IN THE HIGH COURT OF ORISSA, CUTTACK

CRLMC No. 490 Of 2005

An application under section 482 of the Code of Criminal Procedure, 1973 in connection with G.R. Case No. 526 of 1997 pending on the file of S.D.J.M., Bhanjanagar.

Musa Pradhan
& Another ..... Petitioners

-Versus-

State of Orissa ..... Opposite party

For Petitioners: - Debasis Sarangi

For Opposite Party: - Mr. Priyabrata Tripathy
Addl. Standing Counsel

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing: 04.12.2017 Date of Judgment: 27.12.2017

S. K. SAHOO, J. The petitioners Musa Pradhan and Bansidhar Pradhan have filed this application under section 482 of the Criminal Procedure Code for quashing the impugned order dated 22.12.2004 passed by the learned S.D.J.M., Bhanjanagar in G.R. Case No. 526 of 1997 in taking cognizance of offence under section 376 of the Indian Penal Code and also taking recourse to

section 323 of Cr.P.C. for commitment of the case to the Court of Session. The said case arises out of Buguda P.S. Case No. 174 of 1997 in which chargesheet was submitted under sections 493, 506 read with section 34 of the Indian Penal Code.

2. The case was instituted on 15.11.1997 on the basis of the first information report lodged by the victim girl before the officer in charge, Buguda police station.

As per the first information report, it is the prosecution case that the victim was going to sleep in the house of Kirtan Pradhan since last one and half years prior to the occurrence. One night when the victim came outside, the petitioner Bansidhar Pradhan was there and he gave proposal of marriage to the victim but the victim did not respond. Subsequently on many an occasion, the petitioner Bansidhar Pradhan continued to propose the victim for marriage but she refused to marry. The petitioner Bansidhar Pradhan in order to compel the victim for marriage told her that he would commit suicide coming in front of a running train if she did not agree for marriage. On the Raja Sankranti day of the year 1997, the victim had been to bring straw as her father was ailing. The petitioner Bansidhar Pradhan all on a sudden appeared there, caught hold of the victim from her back and when the victim shouted, the

petitioner put his hands on the mouth of the victim and asked her not to shout as he would marry her. The petitioner Bansidhar Pradhan then took then the victim forcibly inside the nearby jungle and kept physical relationship with her. On subsequent occasions also, the petitioner Bansidhar Pradhan went on keeping physical relationship with the victim with assurance of marriage for which she became pregnant for five months. On 22.10.1997 when the victim met the petitioner Bansidhar Pradhan and asked him to keep up the promise by marrying her, the petitioner Musa Pradhan who is the father of Bansidhar Pradhan threatened her with dire consequence in the event she tried to keep any contact with his son.

On the basis of such first information report, Buguda P.S. Case No.174 of 1997 was registered under sections 493/506/34 of the Indian Penal Code against the petitioners. During course of investigation, it was found that in connection with the case, village meetings were held on some occasions where both the parties attended but none of the petitioners agreed for marriage. The victim was medically examined by the Professor, M.K.C.G. Medical College and Hospital, Berhampur who found the age of the victim to be 20 years and the age of the foetus was within 20-24 weeks. The petitioner Bansidhar

Pradhan was also medically examined and it was found that he was capable of committing sexual intercourse. The 164 Cr.P.C. statement of the victim was recorded on 03.12.1997 who stated her age to be fifteen years. Finding prima facie case under sections 493/506/34 of the Indian Penal Code against both the petitioners, charge sheet was submitted.

3. The learned S.D.J.M., Bhanjanagar framed charges against the petitioners under sections 493/34 and 506/34 of the Indian Penal Code. During course of trial, numbers of witnesses were examined and the victim was examined on 22.12.2004 as P.W.5 and she stated in her evidence about the commission of rape on her by petitioner Bansidhar Pradhan about seven years back and on subsequent occasions on the assurance of marriage. She specifically stated that she conceived through the petitioner Bansidhar Pradhan due to such rape and delivered a female child in the year 1998.

4. After the chief examination of the victim was over, the learned S.D.J.M. found the case to be one under section 376 of the Indian Penal Code which is triable by Court of Session. It was held by the learned S.D.J.M. that at the first time, when the lady was victimized, she was lifted to a cashew nut garden where she was forcibly raped by the petitioner Bansidhar Pradhan and

at that time the marriage or marriage like incident was not in picture and therefore, the accused should have been prosecuted for the offence under section 376 of the Indian Penal Code. The learned S.D.J.M. accordingly passed the impugned order of taking cognizance of offence under section 376 of the Indian Penal Code and invoked its power under section 323 of Cr.P.C. for commitment of the case to the Court of Session.

