

(2016) 09 PAT CK 0095

PATNA HIGH COURT

Case No: Criminal Miscellaneous No. 3773 of 2016, (Arising Out of PS.Case No. 23 Year - 2014 Thana - Chakamhesi District - Samastipur).

Archana Wife of Gauri Shankar
resident of Village - Gaurai,
Police Station - Chakmehsi,
District - Samastipur - Petitioner
@HASH The State of Bihar -
Opposite Party

APPELLANT

Vs

RESPONDENT

Date of Decision: Sept. 6, 2016

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 226, Section 227, Section 228(1) (a), Section 482
- Penal Code, 1860 (IPC) - Section 302, Section 34, Section 498A

Citation: (2017) 172 AIC 401 : (2016) 4 ECRC 514 : (2017) 1 PCCR 329 : (2016) 4 PLJR 779

Hon'ble Judges: Rakesh Kumar, J.

Bench: Single Bench

Advocate: Mr. Dr. Amrendra Kumar, Advocate, for the Petitioner No. 1; Mr. Nachiketa Jha, Advocate, for the Opposite Party

Final Decision: Allowed

Judgement

Mr. Rakesh Kumar, J. (Oral)—Heard Dr. Amrendra Kumar No. 1, learned counsel for the petitioner, learned Additional Public Prosecutor as well as well as Sri Nachiketa Jha, learned counsel who has voluntarily appeared on behalf of the opposite party no. 2, 3 and 4.

2. The petitioner is the informant in Chakmehsi P.S. Case No. 23 of 2014 initially registered for the offence under section 323/498A/34 of the Indian Penal Code. He has approached this Court invoking its inherent jurisdiction under Section 482 of the

Code of Criminal Procedure 1973 with a prayer to quash an order dated 5.12.2015 passed in Sessions Trial No. 539 of 2015 (arising out of Chakmehsi P.S. Case No. 23 of 2014). By the said order the learned Additional Sessions Judge - VI, Samastipur has allowed the petition filed on behalf of the opposite party no. 2 to 4 and remitted back the matter to the court of learned Additional Chief Judicial Magistrate - I, Samastipur for trying the case. The said order was passed under section 228 (1)(a) of the Cr.P.C.

3. Short fact of the case is that on the basis of fardbyan of the petitioner an F.I.R. vide Chakmehsi P.S. Case No. 23 of 2014 was registered on 25.3.2014 for the offence under section 323/498A/34 of the Indian Penal Code. The petitioner/informant had alleged in the F.I.R. that her marriage was solemnized in the year 2009 with the opposite party no. 2. For about six months there was cordial relation in between the petitioner and her husband. Thereafter she was tortured mentally and physically for providing a Honda City Car. In relation to the said atrocity a case was filed earlier by the petitioner. However on some condition bail was granted to opposite party no. 2 by the High Court. Thereafter she was carried by her husband to Mumbai where her husband was posted. It was alleged that while going to Mumbai her father-in-law and mother-in-law who are opposite party no. 3 and 4 also accompanied them. She went to Mumbai with her husband on 18th March 2014 and in Mumbai again she was tortured by all the three accused persons in different manner. On 25.3.2014 she was carried back to her village Gaurai and on the same date at about 3 P.M. after arrival all the three accused persons pressurised her to withdraw the earlier case, however she told that she will have discussion with her father. After noticing this stand the husband of the petitioner i.e. opposite party no. 2 and opposite party no. 4 mother-in-law with intent to kill her assaulted her with iron rod which hit her right shoulder. Thereafter it has been alleged that all the three accused persons started to press her neck. However on prior information her father and other neighbours arrived and her life was saved. After registering F.I.R. police investigated the case and thereafter Charge Sheet No. 79 of 2014 dated 19.11.2014 was submitted against all the three accused persons i.e. opposite party no. 2 to 4 for offence under section 323/325/498(A)/307/34 of the Indian Penal Code. After compliance of provisions under Section 207 of the Cr.P.C. the case was committed to the court of Sessions and it was numbered as Sessions Trial No. 539 of 2015. At the time of charge it appears that from the accused persons a petition under Section 227 of the Cr.P.C. was filed for their discharge which was fixed for hearing on 5.12.2015 which is evident from the order dated 27.11.2015. Finally, by the impugned order the learned Additional Sessions Judge - VI, Samastipur, opined that the material on record was not sufficient to frame charge under section 307 of the Indian Penal Code and as such exercising power under section 228 (1)(a) of the Cr.P.C. he directed to remit back the matter to the learned Additional Chief Judicial Magistrate - I, Samastipur directing the accused persons to remain present for framing of charges on 16.1.2016 before the concerned Magistrate. Aggrieved with the order impugned the

informant/petitioner has approached this court by filing the present petition.

