

(1999) 04 OHC CK 0015

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 1826 of 1998

Masabattula Kondel Rao and Others

APPELLANT

Vs

Smt. Keduri Achama and Another

RESPONDENT

Date of Decision : 23-04-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 202, 202(2), 207, 208

Dowry Prohibition Act, 1961 — Section 4

Penal Code, 1860 (IPC) — Section 302, 34, 498A

Citation : (2000) CriLJ 1185 : (1999) 16 OCR 654

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

Bench : Single Bench

Advocate : N.C. Pati, A.K. Das, A.R. Mohapatra, S. Mishra and J.R. Dash, for the Appellant; Addl. Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Mohanty, J.—The petitioners who are accused persons in S.C. No. 25 of 1996, arising out of a complaint case, challenge the order of the Additional Sessions Judge, rejecting their applications for acquittal and the other for not examining the witnesses other than those, who have been examined u/s 202, Cr. P. C.

2. The brief facts of the case is that one K. Kalabati (deceased) married accused M. Koondel Rao in the year 1991, but she died on 26-4-1996 at about 4.00 to 5.00 p.m. sustaining burn injuries. The incident was reported to the local police station by M. Simachalam, petitioner No. 3 on which Parlakhemundi P. S. U. D. Case No. 3 of 1995 was started. The police submitted Final Form reporting that the deceased committed suicide. After the Final Form was submitted, the mother of the deceased, Smt. Keduri Achama (opp. party No. 1) filed I.C.C. Case No. 34 of 1995 before the learned S. D. J.M., Parlakhemundi and examined two witnesses in the case. On the basis of the evidence of the two witnesses the Magistrate having found that it reveals a case triable by the Court of Session,

took cognizance of an offence punishable u/s 302/34, I.P.C. read with Section 4 of the Dowry Prohibition Act, and committed the case to the Court of Session which was numbered as S.C. No. 25 of 1996 before the Sessions Judge, Ganjam-Gajapati-Parlakhemundi. The learned Sessions Judge framed charges under Sections 302/498A/34, I.P.C. and u/s 4 of the D. P. Act and posted the case for trial to 2-1-1998. It is alleged that the learned Public Prosecutor having filed a list of 17 witnesses, the petitioners filed two petitions, one for acquittal of the accused persons, the mandatory provisions of Section 202(2), Cr. P. C. proviso having not been followed and the other petition was for examining only two witnesses who have been examined u/s 202, Cr. P. C. The learned Additional Sessions Judge by order dated 15-4-1998 rejected both the petitions on the ground that it has been filed at a belated stage and that the accused persons could have moved the learned S.D.J.M. and since the stage is already over, the petitions are not maintainable.

3. It is submitted that the Additional Sessions Judge has committed serious error of law in holding that the accused persons should have moved the lower Court for the purpose inasmuch as it is contended that the learned Additional Sessions Judge has failed to appreciate that the accused persons did not have any locus standi during the enquiry u/s 202, Cr. P. C. to move such an application. It is further contended that under proviso to Sub-section (2) of Section 202, Cr. P. C. the complainant was to be called upon by the learned Magistrate to produce all her witnesses and examined them on oath, if the complaint case is exclusively triable by the Court of Session. It is, therefore, the submission of the learned counsel for the petitioners that only two witnesses having been examined during the enquiry u/s 202, Cr. P. C. the learned Public Prosecutor could not have given a list of 17 witnesses during the trial before the learned Sessions Judge which is contrary to the provision of the Code and it shall frustrate the purpose of the proviso to Sub-section (2) of Section 202, Cr. P. C.

4. Under the proviso to Sub-section (2) of Section 202, Cr. P. C, if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session he has to call upon the complainant to produce all the witnesses and examine them on oath. It must be borne in mind that the enquiry u/s 202, Cr. P. C. is not intended to take the place of trial since the object of the section is not to find out whether the accused is guilty of the alleged offence at that stage, but the Court has to ascertain whether there is any sufficient evidence or there is a prima facie case against the accused to be proceeded with. At the stage of enquiry the accused does not come into picture and only when the process is issued he is to be heard. Section 225 of the Code contemplates that the prosecution has to be conducted by the Public Prosecutor and u/s 226, Cr. P. C. when the accused appears or is brought before the Court in pursuance of a commitment of the case u/s 200, Cr. P. C. the prosecutor shall open his case by prescribing the charge brought against the accused and state by what evidence he proposes to prove the guilt of the accused. u/s 227 of the Code if upon consideration of the record and the documents submitted therewith and after