5. Mr. Debasis Sarangi, learned counsel appearing for the petitioners in his own inimitable style contended that the impugned order passed by the learned S.D.J.M. in directing the petitioners to appear before him on the date fixed for commitment of the case to the Court of Session invoking its power under section 323 of Cr.P.C. is illegal in as much as the learned Magistrate should have submitted the case with a brief report to the Chief Judicial Magistrate to do the needful as provided under section 322 of Cr.P.C. It is further contended that when the cross-examination of the victim had not been commenced, the learned Magistrate should not have exercised its power under section 323 of Cr.P.C. on the basis of chief examination of the victim inasmuch as there are material contradictions in the evidence of the victim vis-a-vis the facts narrated in the F.I.R. as well as her 164 Cr.P.C. statement. It is

further contended that the materials available on record indicate that the victim was a consenting party and therefore, the ingredients of the offence under section 376 of the Indian Penal Code are not attracted and as such the learned Magistrate committed illegality in taking cognizance of such offence.

Mr. Priyabrata Tripathy, the learned Addl. Standing Counsel on the other hand contended that right from the beginning the victim has stated in the F.I.R. as to how the petitioner Bansidhar Pradhan tried to pressurize her to marry him and ultimately one day dragged her forcibly and kept physical relationship with her. It is further contended that when the 164 Cr.P.C. statement of the victim was recorded, she stated her age to be fifteen years and therefore, in view of clause sixthly of section 375 of the Indian Penal Code prior to the amendment in the year 2013, when the victim was under sixteen years of age, her consent is immaterial and the sexual intercourse by petitioner Bansidhar Pradhan with the victim would amount to rape. It is further contended that the ossification test report of the victim obtained during investigation that the victim was aged about twenty years is not the conclusive proof of her age which is to be finally adjudicated by the learned trial Court. It is further contended that since the

learned S.D.J.M. has got jurisdiction to commit the case to the Court of Session in view of section 323 of Cr.P.C., there is no necessity of submitting the case to the Chief Judicial Magistrate as provided under section 322 of Cr.P.C. It is further contended that the F.I.R. lodged by the victim, her 164 Cr.P.C. statement as well as her evidence in the trial Court as P.W.5 prima facie makes out the ingredients of offence under section 376 of the Indian Penal Code and therefore, this Court should not exercise its inherent jurisdiction under section 482 of Cr.P.C. to quash the impugned order.

6. Adverting to the contentions raised by the learned counsels for the respective parties, the following questions cropped up for determination:-

(i) Whether the Magistrate can directly commit the case to the Court of Session under section 323 of Cr.P.C. if during course of inquiry or trial, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session *or* after formation of such judicial opinion, it is necessary on his part to submit the case to the Chief Judicial Magistrate for commitment as provided under section 322 of Cr.P.C.;

(ii) Whether the Magistrate has committed any illegality in exercising its power under section 323 of Cr.P.C. when the victim had not been cross-examined by the defence;

(iii) Whether prima facie material to take cognizance of offence under section 376 of the Indian Penal Code is made out.

Discussion on the first question:

7. Section 322 of Cr.P.C. lays down the procedure to be followed by the Magistrate in the cases which he cannot dispose of. From the evidence collected in course of an inquiry into an offence or trial, such situation may likely to arise. The conditions which must be shown to exist in order to bring a case within the ambit of section 322(1) of Cr.P.C. are as follows:-

(i) lack of jurisdiction to try the case;

(ii) lack of jurisdiction to commit the case for trial to the Court of Session;

(iii) the case is one which should be tried by some other Magistrate in the district;

(iv) the case is one which should be committed by some other Magistrate in the district;

(v) the case is one which should be tried by the Chief Judicial Magistrate.

Once any of the above contingencies arises, the Magistrate shall stay the proceedings of the case and submit the case to the Chief Judicial Magistrate with a report explaining briefly the nature of the case. Therefore, if the Magistrate has no jurisdiction to commit the case for trial to the Court of Session, he cannot straightaway commit the case but he has to submit the case to the Chief Judicial Magistrate with a brief report who in turn shall do the needful in committing the case. On the other hand, if the Magistrate has got jurisdiction to commit the case for trial to the Court of Session, there is no necessity on his part to submit the case to the Chief Judicial Magistrate. When the materials and evidence of a witness refers to an offence against one of the accused to be triable by a Court of Session, committal of the entire case is valid.

