
(2014) 04 CAL CK 0116
In the Calcutta High Court
Case No : C.R.R. No. 2869 of 2007

Gangamaya Sunar

APPELLANT

Vs

The State of West Bengal and Another

RESPONDENT

Date of Decision : 01-04-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 227, 228, 401
Penal Code, 1860 (IPC) — Section 354, 376(f), 511

Citation : (2014) 04 CAL CK 0116

Hon'ble Judges : Asim Kumar Mondal, J

Bench : Single Bench

Advocate : Prabir Mitra, Advocate for the Appellant; S. Banerjee, Mr. Bhaskar Seth for Opposite Party No. 2 and Mr. Anand Keshri for State, Advocate for the Respondent

Judgement

Asim Kumar Mondal, J.—The instant application has been filed u/s 401 read with Section 482 of the Code of Criminal Procedure challenging the order dated July 13th, 2007 passed by the learned Additional Sessions Judge, In-Charge of District and Sessions Judge, Paschim Medinipur in connection with Criminal Revision No. 184 of 2007 arising out of a Sessions Trial Case No. 62, May, 2007. The background of the present revisional application which is required to be taken into note that one Gangamaya Sunar, petitioner herein lodged a written complaint before Kharagpur (Local) Police Station against the opposite party No. 2 herein alleging commission of rape upon her minor daughter which has been registered as Kharagpur (Local) P.S. Case No. 270 of 2005 dated October 27th, 2005 u/s 376(f) of the Indian Penal Code.

2. The Investigating Agency after investigation into the complaint submitted a charge sheet against the opposite party No. 2 on March 30th, 2007 being charge-sheet No. 79 of 2007 dated March 30th, 2007 u/s 376(f) of the Indian Penal Code.

3. The case was duly committed to the learned Court of Sessions and it was

transferred to learned Assistant Sessions Judge, First Court at Paschim Medinipur for trial.

4. Two petitions were filed on the very date of commitment of the case praying for bail and also for discharge from the case u/s 376(f) of the Indian Penal Code. Both the prayers were refused.

5. The opposite party No. 2 again on July 11th, 2007 filed an application for discharge from the offence u/s 376(f) of the Indian Penal Code and by another petition for bail. Learned Assistant Sessions Judge, by an order dated July 11th, 2007 has been pleased to reject both the prayers.

6. The opposite party preferred a revisional application before the learned Sessions Judge challenging the said order which was registered as criminal revision case No. 184 of 2007.

7. Learned Sessions Judge, by an order dated July 13th, 2007 disposed of the said revisional application whereby learned Additional District and Sessions Judge, In-Charge of Sessions Court discharge the accused opposite party No. 2 from the offence u/s 376(F) of the Indian Penal Code and directed to sent down the case record u/s 228 of the Criminal Procedure Code for trial before the Judicial Magistrate for an offence u/s 354 of the Indian Penal Code.

8. Being aggrieved by and dissatisfied with the said order impugned, the petitioner has preferred the present revisional application on the ground that learned Judge has failed to appreciate the facts and circumstances of the case and has also failed to consider materials-on-record at the time of passing the order impugned. It is also alleged that learned Judge has absolutely under the wrong conception about the elements and ingredients of the offence u/s 376(F)/511 of the Indian Penal Code and finally it is alleged that learned Judge has acted in bias and passed the order impugned in a perverse manner.

9. Mr. Debasish Roy with Mr. Prabir Mitra appears on behalf of the petitioner. Mr. Roy submits that it is very unfortunate to note that on the last occasion this Court directed to produce the Case Diary and it is learnt that a photocopy of the Case Diary has been sent wherein no statement of the victim u/s 164 of the Criminal Procedure Code as well as the medical examination report by the doctors are available.

10. Mr. Roy further submits that learned Additional District and Sessions Judge in-charge of the Sessions Judge of Paschim Medinipur disposed of the revisional application hurriedly on the very date of admission and learned Court below has come to the conclusion that a charge may be brought against the opposite party No. 2 u/s 354 of the Indian Penal Code and directed to sent down the case record to the Magistrate under the provisions of Section 228 of the Criminal Procedure Code. Learned court below did not consider the facts and circumstances of the case and also did not consider the order passed by the learned Assistant Sessions Judge against which the revisional application was

preferred. Learned Assistant Sessions Judge nowhere in his order has concluded that from the materials in the Case Diary the charge may be framed simply u/s 354 of the Indian Penal Code.

