

**(2020) 02 PAT CK 0320**

**In the Patna High Court**

**Case No : Criminal Revision No. 420 Of 2018**

Babu Nandan Sah And Ors

APPELLANT

Vs

State Of Bihar And Anr

RESPONDENT

**Date of Decision : 25-02-2020**

**Acts Referred:**

Indian Penal Code, 1860 — Section 34, 498A

Dowry Prohibition Act, 1961 — Section 3, 4

Code Of Criminal Procedure, 1973 — Section 29, 313, 319, 325(1), 325(2), 325(3), 354, 386(d), 386(e)

**Citation : (2020) 02 PAT CK 0320**

**Hon'ble Judges : Rajeev Ranjan Prasad, J**

**Bench : Single Bench**

**Advocate : Prasoon Sinha, Ram Bilash Roy Raman, Ashhar Musfata, Abu Nasar**

**Final Decision : Dismissed**

## **Judgement**

Heard learned counsel for the petitioners and learned counsel representing opposite party no. 2.

The matter has been heard at length.

This revision application has been preferred for setting aside the judgment dated 08.03.2018 passed in Cr. Appeal No. 39 of 2017/18 of 2017 by which the learned Fast Track Court-II, Sitamarhi has been pleased to set aside the judgment dated 08.05.2017 passed by S.D.J.M. Sadar, Sitamarhi in G.R. Case No. 1045 of 2011, Trial No. 1345 of 2017 as well as the order of sentence dated 09.05.2017 passed by learned Chief Judicial Magistrate, Sitamarhi in the said case.

The facts of the case are not much in dispute. Pursuant to the lodgment of Bairganiya P.S. Case No. 100 of 2011 for the offences alleged under Section 498A/34 of the Indian Penal Code and Section 3 and 4 of Dowry Prohibition Act, a charge-sheet was filed against the three accused persons out of five. Charge was framed against those three but in course of trial the other two accused were

also summoned under Section 319 Cr.P.C. In this way all the five accused stood trial.

The learned S.D.J.M. after recording the evidences found the accused persons guilty and convicted them for the offences under Section 498A/34 of the Indian Penal Code and Section 3 and 4 of the Dowry Prohibition Act. While hearing learned counsel for the accused on the point of sentence, the learned S.D.J.M. took a view that the offence committed by the accused are of very serious nature and the materials available on the record are such that severe punishments should be awarded to the accused persons but because the learned S.D.J.M. could have passed only an order of sentence of imprisonment for a term not exceeding three years or fine exceeding Rs. 10,000/- or both, the records of the case were transferred to the court of learned C.J.M., Sitamarhi in terms of Section 325 (1) of the Code of Criminal Procedure.

After passing of the judgment dated 08.05.2017 when the learned S.D.J.M., Sadar, Sitamarhi sent the records of the case to the court of learned Chief Judicial Magistrate, Sitamarhi, a hearing was given to the accused persons on the point of sentence on 09.05.2017. The learned C.J.M. passed order of sentence whereunder all the five accused persons were sentenced under Section 3 of the Dowry Prohibition Act to undergo simple imprisonment of five years. They were also held liable to pay the dowry amount in proportion so each of the accused were sentenced to fine of Rs. 1,02,200/-. In default to pay fine they were directed to undergo further simple imprisonment for six months. All the five accused were also convicted under Section 4 of the Dowry Prohibition Act and under this provision they were sentenced to undergo simple imprisonment of one year with a fine of Rs. 5,000/- each. Further under Section 498A/34 of the Indian Penal Code all the five accused persons were sentenced to undergo simple imprisonment of three years with fine of Rs. 500/- each. All the sentences were to run concurrently and the period already served by the accused persons during trial were liable to be set off.

The accused-petitioners preferred criminal appeal giving rise to Cr. Appeal No. 39 of 2017/18 of 2017 in the court of learned Fast Track Court-II, Sitamarhi. The appellants-petitioners challenged the judgment of conviction dated 8th May, 2017 passed by learned S.D.J.M. Sadar, Sitamarhi as well as the order of sentence dated 9th May, 2017 passed by learned C.J.M., Sitamarhi.

