
(2017) 01 TP CK 0007
In the Tripura High Court
Case No : Crl. Rev. P. No. 80 of 2012

Smt. Paramita Majumder (Datta)	Vs	APPELLANT
Sri Biswanath Datta		RESPONDENT

Date of Decision : 04-01-2017

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 227
Penal Code, 1860 (IPC) — Section 354, Section 377, Section 498A

Citation : (2017) 1 GauLT 605

Hon'ble Judges : Rakesh Ranjan Prasad, CJ.

Bench : Single Bench

Advocate : A.C. Bhowmik, D.C. Roy, A. Ghosh, S. Chakraborty, P. Saha

Final Decision : Disposed Off

Judgement

Rakesh Ranjan Prasad, C.J.—Aggrieved by the order dated 7-9-2012 of the learned Sub-Divisional Judicial Magistrate, Belonia, South Tripura in C.R. No. 38 of 2011 discharging the respondent No. 2 and 3 of the offences punishable U/s 498-A/354/377 IPC, the petitioner is filing this revision petition.

2. The case of the petitioner, in brief, is that the petitioner is the wife of the respondent No. 1, the respondent No. 2 and 3 are the younger brother and father of the respondent No. 1 respectively and that the father of the petitioner gifted many articles as per the demands of the respondents. The respondent No. 1 is serving as Field Assistant in the Office of the Deputy Director, Economics and Statistics, Karbi Anglong district and occasionally returned home by staying 10/12 days. A male child was born to them on 5- 1-2006. A few days after the birth of their child, the respondent No. 1 demanded a motor cycle and started to put pressure on her in the former form of physical and mental torture, which was increasing day by day by demanding additionally a plot of land. When her father refused to do so, all the respondents insisted donation of the land to the respondent No. 1 as she had no brother. According to the petitioner, the respondent No. 1 also indulged in sexually inappropriate activity by forcibly

putting his male organ into her mouth and discharged his semen and forced her to swallow it. At the instigation of the respondent No. 1, the respondent No. 2 assaulted her and also tried to commit rape on her on several occasions. According to the petitioner, the respondent No. 2 on 28-6-2011 entered into her room to fulfil his lustful desire, jumped upon her and attempted to fulfil his lust, but she managed to save herself after she informed him that she would disclose his lustful attempt to other persons whereupon he left her. On 7-7-2011, when the respondent no. 1 returned home, she apprised him of the incident, but he told her that unless his demands were met, she would continue to be tortured; on that night itself, he beat her severely. She then and there informed her father through mobile as to how she was beaten up by her husband, but her ordeals continued as the respondents kept on giving her mental and physical torture. She was, therefore, constrained to file the complaint petition before the Sub-Divisional Judicial Magistrate, Belonia, who, after taking the statement of the petitioner U/s 200, CrPC, took cognizance of the offences punishable U/s 498-A/377 IPC and issued process against the three respondents. The petitioner examined herself as PW-1 and examined two other witnesses, but no cross-examination was done by the respondents, who had already appeared before the trial court in response to the summons. Ultimately, the learned SDJM passed the impugned order.

3. Both Mr. AC Bhowmik, the learned senior counsel and Mr. S. Chakraborty, the learned counsel for the respondents 1, 2 and 3 have been extensively heard. I have also gone through the materials on record, particularly, the statements of PW-1, 2 and 3. The respondent No. 2 and 3, apart from the respondent No. 1, are charged with the offences punishable U/s 498-A/377 IPC. The learned SDJM appears to have been swayed by the submission of the learned counsel for the accused that when the sexual act had taken place in between man and man and woman and woman, such unnatural acts came within the purview of homosexuality thereby making out a prima facie case of Section 377 IPC. In so far as the framing of the charge against the respondent No. 1, as already noticed, the parties are not in issue. In *Grace Jayaani v. EP Peter*, AIR 1982 Kant 46, the Special Bench of the Karnataka High Court, after quoting from the Halsbury's Laws of England, American Jurisprudence and Taylor's Principles and Practise of Medical Jurisprudence, held that the term "Sodomy" is non coital, carnal copulation with a member of the same or opposite sex, e.g., per anus or per as and a man may thus indulge in sodomy with his own wife. However, in the case of the respondent No. 2 and 3, there is no prima facie case against the respondent No. 2 and 3. The case of the petitioner is that they instigated the respondent No. 1 to demand dowry and ill-treat her. In my opinion, such allegations, in my opinion, cannot be brushed aside at this stage in the teeth of the evidence adduced by the petitioner and her two witnesses examined by her to corroborate her evidence. Interestingly, the respondents did not cross-examine these witnesses.