11. Mr. Roy draws my attention at the annexure "A" at page 10 of the revisional application which is the charge-sheet and also annexure "B" at page 13, 14, 15 and 16 which are the photocopy of permission for attendant, to make report, and discharge certificate of Kharagpur S.D. Hospital. Mr. Roy further submits that from this documents it is crystal clear that the victim was admitted in the hospital on October 27th, 2005 and discharge on October 29th, 2005. Further admitted on 10th November, 2005 and discharge from the hospital on November 17th, 2005. There are prima facie evidences that due to rape upon the victim girl who was aged about 8 years, suffered serious injuries and was treated in hospital for a considerable period. Mr. Roy submits further that learned Additional Sessions Judge while passing the order impugned did not at all consider the materials in the case diary and under what grounds the order impugned had challenged before him. On the contrary learned Additional District Judge, has been much pleased in the impugned judgment/order to criticise the manner and the way by which the learned Assistant Sessions Judge passed the order under challenge before him.

12. Mr. Anand Keshri appearing on behalf of the State submits that it is very unfortunate that in the photocopies of the Case Diary which has been sent by the concerned authority in compliance with the court's direction bears no medical report and also the statement the victim girl recorded u/s 164 of the Criminal Procedure Code which are very important and relevant for framing of charge. Mr. Keshri with his all fairness submits that there are prima facie materials to establish the prima facie offence as alleged in the charge-sheet and as such matter should be dealt with accordingly.

13. Mr. S. Banerjee with Mr. Bhaskar Seth appears on behalf of the opposite party No. 2 and submits that learned Public Prosecutor In-Charge has got the full opportunity to go through the Case Diary and to submit before the learned court below as to the materials available in the Case Diary and the prima facie case which should have been considered by the concerned Court at the time of framing charge. On the contrary learned Public Prosecutor with his all fairness submitted that the Case Diary which was sent by the Investigating Agency was not completed one as the same is lacking of medical reports and injury report of the victim girl. Learned Assistant Sessions Judge accepted the contention of learned Public Prosecutor In-Charge and opined that the charge against opposite party No. 2 may be framed u/s 354 of the Indian Penal Code but was of the view that for speedy disposal of the case and to prevent harassment of both sides in the event of transferring the case u/s 228 of the Criminal Procedure Code framed the charge u/s 376(f)/511 of the Indian Penal Code. Learned Sessions Judge being disagreed with the view of the learned Assistant Sessions Judge on the ground that when learned Court came to the conclusion that for an offence u/s

354 of the Indian Penal Code has been committed, the reason given above by the said learned Court should not be a ground to frame charge u/s 376(f)/511 of the Indian Penal Code.

14. I have carefully perused the order impugned passed by learned Additional District and Sessions Judge In-Charge of Sessions Judge of Paschim Medinipur under challenge and I find that learned Court below accepted the submissions of learned Public Prosecutor In-Charge with an offence u/s 354 I.P.C. has been made out and there is no alternative but to transfer the case to the learned C.J.M. as per provisions of Section 228 of the Criminal Procedure Code. Learned Court below came to the conclusion that the Assistant Sessions Judge has opined in his order dated July 11th, 2007 that a prima facie case u/s 354 of I.P.C. has been made out. Learned Court below in spite of criticising the order under challenge before him has spent much time to criticise the manner and procedure by which the order under challenge was passed by the learned Assistant Sessions Judge. He has also indicated in his order that learned Assistant Sessions Judge wants to dispose of the Magistrate Triable case also for the reason best known to him. So, it is clear from the order impugned before this Court that learned Sessions Judge accepted the submissions of learned Public Prosecutor In-Charge and opined that learned Assistant Sessions Judge is of the view that a charge u/s 354 of the Indian Penal Code has been made out from the materials available in the Case Diary. There is no consideration reflected in his order as to whether he has called for the Case Diary and perused the same and thereafter opined that a prima facie charge of offence u/s 354 has been made out or not.

15. From the written complaint it appears to me that there is a specific allegation indicating the commission of offence u/s 376(F) of the Indian Penal code. Police investigated the case examined witnesses and also recorded the statement of the victim u/s 164 of the Criminal Procedure Code. Police also collected medical examination report and submitted a charge-sheet stating that a prima facie charge u/s 376(f) of the Indian Penal Code has been well established against the accused person.

16. I also perused the photocopy of the annexures in the revisional application i.e. the order passed by learned Assistant Sessions Judge rejecting the prayer for bail. It appears that learned Assistant Sessions Judge has opined that non-rupture of hymen and absence of injury mark in the victim's private part are to be adjudicated in due course of trial and he is not inclined to hear regarding all the materials available in the Case Diary on merit at the very initial stage of framing charge.