For purpose of setting aside of the judgment of conviction and the opinion of guilt recorded by the learned S.D.J.M., the appellants-petitioners argued before the learned appellate court that no separate charge under Section 3 and 4 of the Dowry Prohibition Act was framed and only by framing a joint charge under Section 3/4 of the Dowry Prohibition Act, the guilt of the accused persons against the charged Sections were taken to be proved. The appellants-petitioners also argued before the appellate court that there were huge discrepancies with respect to the amount of dowry and the amount of dowry mentioned in the charge is totally different from the sentence passed under the Dowry Prohibition

Act by learned C.J.M. It was further argued on their behalf that the statement of the accused under Section 313 Cr.P.C. records a sum of Rs. 3,00,000/- but the judgment passed is for a sum of Rs. 5,11,000/- which has been proportionately made payable to each of the appellants-petitioners. The appellants thus, assailed the judgment of the learned S.D.J.M. by which the opinion as to guilt was recorded and it was termed as a judgment of conviction as well the order of sentence passed by learned C.J.M. Before the learned appellate court while challenging the judgment of conviction/opinion as to guilt as well as the order of sentence the appellants also relied upon the judgment which are dully mentioned in paragraph 3 of the appellate court's judgment and are recorded hereunder for a ready reference:-

"In support of above mentioned submission some decisions of Hon'ble Courts are referred, which are as follows:

- (1) PLJR 1998, vol. 03, page 789, para 6,8,9 &14.
- (2) SCC 2014, vol. 10, page 270, para 7(IV), 9, 10 & 14, And,
- (3) Criminal Appeal No. 56 of 2002 of Our High Court (Kaushal Kishore Rai versus State of Bihar) para 10.

From above submissions and references it has been claimed on behalf of the appellants that the impugned judgment of conviction and order of sentence is fit to be set aside."

The learned Fast Track Court-II, Sitamarhi accepted the submissions of the appellants, found error in the matter of framing of charge by the learned trying Magistrate, took a view that the charge under Section 3 and 4 of the Dowry Prohibition Act should have been framed separately with separate substance to signify the expression. The appellate court also took a view that the statement under Section 313 Cr.P.C. suffered from defects of the alleged amount of dowry and expressed disclosure of the substance of the demand of payment of the alleged dowry amount. It was specifically held that the learned S.D.J.M. has not followed the provisions of Section 325(2) Cr.P.C. and the learned C.J.M. has failed to follow Sub section (3) of Section 325 Cr.P.C. while passing the order of sentence.

In ultimate analysis, the learned appellate court, therefore, accepted the submissions of the appellants, held both the judgment and sentence illegal and after setting aside those judgment and sentence passed by learned S.D.J.M. and learned C.J.M. respectively, the learned appellate court remitted the matter to the court of learned S.D.J.M. Sadar, Sitamarhi for modification of the substance of the charges and the statements under Section 313 Cr.P.C. as per evidence appearing on record.

Being aggrieved by the order of the learned appellate court in the present revision application learned counsel representing the petitioners submits that so far as the order setting aside the judgment dated 08.05.2017 passed by the

learned S.D.J.M. and the order dated 09.05.2017 passed by learned C.J.M. are concerned, the petitioners are not challenging that part of the order.

Learned counsel for the petitioners submits that in the present revision application the petitioners are aggrieved by the order passed by the learned appellate court whereby the learned appellate court has remitted the matter to the court of learned S.D.J.M. Sadar, Sitamarhi. In his submissions, the learned appellate court should have remitted the matter to the court of learned Chief Judicial Magistrate, Sitamarhi and not to the court of learned S.D.J.M., Sitamarhi and this is the matter of grievance for the petitioners.

Mr. Prasoon Sinha, learned counsel representing the petitioners has strongly argued before this Court that the judgment of conviction recorded by learned S.D.J.M. was nothing but an opinion as to the guilt of the accused persons and once the records were transferred under Sub section (1) of Section 325 Cr.P.C. to the court of learned C.J.M., Sitamarhi, by virtue of Sub section (3) of Section 325 Cr.P.C. the learned C.J.M. was fully competent to take any further evidence in the matter and even the statements of the accused under Section 313 Cr.P.C. could have been recorded afresh by learned C.J.M. and he could have passed a judgment and order of sentence based on the materials available on the record.

Learned counsel submits that once the appellate court found that the order passed by learned C.J.M. suffered from certain legal infirmities, the appellate court should have set aside the order of the learned C.J.M. and at this stage itself the records could have been sent back to the court of learned C.J.M. In fact, Mr. Sinha has argued that even though the appellants had challenged the judgment of the learned S.D.J.M., Sitamarhi, it was not incumbent upon the learned appellate court to accept the submissions of the appellants to set aside the judgment of the learned S.D.J.M. and learned counsel has submitted before this Court that in its revisional jurisdiction, this Court can very well with the aid of Section 386(d) and (e) Cr.P.C. consider the propriety of the judgment of the learned appellate court and modify it to the extent required.