4. Dr. Amrendra Kumar No. 1, learned counsel for the petitioner has firstly argued that the impugned order is liable to be set aside solely on the ground that the learned Additional Sessions Judge - VI, Samastipur has grossly erred in remitting back the matter to the court of learned Additional Chief Judicial Magistrate-I, Samastipur without framing of charge. According to learned counsel for the petitioner if in a case a Sessions Judge is satisfied after completion of proceeding under Section 226 and 227 of the Cr.P.C. that material on record does not suggests commission of offence which is triable by the court of Sessions, he will firstly frame charge and thereafter remit back the matter to the competent court of Magistrate for trying the case. He has emphasised that on perusal of the impugned order it is evident that the learned Additional Sessions Judge - VI, Samastipur, without framing of charge has remitted back the matter to the Additional Chief Judicial Magistrate-I, Samastipur for trying the case. According to learned counsel for the petitioner the order impugned is liable to be set aside in view of the fact that it is violative of the statutory provision i.e. Section 228 (1)(a) of the Cr.P.C. Learned counsel for the petitioner has also argued that though in the present case from the accused side a petition was filed under section 227 of the Cr.P.C. in the impugned order he has mentioned that he has entertained the petition under section 228 (1)(a) of the Cr.P.C. He further submits that law on the point has already been set at rest that at the time of charge only requirement is to see as to whether prima facie case is made out or not. By way of referring to the impugned order, learned counsel for the petitioner has argued that the learned Additional Sessions Judge-VI, Samastipur, at the time of passing order has virtually conducted a mini trial and passed the impugned order. He has not considered that the allegation prima facie indicates that attempt was made to kill the informant.

5. By way of referring to the facts disclosed in the F.I.R. it has categorically been stated that the informant has alleged that accused persons with intent to kill her gave blow of iron rod on the head but she received injury on her right shoulder. It was not the end of the matter. Thereafter all the three accused persons started to press her neck with intent to kill her however in the meanwhile her father and others arrived and life of the informant could be saved. It has been argued that on the basis of the facts disclosed in the F.I.R. itself there was specific case for attraction of Section 307 of the Indian Penal Code. Even for the time being it is assumed that there was any doubt, even in that event, as per settled law, in case there is a probability of commission of an offence, charges can well be framed whereas the learned Additional Sessions Judge - VI, Samastipur, examined the matter as if he had decided to discharge the accused persons from the offence under Section 307 of the Indian Penal Code. On the aforesaid grounds he has prayed for quashing of the impugned order.

6. Sri Nachiketa Jha, learned counsel for the opposite party no. 2 to 4 has primarily raised objection on the point that now stage in the case has already been changed. He submits that after the matter was remitted back to the learned Magistrate charges were framed by the Magistrate and till date at least three witnesses have already been examined. It has been argued that once trial has commenced after passing of the impugned order, this court may refrain from interfering with further proceedings in the matter. It has also been argued that the facts disclosed in the F.I.R. indicates that the case was lodged falsely by the informant. He has argued that the victim has received injuries while she fell down from a bus and thereafter she was provided medical aid by the in-laws of the informant.

