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Jm

**THE HIGH COURT OF SIKKIM : GANGTOK**

**CRL.REV.P. NO.6 OF 2007**

In the matter of an application under Sections 397 and 401 read with Section 482 of the Criminal Procedure Code, 1973

**and**

in the matter of

Govind Tamang,  
S/o late Nima Dorjee Tamang,  
R/o Upper Samdong,  
P.S. Singtam,  
East Sikkim  
(at present Rongyek Jail)

..... **Accused/  
Petitioner.**

**versus**

State of Sikkim,  
through the Chief Secretary,  
Government of Sikkim,  
Gangtok, East Sikkim

..... **Respondent.**

For Petitioner : Mr. N. Rai, Legal Aid Counsel with Ms. Jyoti Kharka, Advocate.

For Respondent : Mr. Karma Thinlay, Additional Public Prosecutor.

**PRESENT : THE HON'BLE MR. JUSTICE A. P. SUBBA, JUDGE.**

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Last date of hearing : 6<sup>th</sup> May, 2008

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**DATE OF JUDGMENT : 30<sup>th</sup> May, 2008**

**J U D G M E N T**

**A. P. SUBBA, J.**

This Revision Petition is directed against the order dated 19<sup>th</sup> November, 2007, passed by the learned Sessions Judge (E & N) at Gangtok in S.T. Case No.16 of 2007.


**2.** The relevant facts which led to the filing of this Revision Petition are that the accused/petitioner herein was put on a trial on the




basis of a charge-sheet filed against him under Sections 376/511 of the Indian Penal Code (in short "IPC"). The allegations against the accused/petitioner as contained in FIR dated 22<sup>nd</sup> June, 2007, filed by one Tshering Doma Bhutia, a Panchayat Member of the Upper Samdong, East Sikkim was to the effect that the accused/petitioner, Govind Tamang alias Pempa Tamang had sexually abused/assaulted his minor daughter/child Asma Tamang aged 2 years at his house while his wife Pushpa Tamang was away from home in the evening of 19<sup>th</sup> June, 2007.

**3.** The matter came up for consideration of charge before the learned Sessions Judge on 19<sup>th</sup> November, 2007. After hearing the parties and on perusal of the records, the learned trial Court came to be of the view that the materials on record made out a *prima facie* case under Section 376 read with Section 511 IPC against the accused/petitioner and accordingly directed vide order dated 19<sup>th</sup> November, 2007 that charge against the accused/petitioner be framed under the said sections of law and posted the case for framing of charge. It is against this order passed by the learned Sessions Judge that the accused/petitioner has come up with the present Revision Petition.

**4.** Shri N. Rai, learned Legal Aid Counsel assisted by Ms. Jyoti Kharka, Advocate appearing for the accused/petitioner and Mr. Karma Thinlay, learned Additional Public Prosecutor appearing for the respondent were heard.



**5.** The learned counsel for the accused/petitioner assailed the impugned order mainly on two grounds. It was contended that the learned trial Court had passed the impugned order without giving any reasons in so far as the impugned order was mechanically passed



without any application of mind. Secondly, it was contended that the materials on record did not make out a *prima facie* case under Sections 376/511 IPC. Mr. Karma Thinlay, learned Additional Public Prosecutor on the other hand submitted that the impugned order was legally sound in so far as the same was not contrary to materials on record. It was his specific contention that there was no provision in law which required the Court to give detailed reasons in support of an order directing framing of charge. It was his further submission that as the determination of the question as to whether the material on record show a *prima facie* case under Sections 376/511 IPC or only under Section 354 IPC would involve appreciation of evidence it would be contrary to law to undertake such an exercise at the stage of considering *prima facie* case on the question of framing of charge.

**6.** In order to appreciate the above rival contentions of the parties, it would be relevant to reproduce the impugned order, i.e., order dated 19<sup>th</sup> November, 2007 as follows:-

"Ld. P.P. Shri N. P. Sharma present for the State.  
Accused produced from Judicial Custody.

Ld. Legal Aid counsel Shri N. Rai present for the accused.

This is to consider whether there are any materials on record to frame charge against the accused U/Ss 376/511 of IPC.

Heard ld. counsel for the parties.


Perused the record.

I am satisfied that there are materials on record to make out case U/S 376 read with Section 511 of IPC against the accused for having attempted to commit sexual act on his minor daughter Miss Asma Tamang on the night of 19.06.2007.

Charge thus be framed against the accused U/Ss 376/511 of IPC on the next date.

Accused further remanded till 26.11.07.

To : 26.11.2007."