Heavily relying upon the judgment of the Hon'ble Division Bench of this Court in the case of State of Bihar vs. Gita Nand Jha reported in 1998 (3) PLJR 787, Mr. Sinha has drawn the attention of this Court towards the observations of the Court in paragraph 6 of the said judgment. It has been reiterated that the judgment of conviction recorded by learned S.D.J.M. was to be taken as a mere opinion formed by learned C.J.M. and thus learned C.J.M. could have proceeded to take further evidence if found necessary and could have formed his own judgment on the basis of the materials available on the record.

Mr. Ashhar Mustafa, learned counsel representing the opposite party no. 2 has with equal vehemence opposed this application.

Learned counsel has taken this Court through the scheme of Section 325 Cr.P.C. It is his submission that formation of an opinion as to guilt of the accused persons based on the materials available on the record before the trying

Magistrate is a condition precedent for invoking Sub section (1) of Section 325 Cr.P.C. It is submitted that once the trying Magistrate forms an opinion that there are evidences on the record showing that the guilt against the accused persons are proved beyond reasonable doubts, only after forming such opinion he can transfer the records to the court of learned C.J.M. for the reasons as required in terms of Sub section (1) of Section 325 Cr.P.C.

In this case, it is submitted that these petitioners had preferred the appeal before the learned Fast Track Court-II and they had challenged the judgment of the learned S.D.J.M. in which he had recorded his opinion as to the guilt of the accused persons. Learned counsel submits that no doubt the learned S.D.J.M. has recorded the word "convicted" but in view of the judgment of this Court such use of words and expressions are only misnomer and are to be necessarily seen in the light of judicial pronouncements on the subject to mean and understand that it was nothing more than a mere expression of opinion as to guilt of the accused persons.

Learned counsel submits that no doubt after the records are transferred to the court of learned C.J.M., in view of Sub section (3) of Section 325 Cr.P.C. the learned C.J.M. is fully competent to receive further evidences and proceed to pass a judgment and sentence in the matter but in this case when the records were transferred to the court of learned C.J.M., the accused-petitioners never requested the learned C.J.M. to record any further evidence and they participated in the hearing of sentence whereafter the learned C.J.M. passed the order of sentence on 09.05.2017. When the challenge was made to the judgment of the learned S.D.J.M. and the subsequent sentence awarded by the learned C.J.M. on the ground that very formation of opinion as to guilt of the accused are not well founded inasmuch as the charges under Section 3 and 4 of the Dowry Prohibition Act were not separately framed and the charges were not dully proved in terms of their ingredients and further that the incriminating material against the accused persons were not brought to the notice of the accused while recording their statements under Section 313 Cr.P.C., the learned appellate court accepted the submission of the accused, set aside the judgment of the learned S.D.J.M. and the subsequent order of sentence passed by learned C.J.M. It is submitted that in these circumstances it is not open to the appellants to move this Court in this revision application contending that even though they had challenged the judgment of the learned S.D.J.M. in appeal and had argued against that but the learned appellate court should not have interfered with that judgment and only by setting aside the order of learned C.J.M., the matter could have been remitted to the court of learned C.J.M. This, in the opinion of the learned counsel would amount to probate and reprobate in judicial proceedings which would not be permissible.

Learned counsel has further distinguished the facts of the present case from that of those in the judgment of the Hon'ble Division Bench of this Court in the case of Gita Nand Jha (supra) and submits that the question which had fallen for

consideration before the Hon'ble Division Bench in the said case were limited to the interpretation of Sub section (3) of Section 325 Cr.P.C. as to whether after transfer of the records of the case, the learned C.J.M. could have recorded further evidence and could have passed a judgment and order of sentence without being influenced by the opinion as to the guilt of the accused persons formed by the learned Magistrate. Such is not the question under consideration in the present case.

#### Consideration

Having heard learned counsel for the parties and upon perusal of the records, this Court finds much substance in the submissions of learned counsel for the opposite party no. 2.

It is not in dispute that the learned S.D.J.M., Sitamarhi had formed an opinion as to the guilt of the accused persons and thereafter, he had transferred the records to the court of learned C.J.M., Sitamarhi as he was of the opinion that the accused persons are required to be awarded with severe punishments for which the learned C.J.M. is only competent in view of Section 29 Cr.P.C. It is also not in dispute that before the learned C.J.M., no application was filed on behalf of the accused persons requesting him to take further evidence. The accused persons participated in hearing on the point of sentence and the learned C.J.M. passed an order of sentence as stated above.