Section 323 of Cr.P.C. on the other hand deals with the procedure, the Magistrate has to follow when after commencement of inquiry or trial, he finds the case is one which should be committed. If in the course of an inquiry or trial into an offence, it appears to the Magistrate 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 Chapter XVI of Cr.P.C. governing the committal of cases to the Court of Session. After commitment, the provisions of Chapter XVIII of Cr.P.C. which relates to trial before a Court of Session shall be followed.

Section 323 of Cr.P.C. is supplementary to section 209 of Cr.P.C. A Magistrate is given under this section, in addition to his power under section 209 of Cr.P.C, a power to commit a case which ought to be tried by Court of Session. A bare reading of the provisions of sections 322 to 325 of the Criminal Procedure Code, it is seen that (i) if it appears to the Magistrate from the facts disclosed in the police report and other evidence that he will not be able to inflict adequate punishment in the case and, thus, the case ought to be tried by the Chief Judicial Magistrate, he is empowered to submit the case to the Chief Judicial Magistrate under section 322 of Cr.P.C.; (2) if the Magistrate, after closing of the evidence of both the parties, finds the accused guilty and thinks that the accused ought to receive a punishment different in kind or severe than that which he is empowered to inflict, he is empowered to submit the case to the Chief Judicial Magistrate, under section 325 of Cr.P.C.; (3) if on the other hand, it appears to the Magistrate at any stage of the

trial before signing the judgment that the case is one which ought to be tried by the Court of Session (who has concurrent jurisdiction), he shall commit the case to the Court of Session under section 323 of the Criminal Procedure Code. Section 323 of the Cr.P.C. gives a wide discretion to the Magistrate which should be exercised judiciously and not capriciously upon a mere request of a party. The Magistrate should have adequate reason for sending a person to stand trial before a Court of Session for an offence which he could not himself try. The Magistrate has got full discretion, at any stage of the proceedings of the case before him, to decide whether or not the case is a fit one for commitment to the Court of Session. Powers of the Magistrate under section 323 of Cr.P.C. are comprehensive and not limited by any extent. Whether the considerations for a Magistrate to take a decision that the case is one which ought to be tried by the Court of Session were valid or not depend upon the facts of each case. There could be no hard and fast rule to guide the discretion of the Magistrate. The distinctive features between section 209 and section 323 of Cr.P.C. are that while committing the case under section 209 Cr.P.C., it is to appear to the Magistrate that the offence is triable by the Court of Session as per the classification of offences under the First Schedule of

Cr.P.C. whereas in committing a case to the Court of Session under section 323 of Cr.P.C., it must appear to the Magistrate that the case is one which ought to be tried by the Sessions Court. Therefore, if the evidence adduced before the Magistrate during inquiry into an offence or during trial, discloses an offence triable by a Sessions Court, the Magistrate must commit the case to the Court of Session. Law is well settled that the Magistrate has got power under section 323 of Cr.P.C. to commit a non-Sessions triable case to the Court of Session, if the counter case is triable by Court of Session. The expression "ought to be tried" in section 323 of Cr.P.C. includes such offences as are not triable exclusively by the Court of Session. Therefore, any relevant or proper ground on the basis of which it could be said that the case is one which ought to be tried by the Court of Session could be valid ground for the making of an order of committal under section 323 of Cr.P.C. The Magistrate can exercise his discretion suo moto or on an application of any of the parties. If he exercises power under section 323 of Cr.P.C. and commits the case to the Court of Session, proceeding before him stands terminated.