hearing the submission of the accused and the prosecution in this behalf the Judge considers that there is no sufficient ground for proceeding against the accused, he shall record his reasons for so doing. The charge is framed u/s 228 of the Code when the Judge is of the opinion that there is ground for presuming that the accused has committed an offence and if the accused confesses guilt the Judge shall record the plea and may in his discretion convict him thereunder u/s 229 of the Code. However, u/s 232, Cr. P. C. if after taking evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point the Judge considers that there is no evidence that the accused committed the offence the Judge shall record an order of acquittal.

5. The main pleas of the accused-petitioners before the Court below was that on the basis of the F.I.R. lodged by the complainant, investigation was conducted by the police and a final report was submitted showing the death of the victim a suicidal burning and the mother of the deceased, thereafter filed a complaint case and after enquiry the Magistrate took cognizance under Sections 302/498A, I.P.C. and Section 4 of the D. P. Act. It is, therefore, the contention of the learned counsel that in view of the proviso of Sub-section (2) of Section 202, Cr. P. C, the witnesses not examined by the complainant cannot be examined during the Sessions trial.

6. The learned Additional Sessions Judge in the impugned order found that the committing Magistrate, before commitment had clubbed and taken up both the police case i.e. the G.R. Case and the private complaint together. Thus, the learned Magistrate while exercising the powers u/s 202(2), Cr. P. C. has not only taken the complaint case, but along with it has considered the G.R. Case together and committed the matter to the Court of Session having been satisfied that the offence complained of is triable exclusively by the Court of Session. It may be relevant to refer to Section 209 of the Code which contemplates that when a case is instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall commit after complying the provision of Section 207 or 208, Cr. P. C. as the case may be, the case to the Court of Session etc. Thus, the Magistrate was required to comply with the provisions of Section 208 of the Code when he was satisfied that the case was to be tried by a Court of Session. A reference may also be made to Section 311, Cr. P. C. authorising the Court at any stage of any enquiry, trial or other proceeding under this Code summon any person as witness or examine any person on attendance if his evidence appears to be essential to the just decision of the case. The procedure to be adopted for a Sessions trial is provided under Chapter XVIII. Thus, the learned Magistrate was required to comply with the provisions of Section 208 of the Code when he committed the matter to the Court of Session and then only the Sessions trial could have started. Since both the G. R. Case as well as the complaint case were taken up together and the commitment was made, there was nothing wrong for the learned Additional Sessions Judge who was in seisin of the Sessions case to issue process to the witnesses indicated in

both the cases. It is not the case of the petitioners that only the complaint case was committed for trial and as such, the witnesses examined u/s 202, Cr.P.C. were to be the witness in the sessions trial. The contention of the learned counsel for the petitioners that no other witnesses except those examined by the Magistrate u/s 202, Cr.P.C. could be issued with summons is, therefore, misconceived and is to be rejected. The learned counsel has referred to some decisions of this Court to contend that in an enquiry u/s 202, Cr.P.C. where the Magistrate finds the case is triable exclusively by the Court of Session, he has to call upon the complainant to produce all his witnesses. There is no quarrel over this proposition and in the facts and circumstances of the case the point in issue is not as to whether the Magistrate was required to call upon the complainant to produce all her witnesses or not. The peculiarity of the present case is that the Final Form filed by the Police in the G.R. Case and the complaint case were taken together and the Magistrate having found a prima facie case committed the same to the Court of Session. 7. The next contention of the learned counsel that the petitioners ought to have been acquitted before issuance of the process since there was no material, is also misconceived. Acquittal or conviction is contemplated u/s 232, Cr.P.C. In any case in which a charge has been framed, the Magistrate finds the accused not guilty, he shall record an order of acquittal. If after taking the evidence for prosecution, examining the accused and hearing the prosecution and the defence on the point the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal u/s 232, Cr.P.C. Since that stage has not reached, the question of passing an order of acquittal did not arise and, therefore, the petition filed by the accused persons for their acquittal was misconceived and rightly been rejected.

8. In any view of the matter, I do not find any merit in the contentions raised by the learned counsel for the petitioners and accordingly the Criminal Misc. Case is dismissed. .