It is only thereafter, these petitioners went in appeal before the learned appellate court and challenged both the judgment of the learned S.D.J.M., Sitamarhi as well as the order of sentence passed by the learned C.J.M., Sitamarhi. There are ample materials reflected in the judgment of the learned appellate court to take a view that the opinion formed by learned S.D.J.M., Sitamarhi was assailed on various grounds including that those opinion were not formed on proper framing of charges and further that the statement under Section 313 Cr.P.C. of the accused persons were also not duly recorded by pointing out the incriminating materials available against them. If these were the grounds taken to assail the opinion formed by the learned S.D.J.M. which was no doubt incorrectly expressed as 'conviction' and the learned appellate court accepted those submissions of the appellants, set-aside the judgment of the learned S.D.J.M. and the subsequent order of sentence passed by the learned C.J.M. and then remitted the matter to the court of learned S.D.J.M., this Court finds no reason to take a view that the learned appellate court has committed any illegality much less any perversity in passing of the impugned judgment. Section 325 Cr.P.C. reads as under:

"325. Procedure when Magistrate can not pass sentence sufficiently severe.- (1) Whenever a Magistrate is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or, being a Magistrate of the second class, is of opinion that the accused ought to be required to execute a bond

under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the Chief Judicial Magistrate to whom he is subordinate.

(2) When more accused than one are being tried together, and the Magistrate considers it necessary to proceed under Sub-Section (1), in regard to any of such accused, he shall forward all the accused, who are in his opinion guilty, to the Chief Judicial Magistrate.

(3) The Chief Judicial Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law."

In the case of Gita Nand Jha (supra), the Hon'ble Division Bench of this court was considering the solitary question as to the scope and ambit of Section 325 Cr.P.C. and the question which had fallen for consideration before the Hon'ble Division Bench is reflected in paragraph '4' of the said judgment which is taken note of hereunder:

"4. Answer to the question referred to the Division Bench depends upon the interpretation of the provision of Section 325 of the Code....."

Having discussed the relevant laws the Hon'ble Division Bench of this Court in the case of Gita Nand Jha (supra) in paragraph '6' of its judgment held :

"6. Thus, it is clear that so far the referring Magistrate is concerned, he is not required to deliver the judgment in terms of Section 354 of the Code. He has only to form an opinion about the guilt and record his opinion and thereafter will submit the proceedings to the Chief Judicial Magistrate. In other words, he has not to convict the accused. Only after recording of his opinion he has to send the records to the Chief Judicial Magistrate, who will finally dispose of the matter in terms of Section 325(3) of the Code. If the referring Magistrate instead of only-forming an opinion proceeds further and convicts the accused and send the records only for awarding the sentence the same does not make any difference. Recording of conviction is only a surplusage which amounts to only an irregularity and that does not in any way affect or control the power of the Chief Judicial Magistrate to whom the matter is referred in terms of the aforesaid provision to pass an order in terms of Section 325 of the Code."

To this court, it appears that so far as the proposition of law laid down by the Hon'ble Division Bench of this Court in the case of Gita Nand Jha (supra) are concerned, it is well settled but then the judgment of the Hon'ble Division Bench has to be seen in the facts of a particular case. It has been held by the Hon'ble Apex Court in the case of Bharat Petroleum Corporation Ltd. And Anr. Vs. N.R. Vairamani & Others reported in (2004) 8 SCC 579 that the judgments/ observations of the Court should not be cited like euclid's theorems because a slight change in the facts of the case makes a sea difference in the judgment of

the court.

In this case, where this Court finds undisputed position is that the petitioners had challenged the order of the learned S.D.J.M. and got success in the same as the learned appellate court set-aside the said judgment, at this stage they cannot be allowed to take a plea that the learned appellate court should not have set-aside that judgment and only by setting aside the judgment of the learned C.J.M., the appellate court should have remitted the matter to the court of learned C.J.M. for fresh consideration. Such plea would not be available to the petitioners before this Court.

This Court is also of the considered opinion that to exercise its power under sub-section (3) of Section 325 Cr.P.C. the learned C.J.M. must have a record which has been transferred to the court of learned C.J.M. by the learned Judicial Magistrate after forming an opinion in terms of sub-section (1) of Section 325 Cr.P.C. Thus formation of opinion is a condition precedent.

In this case the learned appellate court was fully aware of this situation that once the judgment of learned S.D.J.M. is set-aside, the opinion earlier formed by him also vanishes and nothing remains on the records to send the files to the court of learned Chief Judicial Magistrate. It for this reason the learned appellate court is right in remitting the matter to the court of learned S.D.J.M.

This Court has been informed that after the remand was made separate charges under Sections 3 and 4 of the Dowry Prohibition Act have been framed and 5 witnesses have been examined and thereafter the case is pending for evidence of the Investigating Officer.

In the facts and circumstances and in view of the discussions made hereinabove, this Court finds no ground to interfere with the impugned judgment.

This revision application has no merit. It is dismissed accordingly.