7. A bare reading of the above impugned order goes to show that no reasons have been recorded for directing framing of charge. It is the submission of the learned counsel for the accused/petitioner that even though the order passed falls under Section 228 of the Code of Criminal Procedure, 1973 (in short "Cr.P.C.") which does not specifically provide for giving of reasons in support of the order, the order being a judicial order it was incumbent upon the Court to give reasons in support of the order.

8. The procedure relating to trial before a Court of Session is contained in Chapter XVIII of the Code. Section 227 Cr.P.C. which deals with discharge and Section 228 Cr.P.C. which deals with order relating to framing of charge both of which fall under this Chapter and which are relevant for the purpose may be reproduced as follows:-

**"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."

**"228. Framing of charge.—** (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which—

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- (a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;
  - (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read


and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."


9. A perusal of the above provisions show that while a Court is required to give reasons in support of an order directing discharge of an accused under Section 227 Cr.P.C., there is no such specific requirement under Section 228 Cr.P.C. while passing an order of framing of charge. Even though this position is accepted, the contention of the learned counsel for the accused/petitioner, as noted above, is that even though Section 228 Cr.P.C. contains no such requirement in specific terms an order passed under the section being a judicial order it is incumbent on the Court concerned to give reasons. In support of his contention, the learned counsel relied on the decisions of Patna High Court in **Haji Minhajuddin and Others vs. State of Bihar and Another** reported in **1991 CRI.L.J. 481** wherein it has been held relying on the observations of the Supreme Court in **State of Karnataka vs. L. Muni Swami** reported in **AIR 1977 SC 1489** that a Court has to record his reasons for framing of charge against the accused while exercising power under Section 228 Cr.P.C. Disputing the submission that the above reflects the correct position in law, the learned Additional Public Prosecutor contended that there is no legal requirement for recording reasons in support of an order regarding framing of charge as in the case of an order of discharge. Though number of decisions had been cited by the learned Additional Public Prosecutor in support of his submission, I find it sufficient to refer to the case of **Kanti Bhadra Shah and Another vs. The State of West Bengal** reported in **JT 2000 (1) SC 13**. Dealing with the matter elaborately in the said case the Hon'ble Supreme Court observed in paragraph 8 as follows:-

**"8.** We wish to point out that if the trial court decides to frame a charge there is no legal requirement that he should pass an order specifying the reasons as to why he opts to do so. Framing of charge itself is prima facie order that the trial judge has formed the opinion, upon considering the police report and other documents and after hearing both sides, that there is ground for presuming that the accused has committed the offence concerned. ...." **[emphasis supplied]**

Throwing light on the reasons as to why a Court is absolved from the obligation of giving reasons while passing an order for framing of charge, the Apex Court in paragraph 12 further observed as follows:-

**"12.** If there is no legal requirement that the trial court should write an order showing the reasons for framing a charge, why should the already burdened trial courts be further burdened with such an extra work. The time has reached to adopt all possible measures to expedite the court procedures and to chalk out measures to avert all road blocks causing avoidable delays. If a magistrate is to write detailed orders at different stages merely because the counsel would address arguments at all stages, the snail paced progress of proceedings in trial courts would further be slowed down. We are coming across interlocutory orders of magistrates and Sessions Judges running into several pages. We can appreciate if such a detailed order has been passed for culminating the proceedings before them. But it is quite unnecessary to write detailed orders at other stages, such as issuing process, remanding the accused to custody, framing of charges, passing over to next stages in the trial. It is a salutary guideline that when orders rejecting or granting trial are passed, the Court should avoid expressing one way or other on contentious issues, except in cases such as those falling within Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985." **[emphasis supplied]**

 **10.** The above authoritative pronouncement of the Apex Court on the point hardly leaves any room for doubt that the provisions contained in Section 228 Cr.P.C. already quoted above cannot be interpreted as laying down any condition that a Court while passing an order for framing of charge should give reasons in support of such an order. It is however not to say that a detailed order giving reasons for



framing of charge if passed will always be bad in law. What is however emphasised is that there is no legal requirement for writing a detailed order while passing an order for framing of charge under Section 227 Cr.P.C. It thus follows that the contention raised by the learned counsel for the accused/petitioner that the impugned order suffers from legal infirmity on account of absence of supporting reasons cannot be accepted. The point raised thus fails.