In case of **Suratan -Vrs.- State of Orissa reported in (2016) 65 Orissa Criminal Reports 389**, it is held as follows:-

> "6.....To invoke power under section 323 of Cr.P.C., it should appear to the Magistrate in any inquiry into an offence or a trial before him that the case is one which ought to be tried by the Court of Session. "Ought" is an auxiliary verb which is used to express duty or moral obligation. The section further indicates that such an order can be passed "at any stage" of any inquiry or trial but prior to signing of judgment. Therefore, if the Magistrate having jurisdiction finds prima facie material that the case is one which is required to be tried by the Court of Session then he is duty bound to pass an order in that respect. Therefore, there is no dearth of power with the Magistrate to pass an order of commitment in a case under inquiry or trial which was originally a non-sessions triable one but it should be exercised only after being satisfied that the case is one which ought to be tried by the Court of Session. The provisions of section 323 of the Code are in addition to the provision of Section 209 of the Code. Section 209 of the Code lays down that when an offence is exclusively triable by a Court of Session i.e. when it appears from the provisions of the schedule to the Code that the offence is triable

> exclusively by a Court of Session, the Magistrate shall commit the case to the Court of Session. The order of commitment contemplated under Section 209 of the Code is a routine mechanical order passed in conformity with the provisions of the schedule to the Code whereas the order contemplated under section 323 of the Code is an exclusive order which requires close consideration by the Magistrate of the offence. There is basic difference between "appears to the Magistrate that the offence is triable exclusively by the Court of Session" as appears in section 209 Cr.P.C. and "appears to the Magistrate that the case is one which ought to be tried by the Court of Session" as appears in section 323 Cr.P.C."

In case of **Raju @ Rohitashva Dubey and Anr. -Vrs.- Union of India reported in 2001 (5) MP High Court Today 410**, where it was contended that provision of section 323 Cr.P.C. is violative of Articles 14 and 21 of the Constitution of India as it gives unfettered power to a Magistrate to commit a case any time before signing the judgment and the same defeats the right of speedy trial which is a fundamental right, a Division Bench of Madhya Pradesh High Court held as follows:-

> "9. The provision of Section 323 Cr.P.C. does not adversely affect the right of speedy trial, but, it goes to the very root of the trial where the case

> should be tried. If a case is not triable or ought not to be tried by Magistrate and during the course of enquiry he comes to such a conclusion, he obviously refers the case to the Competent Court as offence cannot be allowed to go unpunished, is also underlining principle of public policy under Section 323 Cr.P.C. The power of a Magistrate under Section 323 Cr.P.C. is in addition to his power under Section 209 of the Code to commit cases exclusively triable by the Court of Sessions to that Court. The provisions contained in Section 244 Cr.P.C. cannot take away the powers vested in the Magistrate under section 323 to commit the case to the Court of Sessions at any stage of the proceedings before signing the judgment provided the case is one which ought to be tried by the Court of Sessions. Merely because a case has been instituted otherwise then on a police report, cannot take away the power vested in Magistrate under Section 323 Cr.P.C. to commit the case to the Court of Sessions at any stage of the proceedings.....”

The source of commitment of a case to the Court of Session, instituted on a police report or otherwise is three-fold i.e. under sections 209, 322 and 323 of Cr.P.C. but once they are so committed, they flow in a common stream under Chapter XVIII of Cr.P.C. The contentions raised by the learned counsel

for the petitioners that the words appearing in section 323 of Cr.P.C. i.e. "he shall commit it to that Court under the provisions hereinbefore contained" specify that after the decision of commitment is taken by the Magistrate, the case has to be submitted to the Chief Judicial Magistrate with a brief report as provided under section 322 of Cr.P.C. and then the Chief Judicial Magistrate will commit the case to the Court of Session cannot be accepted. Once the Magistrate takes the decision that the case is one which ought to be tried by the Court of Session and he has jurisdiction to commit the case for trial, the order of commitment of the case shall have to be under the provisions hereinbefore contained, i.e., the provisions contained in Chapter XVI of the Cr.P.C. and not under section 322 of Cr.P.C., as the last portion of section 323 of the Cr.P.C. specifies that after such commitment, the provisions of Chapter XVIII shall apply to the committal so made. The order of commitment that the Magistrate makes under section 323 of Cr.P.C. is deemed to be an order of commitment made under section 209 of the Cr.P.C. occurring in Chapter XVI of the Cr.P.C.

In view of the aforesaid discussions, I am of the humble view that it was not necessary on the part of the learned S.D.J.M., Bhanjanagar to submit the case to the Chief Judicial

Magistrate after taking cognizance of offence under section 376 of the Indian Penal Code. He has rightly directed personal appearance of the petitioners on the date fixed for commitment of the case to the Court of Session i.e. Court of Additional Sessions Judge, Bhanjanagar.

