

(2001) 09 OHC CK 0027

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 93 of 1998

Gobinda Chandra Kuanr and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 21-09-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 323, 482
Penal Code, 1860 (IPC) — Section 316, 323, 34, 341

Citation : (2002) CriLJ 515 : (2001) 21 OCR 549 : (2001) 2 OLR 458 : (2002) 2 RCR(Criminal) 395

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : S.C. Sahoo, S.K. Sahu, G.C. Swain and A.P. Ray, for the Appellant;
A.G.A., for the Respondent

Judgement

L. Mohapatra, J.—The petitioners in this application u/s 482 of the Criminal Procedure Code had prayed for quashing the order dated 29.11.97 taking cognizance of offence alleged to have been committed u/s 316 of the Penal Code.

2. On the- basis of an F.I.R. dated 31.5.1996 Dhusuri P.S. Case No. 35 of 1996 was registered against the petitioners for the offences alleged to have committed Under Sections 451, 506. 323, 325, 316 of the Penal Code read with Section 34 of the said Code. It is alleged in the F.I.R. that on 27.5.96 in the night while the informant and his father-in-law were taking their dinner, the petitioners abused them, threatened to assault and as a matter of fact assaulted the father-in-law of the informant by fist blows and when the wife of the informant came to the spot" she was also assaulted by the petitioner No. 2 on her belly by means of a "Chatu" for which wife of the informant became senseless. As she was pregnant at that time she was shifted to Headquarters Hospital, Bhadrak and there she gave birth to a still born child.

3. After investigation, charge-sheet was submitted and the learned S.D.J.M., Bhadrak by order dated 3.10.97 took cognizance of offence committed Under

Sections 341/323 of the Penal Code read with Section 34 of the said Code. Even after the said order was passed, learned A.P.P. appearing on behalf of the State filed an application praying before the Court to take cognizance u/s 316 of the Penal Code and the learned Magistrate by order dated 29.11.97 took cognizance again for the offence u/s 316 of the Penal Code.

4. This order is assailed by Sri Sahoo, learned counsel for the petitioners stating that after taking cognizance on 3.10.1997 the learned Magistrate could not have taken cognizance again on the basis of an application filed by the A.P.P. and only recourses open to the prosecution was to take steps u/s 323 of the Cr.P.C. Section 323 of the Cr.P.C. prescribes that if 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 contained in the Cr.P.C. Shri Sahoo, learned counsel for the petitioners submitted that once learned Magistrate has taken cognizance such an enquiry comes to an end and further cognizance in respect of offence can only be taken at the time of trial and if it is found that such offence is triable by the Court of Session the Magistrate shall commit the case to the Court of Session. Reliance has also been placed on a decision of the Apex Court reported in 1996 (II) OLR SC 37, (1996) 11 OCR (SC) 139 (Raj Kishore Prasad v. State of Bihar and another). The Apex Court while considering the question of inquiry in relation to Section 209 of Cr.P.C. observed as follows :

"The present Section 209 is thus the product of the aforesaid expert deliberation followed by legislative exercise. It is thus to be seen prominently that preliminary inquiries then known as "committal proceedings" have been abolished in cases triable by a Court of Session. The functions left to be performed by the Magistrate, such as granting copies, preparing the records, notifying the Public Prosecutor etc. are thus preliminary or ministerial in nature. It is of course was true that the Magistrate at that juncture takes cognizance of a sort, but that is solely to perform those preliminary functions as a facilitator, towards placement of the case before the Court of Session, rather than being an adjudicator. It is thus manifest that in the sphere of the limited functioning of the Magistrate, no application of mind is required in order to determine any issue raised, or to adjudge anyone guilty or not, or otherwise to pronounce upon the truthfulness of any version. The role of the Magistrate thus is only to see that the package sent to the Court of Session is in order, so that it can proceed straightaway with the trial and that nothing is lacking in content, as per requirements of Sections 207 and 208 of the Code of Criminal Procedure. Such proceedings thus, in our opinion do not fall squarely within the ambit of "inquiry" as defined in Sec 2(g) of the Code of Criminal Procedure, which defines that "inquiry means every inquiry, other than a trial conducted under this Code by a Magistrate or a Court", because of the prelude of its being "subject to the context otherwise requiring". As said before, the context requires the proceedings before a Magistrate to be formal, barely committal in that sense, and that any notion based upon the old state of

law of its being an inquiry to which Section 319 could get attracted, has been done away with. Therefore, it would be legitimate for us to conclude that the Magistrate at the stage of Section 209, Cr.P.C. is forbidden to apply his mind to the merit of the matter and determine as to whether any accused need be added or subtracted to face trial before the Court of Session."

5. In view of what has been stated by the Apex Court and the language used in Section 323, Cr.P.C., I am of the view that it was open for the Magistrate to take cognizance of offence u/s 316 of the Penal Code after submission of charge-sheet looking into the case record. If the learned Magistrate failed to take cognizance at that stage and took cognizance of offences in respect of which charge-sheet has been filed he has no authority to take further cognizance on the basis of an application filed by the A.P.P. in exercise of powers u/s 323 of the Cr.P.C. as by that time enquiry was over and trial had not commenced. It was open for the learned Magistrate to take cognizance of any other offence at the time of trial and has no jurisdiction to take cognizance again in respect of any other offence after conclusion of inquiry and before commencement of trial.

6. I, therefore, set aside the order impugned and direct that in the event in course of trial the learned Magistrate is of the opinion that offence u/s 316 of I.P.C. is made out, he may take cognizance at that stage and pass necessary orders in accordance with law.