**11.** The next point urged by the learned counsel for the accused/petitioner is that the materials which have come on record do not show any *prima facie* case under Sections 376/511 IPC. The contention of the learned counsel for the accused/petitioner in this regard is that the only evidence that has come on record on the basis of the statements of one Rita Bhutia wife of one Rinzing Bhutia recorded under Section 161 Cr.P.C. is that the accused had rubbed the private part of the child with his hands. This evidence according to the learned counsel would not show any *prima facie* case under Section 376 read with Section 511 IPC even when taken as true. This evidence, as further submitted by the learned counsel, at the most would make out a *prima facie* case under Section 354 IPC and not under Section 376 read with 511 IPC. In support of this submission, the learned counsel relied on the decision of Delhi High Court in **Ramji Lal vs. State** reported in **(1994) Delhi Law Times 829**. A perusal of the facts of the case would go to show that the evidence brought on record was that the accused had only tried to fondle the private part of 3<sup>1</sup>/<sub>2</sub> years old child with his fingers. Keeping such evidence in view it was held that the case squarely falls within the mischief of Section 354 IPC and not under Sections 376/511 IPC. In the present case, as already noted above, the only evidence at this stage is that the

accused rubbed the private part of the child with his hand. The question is whether this evidence taken as it is shows *prima facie* case of the commission of offence under Section 354 IPC as contended by the learned counsel or it amounts to an attempt to commit rape under section 376 IPC as held by the learned trial Court. The contention of the Additional Public Prosecutor as already noted above is that such a question cannot be considered at this stage *inasmuch* as determination of such an issue involves appreciation of evidence. The following are the decisions relied on by the learned Additional Public Prosecutor in support of his submission:-


1. ***Soma Chakravarty vs. State Through CBI*** reported in ***(2007) 5 SCC 403***;
2. ***State of Delhi vs. Gyan Devi & Ors.*** reported in ***JT 2000 (Suppl.2) SC 635***; and
3. ***State of Bihar vs. Ramesh Singh*** reported in ***(1977) 4 SCC 39***.

It is however to be noted that all that these decisions lay down is that a meticulous examination of evidence is to be avoided while considering materials for framing of charge as at this stage a trial Court is not to examine and assess in detail the materials placed on record by the prosecution. However, it must be noted that the ratio of these decisions would not be attracted in the present case *inasmuch* as the determination of the question raised does not at all involve any detail examination or assessment of evidence. I, therefore, see no impediment in considering the question raised by the learned counsel for the accused/petitioner.

**12.** It must however be conceded that the word "attempt" has not been defined in the Code and to add to this, the dividing line between an act of preparation and an attempt to commit a crime is often very thin. It is for this reason that indecent assaults, as



observed by Courts in several judicial pronouncements, are often magnified into attempt of rape and more often into rape itself. However, even though there is no legislative definition of the word "attempt", it is well to bear in mind that different tests/principles have been evolved on the basis of judicial pronouncement for determining the dividing line between preparation and attempt. One such test is the Doctrine of *Locus Paenitentiae* Test. According to this doctrine if a man of his own accord gives up before the criminal act is carried out, his act would amount to mere preparation. In other words, if it appears that the accused desists from the contemplated act on his own or for any reason including resistance his act will be treated as preparation only. According to the Proximity Rule Test which is a combination of principles laid down in a number of decided cases, an act of attempt must be sufficiently proximate to the crime intended. Thus, under this doctrine only an act sufficiently near to the accomplishment of the substantive offence punishable can be designated as an attempt. Applying these tests to the materials on record it cannot be said that the act of the accused/petitioner falls within the scope and ambit of the word "attempt". Thus, the submission of the learned counsel for the accused/petitioner that the act of the accused/petitioner at the most may amount to an offence punishable under Section 354 IPC cannot be easily brushed aside. It is thus needless to say that it would have been more in conformity with the principles of law governing the issue if the learned trial Court had on the basis of the materials on record had come to the conclusion that a *prima facie* case that was made out against the accused/petitioner was only one under Section 354 IPC and not under Section 376/511 IPC. It thus follows that the appropriate section

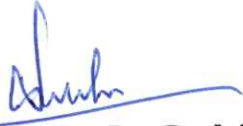


under which the charge could have been ordered to be framed on the basis of the evidence on record would be one under Section 354 IPC and not Sections 376/511 IPC.

**13.** In view of the foregoing discussion and observations, a suitable modification of the impugned order is called for. Accordingly, it is hereby directed that charge be framed under Section 354 IPC instead of Sections 376/511 IPC. The impugned order stands modified to the extent indicated above. It is needless to say that the learned trial Court, after framing the charge under the above section of law, shall proceed with the case in accordance with law.

**14.** It is however made clear that the observations made above being only for the purpose of finding out *prima facie* case without entering into any detailed appreciation of evidence will not influence the trial Court nor will it prejudice the rights and contentions of the parties at the hearing of the main case.

**15.** Let the records of the Court below be returned forthwith.

  
( **Justice A. P. Subba** )  
**Judge**  
30-05-2008