial has already commenced as examination-in-chief of PW1 was complete. As such when the records reach the learned Sessions Judge for appreciation under Section 227 of the Code of Criminal Procedure the term "record of the case" would include within its ambit, the evidence so recorded for the purposes of consideration of charges which are sessions triable and which led the Magistrate to feel that it was not possible for him to carry forward with the trial and ought to be committed to the Court of Sessions.

Thus, having regarding to the issues considered by the learned Sessions Court in detail while rejecting the application dated 19.12.2023 on 01.02.2024 and consequently framing the charges on 19.02.2024, I do not find any illegality in the said orders which would call for this Court for interference.

Accordingly the revisional applications being CRR 804 of 2024 and CRR 1112 of 2024 are dismissed.

Pending connected applications, if any, are consequently disposed of.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities. .

(Tirthankar Ghosh, J.)