

(2000) 03 OHC CK 0044

In the Orissa High Court

Case No : Criminal Revision No. 453 of 1999 and Criminal Miscellaneous Case No. 353 of 2000

Anania Naik

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 14-03-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167(2), 439
Penal Code, 1860 (IPC) — Section 371(1), 376, 376(2), 448, 450

Citation : (2000) 18 OCR 699

Hon'ble Judges : P.K. Tripathy, J

Bench : Single Bench

Advocate : D. Panda, D. Pr. Dhal, A. Parida and D.C. Swain, for the Appellant;

Judgement

P.K. Tripathy, J.—Accused in G.R.case No. 1410 of 1999 of the Court/of S.D.J.M, Bhubaneswar has filed the above Criminal Revision challenging the order passed by the S.D.J.M. on 9.8.1999 rejecting his prayer to grant the benefit of bail u/s 167 (2) (a) Code of Criminal Procedure He has also filed the above noted Criminal Misc. Case u/s 439 Code of Criminal Procedure with the prayer for bail. Since both the applications were heard analogously and arise out of the same case, this common judgment shall abide the result in both the cases.

2. It is alleged that the accused Petitioner molested and tried to ravish a young girl, aged about 10 years taking advantage of his access to that house and also taking advantage of absence of any other inmates of that house. On the F.I.R. lodged by the mother of the victim girl, Nayapalli Police-Station Case No. 97 of 1999 was registered for the offences punishable under Sections 448 and 376/511 I.P.C. Acts it reveals from the L.C.R., the charge-sheet having been filed against the Petitioner for the offences under Sections 450 and 376 (2) (1)/511 I.P.C. on 31.8.1999, learned S.D.J.M. has taken cognizance of the said offences.

3. Petitioner was arrested and thereafter produced in the Court of S.D.J.M. on 6.5.99. After his two applications for bail were rejected by learned S.D.J.M.

Petitioner moved for bail in the Court of Sessions vide Criminal Misc. Case Nos. 512 of 1999 and learned Additional Sessions Judge, Bhubaneswar, rejected that application on 30.6.1999. At the time of rejection of the bail applications of the Petitioner, the Courts below opined that there was a prima facie case for the offence u/s 376 I.P.C.

4. On 9.8.99, Petitioner filed an application in the Court of S.D.J.M. with the prayer to release him on bail in accordance with the provision u/s 167 (2) proviso (a) (ii) on the ground that the major offence alleged against the Petitioner being u/s 376/511 I.P.C., therefore, the maximum period of punishment provided u/s 376 I.P.C. shall be reduced to half in view of inclusion of Section 511 I.P.C. According to the Petitioner, the maximum punishment provided for the offence of rape is imprisonment for life. According to Section 57 I.P.C. imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. Therefore, half of it comes to ten years. Since according to Clauses (i) and (ii) of the proviso (a) to Sub-section (2) of Section 167 Code of Criminal Procedure, an accused can be detained in judicial custody pending investigation for a maximum period of 90 days, when the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years and 60 days when the investigation relates to any other offence, therefore, in the present case, when the offence under Sections 376/511 I.P.C. is punishable with a maximum punishment of imprisonment for ten years, Clause (ii) of the proviso (a) is applicable. Petitioner, thus, contended that since no charge-sheet was filed within a period of 60 days, from 6.5.1999, he should be allowed to go on bail. In that connection, Petitioner relied upon the ratio in the case of *Bijay Kumar Rout v. State of Orissa*: (1993) 6 OCR 714, *Ashok Kumar Sharma alias Lala v. State*: (1997) 13 OCR 327. Learned S.D.J.M. rejected that application on the ground that a prima facie case for the offence u/s 376 (2) (f) I.P.C. was made out against the Petitioner and therefore, filing of charge-sheet within sixty days was not required. In that connection, learned S.D.J.M. relied upon the ratio in the case of *Upendra Kumar Shoo v. Giridhari Sahu and Ors.* (1996) 2 OCR 53 : 82 (1996) C.L.T. 763, in support of his reasonings that at the time of consideration of bail application, the Magistrate is competent to peruse the record and to form his own opinion regarding the offence which is made out from the allegations and not blindly to follow the offence quoted by the Investigation Officer.

5. As noted above, on the date the F.I.R was lodged, the Police Officer registered the case for the offence under Sections 376/511, I.P.C. On 31.8.99, learned S.D.J.M. notwithstanding the impugned order dated "9.8.99, has taken cognizance of the offence u/s 376 (2) (f)/ 511 I.P.C. The medical report prima facie shows that there was no injury to the genital of the girl as well as the male organ of the Petitioner. Therefore, prima facie view for the offence u/s 376 (2) (f)/ 511 I.P.C does not appear to be wrong.

6. In the case of *Bijay Kumar Rout* (supra) this Court held that a distinction has to be drawn between the terms providing for imprisonment of "not less than ten

years" from that of the imprisonment for a term "upon ten years". It was further held that when the case is covered by the term of imprisonment for not less than ten years, in such a case, Clause (i) of proviso (a) to Section 167 (2) CLP.C. shall be applicable. On the other hand when the punishment prescribed is upto ten years, then the Clause (ii) of the aforesaid Proviso shall be applicable and in that case if a charge-sheet is not filed within a period of 60 days, the accused is entitled to the benefit of provisions of Proviso (a) of Section 167 (2) of the Code of Criminal Procedure Same view was expressed by this Court in the case of Ashok Kumar Sharma (supra). In that context, this Court while following the aforesaid ratio of this Court, finds that learned S.D.J.M. on wrong appreciation of facts and law rejected the petition filed by the Petitioner. Under such circumstance, while setting aside his order dated 9.8.99 this Court directs learned S.D.J.M. to consider the application of the Petitioner afresh in accordance with law.

7. Since the order dated 9.8.99, as above, has been set aside and learned S.D.J.M. has been directed to consider the application for bail afresh, therefore, it is not required for this Court, at this stage, to consider the application for bail filed by the Petitioner vide Criminal Misc. Case No. 353 of 2000 Accordingly, the Criminal Misc. Case No. 353 of 2000 is disposed of. However, it is observed that in the event the aforesaid application of the Petitioner is again rejected, he may ventilate his grievances in proper forum and/or if so advised, he may renew his prayer for bail.

8. As per the aforesaid orders, the Criminal Revision No. 453 of 1999 is allowed and the Criminal Misc. Case No. 353 of 200 is disposed of. Registry is directed to send back the L.C.R. to the Court below immediately.