17. Further it appears that learned Assistant Sessions Judge has opined during framing charge, that though in the medical report there is no rupture in the hymen, still considering the recorded statement of the witnesses u/s 161 of the Criminal procedure Code and from the statement of the victim u/s 164 of the Criminal Procedure Code there was penetration which of course is subject to prove during the trial. Learned Assistant Sessions Judge also felt that medical

report reflects existence of nail mark over the chest of the alleged victim which for the purpose of determining the framing of charge u/s 376(f) of the Indian Penal Code is held to be sufficient because by existing of this nail marks the attempt of rape is prima facie apparent.

18. The learned Assistant Sessions Judge in spite of finding of the materials available to him in the Case Diary has presumed that the accused person has committed offence u/s 376(f)/511 and held that it is settled law that generally affect of charge u/s 376(F)/511 of Indian Penal Code give rise to the offence u/s 354 of the Indian penal Code.

19. It is beyond my understanding as to why the learned Assistant Sessions Judge came to such self contradictory conclusion and frame charge u/s 376(F)/511 and also I failed to understand as to why learned Additional District and Sessions Judge, In-Charge of Sessions Judge ignored the fact that charge was framed u/s 376(F)/511 and not u/s 354 of the Indian Penal Code. Learned Lower Appellate Court did not give any reason of his findings that prima facie charge u/s 354 has been made out.

20. The basic principle for framing of charges in a criminal proceedings have not been followed either by the learned Assistant Sessions Judge or learned Additional District and Session Judge, In-Charge of Session Judge during hearing of the revisional application filed by the opposite party No. 2 (accused person) challenging the order of the Assistant Sessions Judge framing charge u/s 376(F)/511 of the Indian Penal Code.

21. It is the basic principle of law that the Judge will consider the question of framing of charge u/s 227 of the Code as the undue power to sift and weigh the evidence for the limited purpose of finding out whether or not the prima facie case against the accused has been made out. Where the materials placed before the learned Court disclosed grave suspicion against the accused which has not been properly explained the court will be fully justified to discharge the accused person. The test to determine a prima facie case would naturally depend upon the fact of each case and it is difficult to lay down a rule for universal application. However, if two views are equally possible and the Judges specified that the evidence produced before him will give rise to some suspicions but not grave suspicion against the accused, he will be fully justified in framing charge. At the time of framing of charges, the probative value of the materials-on-record cannot be ignored before framing a charge. The Court must apply its judicial mind on the materials placed on record and must be specified that the alleged offence by the accused person was possible.

22. At the stage of passing the order in terms of Section 227 of the Code of Criminal Procedure, the court has merely to peruse the evidence in order to finding out whether or not there is a sufficient ground for proceeding against the accused. If upon consideration the Court is satisfied that a prima facie case is made out against the accused, the Judge must proceed to frame charge in terms

of Section 228 of the Code. Only in a case where it is shown that the evidence which the prosecution proposes to adduce to prove the guilt of accused, even if fully accepted before it is challenged in cross-examination or rebutted by defence. It shows that the accused committed no the crime, then and then alone the court can discharge the accused.

23. In the order impugned no such consideration is reflected when learned Court below directed the Assistant Sessions Judge to sent down the case record to the Magistrate for trial u/s 354 of the Indian Penal Code as per provision of Section 228 of the Criminal Procedure Code.

24. Both the orders passed by the learned Assistant Sessions Judge and also learned Lower Court suffers from gross irregularity and illegality which cause great injustice to the petitioner. As such the order impugned is liable to be set aside. Both the orders passed by learned Assistant Sessions Judge in Sessions Trial Case No. 62 of May, 2007 vide order dated July 11th, 2007 and the order dated July 13th, 2007 passed by learned Additional District and Sessions Judge, In-Charge of Sessions Judge, Paschim Medinipur in connection with the Criminal Revision No. 184 of 2007 are hereby set aside. The learned Sessions Judge, Paschim Medinipur is directed to withdraw the sessions trial case being No. 62, May, 2007 arises out of the Kharagpur (Local) Police Station Case No. 270 of 2006 dated October 27th 2005 from the concerned court of the Magistrate and transferred the same to his own fault for trial. Learned Sessions Judge is also requested to dispose of the case in accordance with law and procedure after framing charge afresh on the materials available in the Case Diary as early as possible after serving notice to the opposite party No. 2 herein that is the accused person Sri Nandu @ Nanda Kumar Lama and also State. Urgent Photostat Certified Copy of this order if applied for be given to the parties on priority basis.