7. Besides hearing learned counsel for the parties I have also perused the materials available on record. Before proceeding with the matter it would be appropriate to quote Section 228 (1)(a) of the Cr.P.C. exercising the said power the impugned order was passed. It is quoted herein below:-

"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 Sessions, 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;"

8. On perusal of the aforesaid provision it is evident that the learned Additional Sessions Judge - VI, Samastipur though was competent to pass an order for remitting back the matter to the concerned Magistrate of competent jurisdiction for trying a case if he was satisfied that offence alleged was not triable by the court of Sessions, but before passing order for remitting the case it was mandatorily required to frame charge thereafter remit back the matter for trying the case. It is true that in the aforesaid provision the word "may" has been added for framing of charge, but the word "may" should not be looked into isolation but in cohesion. If Section 228 (1)(a) of the Cr.P.C. is read in its entirety it is evident that after framing of charge for trying the case the matter can be remitted back. Had there been any intention of the legislature to give discretion to the Sessions Court either to frame charge or not to frame charge there was no occasion for incorporating the word "for trying the case". In a criminal case trial commences from the date of framing of charge. Law on the point that trial commences from framing of charge is already settled. Accordingly on examination of the aforesaid provision it is evidently clear that at the time of remitting back the matter to the Magistrate framing of charge by the Sessions Judge is a condition precedent. In the present case obviously without

framing of charge the case was remitted back to the learned Additional Chief Judicial Magistrate - I, Samastipur and as such the learned Additional Sessions Judge - VI, Samastipur has committed error in transmitting the record without framing of charge. Besides this on examination of the impugned order the Court is of the opinion that at the stage of charge the learned Additional Sessions Judge - VI, Samastipur was not required to record such a detailed finding that too without recording the evidence of the victim. The learned Additional Sessions Judge - VI, Samastipur has examined the injury report. It was noticed by the learned Additional Sessions Judge - VI, Samastipur that there was abrasion on the neck scalp, injury over neck, of course there was no external injury, but once there were some materials to suggest that there were some injuries on the neck and there was statement of the victim that with intention to kill her all the three accused persons started to press her neck, in such a situation at this preliminary stage the learned Additional Sessions Judge - VI, Samastipur was not required to pass a definite finding that no case under Section 307 of the Indian Penal Code was made out. These things were required to be examined during detail trial, not at such preliminary stage. The Court is in agreement with the submission of learned counsel for the petitioner that at the time of charge only requirement is to see as to whether prima facie case is made out or not. The word "prima facie" has been elaborately discussed in a case reported in **1996 CRI. L.J. 2448 (State of Maharashtra v. Som Nath Thapa)** in paragraph no. 30, 31 and 32 of the judgment, which are quoted herein below:-

"30. In **Antulay's case, (AIR 1986 SC 2045)**, Bhagwati, C.J. opined, after noting the difference in the language of the three pairs of section, that despite the difference there is no scope for doubt that at the stage at which the court is required to consider the question of framing of charge, the test of "prima facie" case has to be applied.

Accordingly to Shri Jethmalani, a prima facie case can be said to have been made out when the evidence, unless rebutted, would make the accused liable to conviction. In our view, better and clearer statement of law would be that if there is ground for presuming that the accused has committed the offence, a Court can justifiably say that a prima facie case against him exists, and so, frame charge against him for committing that offence"

31. Let us note the meaning of the word "presume". In Black's Law Dictionary, it has been defined to mean "to believe or accept upon probable evidence". (Emphasis ours). In Shorter Oxford English Dictionary it has been mention that in law "presume" means to take as proved until evidence to the contrary is forthcoming", Stroud's legal Dictionary has quoted in this context a certain judgment according to which "A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged." (Emphasis supplied). In law lexicon by P. Ramanath Aiyer the same quotation finds place at page 1007 of

1987 edition.

32. The aforesaid shows that if on the basis of materials on record a Court, could come to the conclusion that commission of the offence, is a probable consequence, a case for framing of charge exists. To put it differently if the Court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

9. Meaning thereby that if there is probability to draw an inference regarding commission of an offence it would be sufficient for framing of charge. In view of the aforesaid facts and circumstances particularly the fact that the learned Additional Sessions Judge - VI, Samastipur, has grossly erred in not framing charge and remitted back the matter to the learned A.C.J.M. - I, Samastipur, the Court is of the opinion that the order impugned is liable to be set aside. Accordingly the order dated 05.12.2015 is hereby set aside. The learned Additional Sessions Judge - VI, Samastipur is directed to call for the records and proceed with the case from the stage of charge. Since it was informed by learned counsel for the petitioner that after the case was remitted back, charges were framed by the learned Additional Chief Judicial Magistrate-I, Samastipur and three witnesses were already examined including the victim, all subsequent proceedings shall be treated as nonest.

10. The present petition stands allowed.