Discussion on the second question:

8. There is no dispute that after the chief examination of the victim (P.W.5) was completed, the learned Magistrate had taken the decision of commitment. The learned Magistrate has perused the copy of the charge sheet, the statement of the victim and two others recorded under section 164 of Cr.P.C. apart from the chief examination of the victim for taking such decision and by then the victim had not been cross-examined by the defence.

In case of **Hardeep Singh -Vrs.- State of Punjab reported in (2014) 57 Orissa Criminal Reports (SC) 455**, one of the questions came up for consideration before the Five-Judge Bench as to whether the word "evidence" used in section 319(1) of Cr.P.C. could only mean evidence tested by cross-examination or the Court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned. The Hon'ble Court

answered that considering the fact that under section 319 Cr.P.C., a person against whom material is disclosed is only summoned to face the trial and in such an event under section 319(4) Cr.P.C., the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Therefore, I am of the view that on the basis of the evidence of chief examination of witness/witnesses adduced during trial, the Magistrate can take action contemplated under section 323 of Cr.P.C. in directing commitment of the case to the Court of Session provided that it appears to him at that stage that the case is one which ought to be tried by the Court of Session and he need not wait such evidence to be tested by cross-examination. If the Magistrate waits for cross-examination to be over and then assesses the evidenciary value of the witness/witnesses as contended by the learned counsel for the petitioners, it would amount to pre-judge on the merits of the case on the basis of such evidence which is not permissible at that stage.

Thus when the learned Magistrate has come to the conclusion that the offence committed by petitioner Bansidhar

Pradhan was 'rape' under section 376 of the Indian Penal Code, he had to, and rightly took the decision for commitment of the case to the Court of Session and the formulation of judicial opinion does not suffer from any perversity or illegality.

Discussion on the third question:

9. The victim is the informant in the case and she has stated in the F.I.R. that on the Raja Sankranti day, while she had been to collect straw, the petitioner Bansidhar Pradhan all on a sudden appeared there, caught hold of her from her back and when she shouted, the petitioner put his hands on her mouth and told her not to shout as he would marry her and then took the victim forcibly inside the nearby jungle and kept physical relationship with her. In the statement recorded under section 164 Cr.P.C., the victim has stated her age to be fifteen years and categorically stated as to how on the Raja Sankranti day, the petitioner Bansidhar Pradhan committed rape on her while she had been to bring straw. In her evidence as P.W.5, the victim has stated that she had gone to bring straw and the petitioner came from back side, caught hold of her and lifted her to cashew nut garden and made her naked and raped her.

Therefore, it cannot be said that there was no prima facie evidence before the learned Magistrate against the

petitioner Bansidhar Pradhan for commission of offence under section 376 of the Indian Penal Code or decision taken by the Magistrate for commitment of the case to the Court of Session is illegal.

10. Law is well settled that inherent power of the High Court under section 482 of Cr.P.C. should to be exercised sparingly, with circumspection and in the rarest of rare cases and not according to whims and caprice in a routine manner. When it is brought to the notice of the Court that grave miscarriage of justice would be committed if the impugned order is allowed to remain in force and the accused would be harassed unnecessarily, the High Court can invoke the inherent power to prevent abuse of process of any Court or otherwise to secure the ends of justice.

In view of the foregoing discussions, I find no illegality in the impugned order. Accordingly, I am not inclined to invoke the inherent power under section 482 of Cr.P.C. to quash the impugned order dated 22.12.2004 in G.R. Case No. 526 of 1997 pending on the file of S.D.J.M., Bhanjanagar.

The observation made while disposing of this CRLMC application and the findings recorded herein are for the purposes of adjudication of this CRLMC application only. This may not be

taken as an expression of opinion on the merits of the case. The learned trial Court would be at liberty to decide the matter in the light of evidence which would be adduced by the respective sides de hors any finding recorded in this judgment.

In the result, the CRLMC application being devoid of merits, stands dismissed. The interim order of stay of further proceeding passed by this Court in Misc. Case No.472 of 2005 on 04.03.2005 stands vacated. The petitioners are directed to appear before the learned S.D.J.M., Bhanjanagar in G.R. Case No. 526 of 1997 within four weeks from today for commitment of the case to the Court of Session failing which the learned S.D.J.M., Bhanjanagar shall proceed against the petitioners in accordance with law. The lower Court record be sent back to the concerned Court immediately.

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S. K. Sahoo, J.

Orissa High Court, Cuttack
The 27th December 2017/ Pravakar/Sisir