4. The provision for discharge of an accused is found at Section 227, CrPC, which

reads thus :

"227. Discharge. - If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

5. In exercise of the power conferred under Section 227, CrPC, the High court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of process of the Court or that the ends of justice require that the proceeding ought to be quashed. The scope of this salutary provision came up for consideration before the Apex Court recently in *State of T.N. v. Suresh Rajan*, (2014) 11 SCC 709. After making comparative study of Sections 227, 239 and 245, CrPC, the Apex Court held :

"29. We have bestowed our consideration to the rival submissions and the submissions made by Mr. Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage.

30. Reference in this connection can be made to a recent decision of this Court in *Sheoraj Singh Ahlawat v. State of U.P.*, (2013) 11 SCC 476, in which, after analysing various decisions on the point, this Court endorsed the following view taken in *Onkar Nath Mishra v. State (NCT of Delhi)*, (2008) 2 SCC 61 : (*Sheoraj Singh Ahlawat case (supra)*)

"15. "11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not

expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence." (Onkar Nath case(supra))"

(emphasis in original)

31. Now reverting to the decisions of this Court in Sajjan Kumar v. CBI, (2010) 9 SCC 368 and Dilawar Balu Kurane v. State of Maharashtra, (2002) 2 SCC 135, relied on by the respondents, we are of the opinion that they do not advance their case. The aforesaid decisions consider the provision of Section 227 of the Code and make it clear that at the stage of discharge the court cannot make a roving enquiry into the pros and cons of the matter and weigh the evidence as if it was conducting a trial. It is worth mentioning that the Code contemplates discharge of the accused by the Court of Session under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on a police report are dealt with in Section 245. From a reading of the aforesaid sections it is evident that they contain somewhat different provisions with regard to discharge of an accused :

31.1. Under Section 227 of the Code, the trial court is required to discharge the accused if it "considers that there is not sufficient ground for proceeding against the accused". However, discharge under Section 239 can be ordered when "the Magistrate considers the charge against the accused to be groundless". The power to discharge is exercisable under Section 245(1) when, "the Magistrate considers, for reasons to be recorded that no case against the accused has been made out which, if unrebutted, would warrant his conviction".

31.2. Section 227 and 239 provide for discharge before the recording of evidence on the basis of the police report, the documents sent along with it and examination of the accused after giving an opportunity to the parties to be heard. However, the stage of discharge under Section 245, on the other hand, is reached only after the evidence referred in Section 244 has been taken.

31.3. Thus, there is difference in the language employed in these provisions. But, in our opinion, notwithstanding these differences, and whichever provision may be applicable, the court is required at this stage to see that there is a prima facie case for proceeding against the accused. Reference in this connection can be made to a judgment of this Court in R.S. Nayak v. A.R. Antulay, (1986) 2 SCC 716. The same reads as follows :

"43. ? Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of

"prima facie" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial court is satisfied that a prima facie case is made out, charge has to be framed."

6. Judged against the principles laid down by the Apex Court in Suresh Rajan case reproduced above, I have no doubt in my mind that the learned SDJM has prematurely discharged the respondent No. 2 and 3 for the offence punishable U/s 498-A IPC though did not err in discharging them of the offence punishable U/s 377 IPC, for which no whisper of allegations are made by the petitioner against them in this behalf. On the other hand, on the materials available on record, the learned SDJM did not commit illegality in framing the charge against the respondent No. 1 U/s 498-A/377 IPC. Consequently, the entire impugned order needs to be modified.

7. The result of the foregoing discussion is that this Criminal Revision Petition No. 80 of 2012 is partly allowed. Criminal Revision Petition No. 1 of 2013 is dismissed. The discharge of the respondent No. 2 and 3 U/s 498-A IPC is accordingly set aside. The trial court shall now frame the charge against the respondent No. 2 and 3 U/s 498-A IPC and proceed with the trial against them jointly the respondent No. 1, who shall also be tried U/s 377 IPC in accordance with law. Needless to say, the discharge of the respondent No. 2 and 3 of the charge U/s 377 IPC does not call for the interference of this Court. The impugned order stands modified only to the extent and in the manner indicated. As more than four years have lapsed, the trial court shall make an endeavour to conclude the trial within a period of six months from the date of receipt of this judgment. Transmit the L.C. record forthwith.

8. It is made clear that the observations made by me in the foregoing are tentative in nature and should not be construed to be final observations on the merit of the case, which is yet to be decided by the trial court on merit.